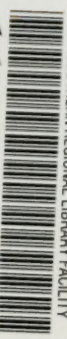


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SCHOOL OF LAW

A TREATISE
ON THE LAW OF
TRUSTS AND TRUSTEES

BY
JAIRUS WARE PERRY

FIFTH EDITION
EMBODYING RELEVANT CASES DOWN TO DATE

BY JOHN M. GOULD

IN TWO VOLUMES

VOL. I.

BOSTON
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1899

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TO THE HONORABLE

HORACE GRAY, JR.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS,

THIS WORK IS INSCRIBED IN ACKNOWLEDGMENT OF THE ASSISTANCE RECEIVED
FROM HIS JUDICIAL OPINIONS, AND FROM HIS PERSONAL INTEREST
IN THE PROGRESS OF ITS CONSTRUCTION,

BY THE AUTHOR.

PREFACE

TO THE FIFTH EDITION.

MR. PERRY'S learned and exhaustive treatise upon the law of Trusts and Trustees has, in its different editions, been so constantly consulted, tested, and relied upon by the profession, and is so interwoven with the decisions of the courts, as to make it at the present time one of the leading monuments of the law. As nearly every relation of life, or course of dealing, may readily give rise to a trust, the subject is evidently capable of indefinite expansion, and many extensions or qualifications of the author's statements of principles could now be well made in the text, and pointed illustrations of the application of general rules be there added; but this, although done to some extent by the preceding editors, has not been thought advisable in the present edition, as the judicial opinions, in which the author's sentences are quoted, are now so numerous that the importance of accurately preserving such quoted clauses is clearly apparent. The notes added in this edition, which are indicated by letters, and are in double columns at the foot of the pages, should therefore be consulted with added care, as they often indicate new lines of departure, or qualifications, limitations, or lucid

illustrations of the author's rules. This is especially true of resulting and constructive trusts, where part payment of the consideration, or fraud or theft, give rise to delicate problems of substantial justice as to the adjustment of equities between investors, or deceived or trusting property-owners, on the one hand, and innocent purchasers and those familiar with legal rules on the other. Discretionary and implied powers, the duties of life-tenants and remainder-men to each other, agents as trustees, the following of trust funds, and investments, are prominent among the other topics which have been specially developed in this edition, in which about four thousand new decisions and authorities have been added. Examination of the new notes will best disclose the amount of care and labor devoted to the new edition.

JOHN M. GOULD.

Boston, Sept. 1, 1899.

PREFACE

TO THE FOURTH EDITION.

IN all the courts of last resort in this country, the judges, continually and as a perfectly understood and settled thing, refer to Perry on Trusts as the standard authority upon all questions of law and equity pertaining to its subject-matter. Many times eminent judges in writing their opinions have deemed it sufficient proof of a principle or rule they wished to make use of, simply to state it with a reference to Perry; and indeed few judges could hope to arrive at more correct conclusions or more convincing proof of them than the clear, strong mind and intense industry of the author enabled him to attain. The heart's blood of his best manhood he poured into this study; many buried years bloom in this book,—it is the flower of a vigorous life.

It is analytic, orderly, and symmetrical, and everywhere marked by comprehensive generalization, accurate detail, and exhaustive citation. So perfect is it that the new cases have not called for a single new chapter, and for less than twenty-five new sections. Three thousand cases decided since the last edition, and referring in some way to trusts or trustees, have been examined by the present editor. Most of them were found not to involve any principle of the law of

trusts, being merely related in name to our subject, because a trustee was involved in a dispute as to whether a certain contract was within the statute of frauds, or parol evidence was admissible for a given purpose, etc., — matters which pertain to other departments of law than that with which we are dealing. The results of about one thousand new cases have been embodied in the text of this edition. There is a marked tendency in the suits of each decade to leave the old battle-grounds and cluster about a few comparatively new and unsettled points. The existence of an implied or resulting trust, the right of a *cestui* to follow trust property and its proceeds, and the rights of creditors, have been such muster-fields during the last few years, and many new phases of these old questions will be found in the chapters that treat of them. The old section numbers have not been disturbed, but the figures at the top of each page refer to sections, not to pages as heretofore. The section indices at the heads of the chapters have been much improved by grouping the references under sub-heads, and the main index has been bettered in the same way, and also somewhat enlarged. Every case inserted in this edition has been carefully examined by the editor in person, and it has been his effort throughout to put no work upon the book that would not be in keeping with its high character.

FRANK PARSONS.

Boston, October, 1889.

ADVERTISEMENT TO THE THIRD EDITION.

THE steady demand for the former editions of this treatise on the Law of Trusts, and the frequent references to it in the reported cases, attest the estimation in which the work is held by the profession, and its assured place among the standard text-books of the law, such as was anticipated for it by those who knew the author best, and were familiar with his studious habit, his ability and learning. It is very much to be regretted that by Mr. Perry's lamented death, at an age when some of the best work might reasonably have been expected from him, we have lost the ripe fruits of the study and thought which he was constantly giving to the subjects of which his book treats, so long as health and strength allowed him to study.

In the preparation of the present edition, notes and references have been made to the decisions, since the publication of the last edition, bearing upon the topics discussed in the book, with occasional additions of old cases which have come under observation, leaving the author's text and notes generally as they were written, without incurring the risk of marring what was well

done before. The arrangement and numbering of sections remain as in the last edition. Much time and labor have been expended in revising the citations; and a large proportion of them have been verified or corrected, and inaccuracies which, in the haste of preparation of the former edition, had crept in, have been corrected. I am indebted, for assistance in this work of verification, to my young friends, Messrs. William Perry and Alden P. White of the Essex bar, upon the former of whom now devolves the duty of upholding in the profession the name and fame of a worthy father. The index of subjects has also been revised and enlarged with many additional references, by which, it is hoped, the body of learning in the text has been made more easily accessible, and the general usefulness of the book increased.

C.

SALEM, February, 1882.

ADVERTISEMENT

TO THE SECOND EDITION.

THE rapid absorption of the first edition of this work into the hands of the profession has not left to the Author so much time as could have been desired for the preparation of a second edition; nor could the necessary work have been done at all, unless it had been constantly in his hands. Even before the first edition had been sent forth, work was done, and materials accumulated, to improve the second, if it should ever be called for. At no time has there been a relaxation of thought and study upon the subject. The new cases have been assimilated as the Reports came along, and old cases have been added as they fell under notice in business or study. The Author owes a debt of gratitude to his professional brethren in every part of the country, for many valuable criticisms, suggestions, and references to authorities. Thirty-three new sections upon the trusts that arise under power of sale mortgages, and deeds of trust in the nature of mortgages, have been added; and many new sections upon important questions are scattered through the work. The numbers of the sections of the first edition

are preserved, that there may be no confusion in the citations of the two editions.

The Author has been reluctant to swell the book into two volumes, but it was found impossible to compress the materials into a single volume of a form and size reasonably convenient for use. In sending forth this edition the Author hopes that it may do something to lighten the toils of a laborious profession, and that it may meet with the same kind indulgence which was so liberally bestowed upon the first.

SALEM, MASS., Sept. 15, 1874.

PREFACE.

AN American book upon the subject of Trusts has long been needed by the profession. At the solicitation of too partial friends, the writer was induced to undertake its preparation. The result is now given to the public.

The writer of a law-book would be inexcusable if he failed to use all the materials at his command, which could in any way enable him to state and illustrate the law. The treatises and opinions of eminent writers, as well as the reports of the decisions and opinions of judges, must all be studied and mastered. And where the book is intended for the daily use of the lawyer in busy practice, it must contain a notice and citation of the latest cases and authorities. To this end all the treatises and essays, as well as the reported decisions, upon the subject, have been used.

In addition to the original opinions of judges contained in the Reports, the excellent treatise on the Law of Trustees, by Mr. Hill, and the notes and commentaries of the learned American editors, have been carefully considered upon all the subjects treated by them.

The most complete work upon the Law of Trusts is the fifth edition of Mr. Lewin's Treatise. This work, first printed more than thirty years ago, has received

in its various editions the most careful emendations, corrections, and additions by its author, until in the last edition it has grown into a remarkably full and clear exposition of the Law of Trusts, as administered in England.

It has been the constant object of the writer to cover all the ground embraced by the treatises of Mr. Lewin and Mr. Hill, so far as the same is important to the American lawyer; and, in addition, to include such other subjects and matters, relating to the Law of Trusts, not treated fully in those works, as are useful and necessary in American practice.

Perhaps the accumulation of authorities upon the many topics discussed may call for some explanation. A large and increasing number of States and courts are yearly sending out a great number of volumes of Reports. Few lawyers can have access to the whole number, but all desire to see the cases in their own State Reports bearing upon each proposition of the text. It has therefore been the aim of the writer to cite the cases in all the States, although the citation of a few leading cases is always sufficient to sustain an elementary proposition. He cannot hope that he has cited all the cases upon the many matters treated; but it has been his purpose to do so, and this has caused an accumulation of cases which to some may seem unnecessary.

Conscious of defects in the execution of his work, he trusts that a liberal profession will rather consider how much of a difficult task has been accomplished, than how much has been omitted or imperfectly done.

The writer cannot send this book forth to the public without acknowledging the constant kindness and encouragement which he has received from his friends during the labor of its composition; and it is his espe-

cial duty and pleasure to acknowledge his obligations to his friend and associate in business for nearly twenty years, WILLIAM CROWNINSHIELD ENDICOTT, Esquire, whose sound learning and clear judgment have been a never-failing resource in matters of doubt and difficulty, and whose refined and severe taste has been freely employed in pruning redundancies and softening asperities of manner and style.

SALEM, MASS., Nov., 1871.

CONTENTS OF VOLUME I.

	PAGE
INDEX TO CASES CITED	xxix

CHAPTER I.

INTRODUCTION.

	SECTION
ORIGIN, HISTORY, DEFINITION, AND DIVISION OR CLASSIFICATION OF TRUSTS	1-27
§ 1. The general nature of trusts.	
§ 2. The technical nature of trusts, and their origin in the <i>fidei commissa</i> of the Roman law.	
§ 3. The origin of uses.	
§ 4. The inconveniences that arose from the prevalence of uses.	
§ 5. The statute of uses.	
§§ 6, 7. The effect of the statute of uses, and the origin of trusts.	
§§ 8, 9, 10. Development of trusts in England and America.	
§ 11. Advantage of the late adoption of trusts in America.	
§ 12. Object of this treatise.	
§§ 13-17. Definition of trusts.	
Classification of trusts.	
§ 18. Simple and special trusts.	
§ 19. Ministerial and discretionary trusts.	
§ 20. A mixed trust and power, and a power annexed to a trust.	
§ 21. Legal and illegal trusts.	
§ 22. Public and private trusts.	
§ 23. Duration of a private trust and of a public trust.	
§§ 24-27. Express trusts, implied trusts, resulting trusts, and constructive trusts.	

CHAPTER II.

PARTIES TO TRUSTS; AND WHAT PROPERTY MAY BE THE SUBJECT OF A TRUST	28-72
--	-------

- I. §§ 28-37. Who may create a trust.
 - § 28. All persons competent to contract or make wills may create trusts.
 - § 29. The king may create trusts.
 - § 30. The State may create trusts; and so may all its officers.
 - § 31. Corporations may create trusts.

- § 32. The power of married women to create trusts.
- § 33. Capacity and power of infants to create trusts.
- § 34. The marriage settlements of infants.
- § 35. Of the ability of lunatics to create trusts.
- § 36. Of conveyances in trust by aliens.
- § 37. Trusts by bankrupts and insolvents.
- II. §§ 38-59. Who may be a trustee.
 - § 38. A person may convert himself into a trustee.
 - § 39. Any person capable of taking the legal title may take as trustee. Rules that govern courts in appointing trustees.
 - § 40. The sovereign may be trustee. Question as to remedy.
 - § 41. The United States and the several States may be trustees.
 - §§ 42-45. Corporations may be trustees.
 - § 46. Unincorporated societies may be trustees for charitable purposes.
 - § 47. Public officers as trustees.
 - §§ 48-51. Married women as trustees.
 - §§ 52-54. Infants as trustees.
 - § 55. Aliens as trustees.
 - § 56. Lunatics as trustees.
 - § 57. A religious person or nun as trustee.
 - § 58. A bankrupt as trustee.
 - § 59. *Cestui que trust* may be a trustee for himself and others.
- III. §§ 60-66. Who may be *cestui que trust*.
 - § 60. All persons may be *cestuis que trust* who may take the legal title.
 - §§ 61, 62. The Crown and the State may be *cestuis que trust*.
 - § 63. Corporations as *cestuis que trust*.
 - § 64. Aliens as *cestuis que trust*.
 - § 65. Those who cannot take a legal interest cannot take an equitable interest.
 - § 66. Except in certain charitable trusts.
- IV. §§ 67-72. What property may be the subject of a trust.
 - § 67. A trust may be created in every kind of valuable property.
 - § 68. Possibilities, *choses in action*, expectancies, and property not at the time *in esse* may be assigned in trust.
 - § 69. *Choses in action* and expectancies that cannot be assigned in trust.
 - §§ 70-72. Trusts in land lying in a foreign jurisdiction, and their administration.

CHAPTER III.

EXPRESS TRUSTS, AND HOW EXPRESS TRUSTS ARE CREATED
AT COMMON LAW, SINCE THE STATUTE OF FRAUDS, AND
IN PERSONAL PROPERTY, AND HEREIN OF VOLUNTARY
CONVEYANCES OR SETTLEMENTS IN TRUST 73-111 *a*

- § 73. Division of trusts, according to the manner of their creation.
- §§ 74-77. Trusts at common law.
- § 74. At common law, a writing not necessary to convey land.

- § 75. Uses might also be created without writing, and so may trusts, in States where the statute of frauds is not in force.
- § 76. Parol cannot control a written trust nor engraft an express trust on an absolute conveyance.
- § 77. Same rule as to trusts created by parol.
- § 78. The statute of frauds, and its form in various States.
- § 79. Effect of the statute upon the creation of express trusts.
- §§ 80, 81. Effect of the different forms of the words of the statutes in the several States.
- § 82. How express trusts may be proved or manifested under the statute.
- § 83. Certainty of the terms of the trust, and the person by whom it is to be declared.
- §§ 84, 85. Trusts declared or proved by answers in chancery.
- § 86. Trust in personal property may be created by parol.
- §§ 87, 88. Trusts arising from gifts *mortis causa* and for charitable uses.
- § 89. Statute of wills, and the execution of wills.
- § 90. Trust cannot be *created* in a will, unless it is properly executed, to pass the property.
- §§ 91, 92. But might be manifested by a recital in a will not properly executed.
- § 93. The effect of the necessity of probate of wills.
- § 94. Parol evidence cannot convert a bequest in a will into a trust. An executor is a trustee of the surplus.
- § 95. When a trust is completely created.
An agreement upon a valuable and legal consideration will be carried into effect as a trust or a contract.
- §§ 96-98. If a complete trust is created without consideration, it will be carried into effect.
- § 97. But if anything remains to be done to complete the trust, it will not be carried into effect, if without consideration.
- § 99. Whether a lawful trust is completely created or not a question of fact in each case.
- § 100. Trust for a stranger without consideration not completed without transfer of the legal title.
- § 101. But if the legal title cannot be transferred, a different rule will apply.
- § 102. If the subject of the proposed trust is an equitable interest, the legal title need not be transferred.
- § 103. The instrument of trust need not be delivered.
- § 104. If once perfected cannot be destroyed, though voluntary.
- § 105. Notice not necessary to trustee or *cestui que trust*.
- §§ 106, 107. Voluntary settlements upon wife and children.
- § 108. When they will not be enforced.
- § 109. Tendency of the rule in the United States.
- § 110. Marriage a valuable as well as meritorious consideration.
- § 111. Effect of a seal.
- § 111 a. New York Statute Law.

CHAPTER IV.

IMPLIED TRUSTS 112-123

- § 112. The manner in which trusts are implied, and the words from which they are implied.
- § 113. Words from which a trust will not be implied.
- §§ 114-116. Rules by which trusts will or will not be implied.
- §§ 117, 118. Implied trusts from directions as to the maintenance of children or others.
- § 119. When trusts for maintenance are not implied.
- § 120. Rules that govern implied trusts.
- § 121. Trusts arising by implication from the provisions of a will.
- § 122. Implied trusts arising from contracts.
- § 123. A direction to employ certain persons does not raise an implied trust.

CHAPTER V.

RESULTING TRUSTS 124-165 *a*

- § 124. Creation and character of a resulting trust.
- § 125. Divisions of this kind of trust.
- § 126. Resulting trust where the purchase-money is paid by one, and deed is taken to another. See § 142.
- § 127. Resulting trust where trust funds are used to purchase property, and title taken in the name of another.
- § 128. In what cases a trust results, and when a trust does not result. See §§ 143, 156, 160.
- § 129. When a person uses his fiduciary relation to obtain an interest in or affecting the trust property.
- § 130. Same rules apply to personal property unless it is of a perishable nature.
- § 131. Where a resulting trust will not be permitted as against law.
- § 136. No resulting trust in a joint purchase.
- § 132. Rules as to a resulting trust.
- §§ 133, 134. Time and circumstances in the creation of a resulting trust.
- § 135. Parol evidence as to a purchase by an agent not admissible.
- §§ 137, 138. Resulting trusts may be established by parol.
- § 139. May be disproved by parol — the burden of proof.
- § 140. Cannot be changed by parol after they arise.
- § 141. Will not be enforced after a great lapse of time.
- § 142. Resulting trusts under the statutes of New York and other States.
- § 143. A resulting trust does not arise if the title is taken in the name of wife or child.
- § 144. What persons it embraces.
- § 145. Doubts and overruled cases.
- § 146. When it will be presumed to be an advancement.
- § 147. The presumption may be rebutted.
- § 148. Is rebutted by fraud in the wife or child.
- § 149. Creditors may avoid such advancements. When and how.
- § 150. A resulting trust from the conveyance of the legal title without the beneficial interest.

- § 151. Every case must depend upon its particular writing and circumstances.
- § 152. Instances and illustrations.
- §§ 153, 154. If there is an intention to benefit the donee, there is no resulting trust.
- § 155. Gifts to executors may create resulting trusts.
- § 156. Resulting trusts do not arise upon gifts to charitable uses.
- § 157. A gift upon trust or to a trustee and no trust declared.
- § 158. Always a matter of intention to be gathered from the whole instrument.
- § 159. Where a special trust fails it will result.
- § 160. Where a special trust fails from illegality or lapses, it results.
- § 160 a. To whom it results.
- §§ 161, 162. Whether a trust results from a voluntary conveyance without consideration.
- § 163. Equity does not favor such conveyances; they may be void for fraud, but no trust results.
- § 164. Voluntary conveyances to wife or child.
- § 165. No trust results from a fraudulent transaction.
- § 165 a. How a resulting trust is executed.

CHAPTER VI.

CONSTRUCTIVE TRUSTS 166-230

- § 166. General nature of constructive trusts. They arise from fraud.
- § 167. Jurisdiction of equity over them, and the relief given by converting the offending party into a trustee.
- § 168. Classification of constructive trusts.
- § 169. General definition of a fraud in equity.
- § 170. Principles upon which equity gives relief against fraud.
- § 171. Actual fraud, or *suggestio falsi*.
- § 172. Illustrations of actual fraud.
- § 173. The misrepresentations and frauds that equity will relieve against.
- § 174. The misrepresentation must be of facts material to the contract.
- § 175. The misrepresentation must be of something peculiarly within the party's knowledge.
- § 176. The relief will depend upon the form in which it is sought.
- § 177. Fraud that arises from concealment, or *suppressio veri*.
- § 178. This kind of fraud depends much upon the relation of the parties.
- § 179. When a person may not be silent.
- § 180. *Suppressio veri* is generally in law an affirmative act.
- § 181. Courts will relieve where acts are fraudulently prevented from being done — illustrations.
- § 182. Trust established where a party fraudulently prevents a will from being made in another's favor.
- § 183. Trust established in *odium spoliatoris*.
- § 184. Trust established upon a conveyance made in ignorance or mistake.
- § 185. But if the conveyance is a compromise, courts will support it if possible.
- § 186. Trust established when a deed by mistake contains more land than was intended.
- § 187. Misrepresentation of the value of property and inadequacy of consideration.

- § 188. Catching bargains with young heirs and reversioners.
- § 189. Trust arising from mental incapacity or imbecility of parties.
- § 190. Mental weakness — old age.
- § 191. Drunkenness.
- § 192. Duress — oppression and distress.
- § 193. Where several of these circumstances are found combined.
- § 194. Frauds that arise by construction from the fiduciary relations of parties.
- § 195. Between trustee and *cestui que trust*.
- § 196. Renewal of leases in his own name by trustee.
- §§ 197, 198. Contracts prohibited between trustee and *cestui que trust*, but the *cestui que trust* alone can avoid them.
- § 199. Rule does not apply to dry trustees.
- § 200. Guardians and wards.
- § 201. Parents and children.
- §§ 202, 203. Attorney and client.
- § 204. Rule applies to all confidential advisers.
- § 205. Administrators and executors.
- § 206. Principal and agent.
- § 207. Directors of corporations.
- § 208. Trusts that arise out of inducements held out for marriage.
- § 209. Other fiduciary relations.
- § 210. Undefined fiduciary and friendly relations.
- § 211. Trusts arising from the frauds of third persons.
- § 212. Frauds upon third persons as creditors, etc.
- § 213. Conveyances by man or woman on the point of marriage.
- § 214. Illegal and immoral contracts.
- § 215. Fraud by pretending to buy for another.
- § 216. Devises or conveyances upon secret illegal trusts.
- § 217. Purchases from trustees with knowledge of the trusts.
- § 218. Purchases without notice of the trust.
- § 219. The safeguards thrown around such purchases.
- § 220. The consideration in such cases.
- § 221. The consideration must have been actually paid.
- § 222. Notice of the trust — to whom it may be.
- § 223. Notice may be actual or constructive.
- § 224. Purchase of property from executors or administrators — real estate.
- § 225. Personal property.
- § 226. Constructive trusts may be proved by parol — statute of frauds does not apply.
- § 227. The right to set aside a conveyance for fraud is an equitable estate that may be conveyed and devised.
- §§ 228-230. Statute of frauds and the time within which steps must be taken to avoid a fraudulent conveyance.

CHAPTER VII.

TRUSTS THAT ARISE BY EQUITABLE CONSTRUCTION IN

THE ABSENCE OF FRAUD 231-247 *a*

- § 231. Trust by equitable construction. Illustration.
- § 232. Vendor's lien for the purchase-money of this description. States in which it exists.

- § 233. This lien does not contravene the statute of frauds.
- § 234. The nature of the interest of the vendor under this lien.
- §§ 235-237. When the lien exists and when not.
- §§ 238, 239. The parties between whom the lien exists.
- § 240. Trust by construction where a conveyance is made that cannot operate at law.
- § 241. Constructive trust where trust property is transferred by gift from the trustee.
- § 242. Constructive trust where a corporation distributes its capital stock without paying its debts.
- § 243. A person holding the legal title as security is a constructive trustee.
- § 244. Executor indebted to the testator's estate is a constructive trustee.
- § 245. A person may become a trustee *de son tort* by construction.
- § 246. An agent may become a constructive trustee.
- § 246 a. Other equitable trusts. See § 247 a.
- § 247. A person holding deeds or papers or property belonging to another may be a constructive trustee.

CHAPTER VIII.

TRUSTS THAT ARISE BY CONSTRUCTION FROM POWERS . 248-258

- § 248. The nature of powers that imply a trust.
- § 249. Court will execute such powers as trusts.
- §§ 250, 251. Instances of powers which the court will execute as trusts.
- § 252. Instances of powers that are not trusts.
- § 253. Where the power is too uncertain.
- § 254. The power must be executed as given, or it will remain a trust to be executed by the court.
- §§ 255, 256. In what manner the court will execute a trust arising out of a power.
- § 257. Whether courts will distribute *per stirpes* or *per capita*.
- § 258. And whether to those living at the death of donor or of the donee.

CHAPTER IX.

APPOINTMENT, ACCEPTANCE, DISCLAIMER, REMOVAL,
RESIGNATION, SUBSTITUTION, AND NUMBER OF TRUS-
TEES, AND APPOINTMENT UNDER A POWER 259-297

- § 259. Acceptance of the trust — how and when it should be accepted.
- § 260. What is an acceptance, and its effect.
- § 261. How an acceptance may be shown.
- § 261 a. Trustee's bond.
- §§ 262, 263. Where an executor is also named as trustee.
- § 264. Of the executor of an executor, or the executor of a trustee.
- § 265. Trustee *de son tort*.
- § 266. No such thing as a passive trustee.
- § 267. Disclaimer by trustee.
- § 268. Cannot disclaim after acceptance.
- § 269. Whether an heir can disclaim after the death of the trustee.
- §§ 270, 271. Parol disclaimer sufficient, but a writing more certain.
- § 272. Where a legacy or other benefit is given to the trustee or executor.

- § 273. Effect of a disclaimer.
Removal or resignation.
- § 274. How a trustee may be removed or resign.
- § 275. For what causes may be removed.
- § 276. For what causes may be allowed to resign.
- § 276 a. A trust shall not fail for lack of a trustee. See § 731.
- §§ 277, 278. How the court proceeds in substituting trustees.
- § 279. Bankruptcy of trustee.
- § 280. The resignation of trustees.
- § 281. Where the same person is executor and trustee.
- § 282. The proceedings to remove and substitute trustees.
- § 283. Where all parties consent.
- § 284. Of the vesting of the property in the new trustees.
- § 285. Duty of trustee where all consent to his discharge.
- § 286. Of the number of trustees.
Appointment of trustees under a power.
- § 287. Trustees cannot appoint their successors or new trustees unless power is given in the instrument of trust.
- § 288. Caution necessary in new appointments.
- § 289. Powers of appointment frequently matters of personal confidence.
- § 290. Occasions or events upon which new appointments may be made.
- § 291. An appointment may be made to fill a vacancy occurring before the death of the testator.
- § 292. Unfitness and incapacity.
- § 293. Power cannot be exercised if the trust is already in suit in court.
- § 294. By whom the power may be exercised.
- § 295. The power must be strictly followed.
- § 296. Who may be appointed to exercise the power.
- § 297. Who may be appointed under a power.

CHAPTER X.

NATURE, EXTENT, AND DURATION OF THE ESTATE TAKEN

BY TRUSTEES 298-320

- § 298. Where trustees take and hold no estate, although an express gift is made to them. Statute of uses.
- § 299. Effect of the statute of uses upon conveyancing in the several States.
- § 300. Effect of the statute in the rise of trusts.
- §§ 301, 302. Rules of construction which gave rise to trusts.
- § 303. The word "seized."
- § 304. The primary use must be in the trustee to raise a trust.
- §§ 305, 306. Personal property not within the statute.
- §§ 307, 308. Where the statute executes trusts as uses, and where it does not.
- § 309. Where a charge upon an estate will vest an estate in trustees, and where not.
- § 310. Where the trust is for the sole use of a married woman.
- § 311. Trusts of personalty are not executed by the statute.
- § 312. The statute only executes the exact estate given to the trustee; but the trustee may take an estate commensurate with the purposes of the trust where it is unexecuted by the statute. Rules.
- §§ 313, 314. Courts may imply an estate in the trustee where none is given.

- §§ 315, 316. May enlarge the estate of the trustee for the purposes of the trust.
 § 317. Illustrations, explanations, and modifications of the rule.
 §§ 318, 319. Rule in respect to personal estate.
 § 320. Distinctions between deeds and wills in England and the United States.

CHAPTER XI.

PROPERTIES AND INCIDENTS OF THE LEGAL ESTATE IN
 THE HANDS OF TRUSTEES 321-356

- § 321. Common-law properties attach to estates in trustees.
 § 322. Dower and curtesy in trust estates.
 §§ 323, 324. Dower and curtesy in equitable estates of *cestui que trust*.
 § 325. Forfeiture and escheat of trust estates.
 § 326. Trustees must perform duties of legal owners.
 § 327. Forfeiture and escheat of the equitable estates of *cestui que trust*.
 § 328. Suits concerning legal title must be in name of trustee.
 § 329. Who has possession and control of trust estates.
 §§ 330, 331. Who has possession of personal estate. Rights and privileges of trustees.
 § 332. Who proves debt against bankrupt.
 § 333. Who has the right of voting.
 § 334. Trustee may sell the legal estate.
 § 335. May devise the legal estate. But see § 341.
 § 336. By what words in a devise the trust estate passes.
 § 337. Where a trust estate passes by a devise, and where not.
 § 338. The interest of a mortgagee in fee.
 § 339. Propriety of devising a trust estate.
 § 340. Whether a devisee can execute the trust.
 § 341. Rule in New York, &c.
 § 342. Where a testator has contracted to sell an estate.
 §§ 343, 344. Rights of the last surviving trustee, and his heirs or executors.
 § 345. Trust property does not pass to bankrupt trustee's assignee.
 § 346. A disseizor of a trust estate is not bound by the trust.
 §§ 347, 348. Merger of the equitable and legal titles.
 §§ 349, 350. Presumption of a conveyance or surrender by trustee to *cestui que trust*.
 §§ 351-353. Where the presumption will be made, and where not.
 § 354. Must be some evidence on which to found the presumption.
 § 355. Is made in favor of an equitable title, not against it.

CHAPTER XII.

EXECUTORY TRUSTS 357-376

- §§ 357-359. Nature of an executory trust. The rule in Shelley's case.
 § 360. Distinction between marriage articles and wills.
 § 361. Construction of marriage articles and their correction.
 § 362. Where strict settlements will not be ordered.
 §§ 363, 364. Settlement of personal property.
 § 365. Construction of marriage settlements.
 § 366. Executory trusts under wills.

- § 367. Who may enforce the execution of executory trusts.
- § 368. Inducements for marriage.
- §§ 369, 370. Construction of executory trusts under wills.
- § 371. The words "heirs of the body" and "issue."
- § 372. When courts will reform executory trusts.
- § 373. How courts will direct a settlement of personal chattels.
- § 374. Whether courts will order a settlement in joint-tenancy.
- § 375. What powers the court will order to be inserted in a settlement.
- § 376. Settlement will be ordered *cy près* the intention.

CHAPTER XIII.

PERPETUITIES AND ACCUMULATIONS 377-400

- § 377. Definitions of a perpetuity.
- § 378. Executory devises — springing and shifting uses.
- § 379. Growth of the rule against perpetuities.
- § 380. Application of the rule. Indefinite failure of issue.
- § 381. Applies to the possible vesting of estates — not to the actual.
- § 382. Applies equally to trust and legal estates.
- § 383. An equitable interest that may not vest within the rule is void. § 23.
- § 384. Distinction between private trusts and charitable trusts.
- § 385. A proper trust to raise money to be applied contrary to the rule.
Making estates inalienable.
- § 386. Equitable estates cannot be made inalienable in England.
- §§ 386 a, 386 b. How they may be made inalienable in some of the United States.
- § 387. Exception in the case of married women.
- § 388. How trusts can be limited, so that *cestui que trust* cannot alienate. See § 815 a.
- § 389. Limitation of personal estate to such tenant in tail as first attains twenty-one.
- § 390. When courts will alter trusts and when not.
- §§ 391, 392. Statutes of various States in relation to perpetuities.
Accumulations.
- § 393. Rule respecting trusts for accumulations.
- § 394. In England the rule was altered by the Thellusson Act.
- § 395. Construction of the Thellusson Act.
- § 396. Rule against accumulations — when it applies and when not.
- § 397. Application of the income in cases of illegal directions to accumulate.
- § 398. Statutes in various States as to accumulations.
- § 399. Accumulations for charitable purposes.
- § 400. Accumulations in cases of life insurance.

CHAPTER XIV.

GENERAL PROPERTIES AND DUTIES OF THE OFFICE OF

TRUSTEE 401-437 b

- § 401. A trustee, having accepted the office, is bound to discharge its duties.
- § 402. He cannot delegate his authority except to agents in proper cases.
- § 403. Not responsible if he follow directions in employing agents.

- § 404. Where agents must be employed.
- § 405. When responsible for agents and attorneys.
- § 406. When not responsible.
- § 407. Difference of liability in law and equity.
- § 408. Trustees responsible for all mischiefs arising from delegating discretionary powers.
- § 409. Employing agents or attorneys may not be a delegation of authority or discretion.
- § 410. A sale or devise of the trust estate not a delegation of the trust.
- § 411. Several trustees constitute but one collective trustee.
- §§ 412, 413. When they must all act and when not.
- § 414. As to the survivorship of the office of trustee.
- § 415. General rule as to liability for cotrustees.
- § 416. May make themselves liable, where otherwise they would not be.
- § 417. Trustees must use due diligence in all cases, or they will be liable for cotrustees.
- § 418. Cases of a want of due care and prudence.
- § 419. In case of collusion or gross negligence, a trustee will be liable for acts of cotrustees.
- § 420. When cotrustees are liable for others upon sales of real estate under a power.
- § 420 a. Indemnifying of one trustee by another.
- § 421. As to liability of coexecutors for the acts of each other.
- § 422. An executor must not enable his coexecutor to misapply the funds.
- § 423. When executors must all join they are not liable for each other's acts; but they must use due diligence.
- § 424. An executor must not allow money to remain under the sole control of his coexecutor.
- § 425. Executors and administrators governed by the same rules.
- § 426. Rule where coexecutors or cotrustees give joint bonds for security of the administration of the estate.
- § 427. Trustees can make no profit out of the office.
- § 428. Cannot buy up debts against the estate or *cestui que trust* at a profit.
- § 429. Cannot make a profit from the use of trust funds in business, trade, or speculation.
- § 430, 431. All persons holding a fiduciary relation, subject to the same rule.
- § 432. Can receive no profit for serving in their professional characters a trust estate.
- § 433. Trustees can set up no claim to the trust estate, and ought not to betray the title of the *cestui que trust*.
- § 434. In England, upon failure of heirs to the *cestui que trust*, trustee may hold real estate to his own use.
- § 435. Speculative questions.
- § 436. In the United States, the interest of the *cestui que trust* in real estate escheats.
- § 437. So it does in England and the United States in personalty.
- § 437 a. Contracts of trustee.
- § 437 b. Signature of trustee.

CHAPTER XV.

POSSESSION — CUSTODY — CONVERSION — INVESTMENT OF
TRUST PROPERTY, AND INTEREST THAT TRUSTEES MAY
BE MADE TO PAY 438-472

- § 438. Duty of trustee to reduce the trust property to possession.
- § 439. Time within which possession should be obtained.
- § 440. Diligence necessary in acquiring possession.
- § 441. The care necessary in the custody of trust property.
- § 442. In what manner certain property should be kept.
- § 443. Where the property may be deposited.
- §§ 444, 445. How money must be deposited in bank.
- § 446. Within what time trustee should wind up testator's establishment.
- § 447. Trustee must not mix trust property with his own.
- § 448. When a trustee is to convert trust property.
- § 449. General rule as to conversion.
- § 450. When a court presumes an intention that property is to be converted.
- § 451. When the court presumes that the property is to be enjoyed by *cestui que trust in specie*.
- § 452. Of investment.
- § 453. As to investment in personal securities.
- § 454. As to the employment of trust property in trade, business, or speculation.
- § 455. Rule as to investments in England.
- § 456. Rule in the United States.
- §§ 457, 458. Rule as to real securities.
- § 459. Of investments in the different States.
- §§ 460, 461. Construction, where the instruments of trust direct how investments may be made.
- § 462. Within what time investments must be made.
- § 463. Trustees must not mingle their own money in investments.
- § 464. Must not use the trust-money in business.
- § 465. Original investments and investments left by the testator.
- § 466. Changing investments.
- § 467. Acquiescence of *cestui que trust* in improper investments.
- § 468. Interest that trustees must pay upon trust funds for any dereliction of duty.
- § 469. When he is directed to invest in a particular manner.
- § 470. When he improperly changes an investment.
- § 471. When compound interest will be imposed, and when other rules will be applied.
- § 472. Rule where an accumulation is directed.

INDEX TO CASES CITED.

References are to sections. All sections up to 472 are in Vol. I.; all after 472 are in Vol. II.

A.		Adams v. Chaplin	380
A. & B., <i>In re</i>	603	<i>v. Claxton</i>	443, 914
Abbey v. Dewey	215	<i>v. Clifton</i>	402, 466, 851, 900
Abbott, <i>Ex parte</i>	649	<i>v. Cole</i>	635, 706, 714
<i>Pet'r</i>	282, 287, 334, 340	<i>v. Collier</i>	147
<i>v. Amer. Hard Rubber Co.</i>	404	<i>v. Gale</i>	464
<i>v. Baltimore</i>	918	<i>v. Gamble</i>	656
<i>v. Bradstreet</i>	891, 899, 903 <i>a</i>	<i>v. Green</i>	231
<i>v. Foote</i>	330	<i>v. Guerard</i>	299
<i>v. Geraghty</i>	361	<i>v. Jones</i>	929
<i>v. Gibbs</i>	795, 796	<i>v. Lambert</i>	718
<i>v. Massie</i>	272	<i>v. Lavender</i>	639
<i>v. Reeves</i>	832, 877, 884, 926	<i>v. Leavens</i>	438
Abby v. Dego	678	<i>v. Lopdell</i>	114
Abeel v. Radcliff	83	<i>v. Mackey</i>	661
Abel v. Heathcote	769	<i>v. Paynter</i>	274, 287, 288
Abell v. Abell	474	<i>v. Perry</i>	305, 748
<i>v. Howe</i>	221, 222	<i>v. St. Leger</i>	873, 881
Abend v. End. Fund Commission	736	<i>v. Taunton</i>	270, 273, 502, 806
Abercrombie v. Bradford	590	Adams and Kensington Vestry, <i>In re</i>	114
Aberdeen v. Blaikie	206	Adams Female Academy v. Adams	727
Abernaithy v. Abernaithy	275, 627	Adamson v. Armitage	648
Abney v. Kingsland	149	Addams v. Heffernan	234
<i>v. Miller</i>	196	Addis v. Campbell	187, 188
Aborn v. Padelford	166	Addison v. Bowie	612
Abraham v. Almon	112	<i>v. Dawson</i>	189
<i>v. Ordway</i>	855	<i>v. Mascal</i>	189
Abshire v. Carter	770	Adey v. Arnold	260
Acherley v. Roe	872	Adler v. Sewell	328
Acker v. Phoenix	97	Adlington v. Cann	75, 77, 83, 88, 90, 92, 93, 739
<i>v. Priest</i>	145	Adlum v. Yard	590, 596
Ackerman v. Emott	430, 456, 459, 460, 471	Adye v. Feuilletéau	453, 464
Ackland v. Gaisford	122	Ætna Life Ins. Co. v. Middleport	60
<i>v. Lutley</i>	317	Affleck v. James	499
Ackleston v. Heap	294	Agar v. Fairfax	871
Ackroyd v. Smithson	160, 449, 499	Agar-Ellis, <i>In re</i>	603
Acton v. White	670	Agassiz v. Squire	511 <i>a</i>
<i>v. Woodgate</i>	585, 593, 596	Aggas v. Pickerell	855, 862
Adair v. Brimmer	422, 467	Agnew v. Fetterman	559
<i>v. New River Co.</i>	885	Aguilar v. Aguilar	634, 658, 659
<i>v. Shaw</i>	217, 847, 892	Ahearn v. Hogan	193, 204
Adams v. Adams	38, 182, 312	Ahrend v. Odiorne	232
<i>v. Angell</i>	347	Aiken v. Smith	318, 353
<i>v. Brackett</i>	562, 570	Ainsley v. Mead	680
<i>v. Bradley</i>	215	Ainslie v. Medlycott	34, 171
<i>v. Broke</i>	460, 778	Airey v. Hall	98, 100, 101, 821
<i>v. Buckland</i>	414	Aislábie v. Rice	518
<i>v. Carey</i>	83, 260	Akin v. Jones	60

[References are to sections.]

Alaniz v. Cassenave	166	Allen v. Rumph	361
Albany Ins. Co. v. Bay	655, 656, 660, 768	v. Russell	828
Albany's Case	765	v. Sayer	621, 858
Albee v. Wyman	672	v. Stevens	448, 729
Albert v. Savings Bank	242	v. Watts	451
v. Ware	14	v. Wilkins	640
Albright v. Oyster	124	v. Withrow	86
Alcock v. Sloper	451, 547	v. Worley	863
v. Sparhawk	570	Allen's Appeal	411
Aldborough v. Frye	188	Allerton v. Knowell	634
Alden v. Gregory	861	Alley v. Lawrence	493, 511 b, 783, 784
v. St. Peter's Parish	384, 701	Alleyne v. Darcy	246, 848, 876, 907
Aldersen, <i>Ex parte</i>	68	Allhusen v. Whittell	551
v. Temple	587	Alliance Trust Co. v. Nettleton Har-	
Alderson v. Peel	97	wood Co.	223
Aldrich v. Aldrich	114	Allis v. Billings	35, 189
v. Cooper	567, 573	Allison v. Allison	183
Aldridge v. Dunn	237, 239	v. Drake	223
v. Westbrooke	888, 898	v. Kurtz	162, 511 c
Aleman v. Wensinger	820 a	v. Wilson	500
Alexander, <i>In re</i>	482	Allman v. Pigg	171
v. Alexander	112, 385, 408, 440, 510, 511 a, 811	Alloway v. Alloway	248
v. Brame	103	v. Braine	869
v. Crittenden	639	Almond v. Wilson	126
v. Crosbie	220	Almy v. Jones	705
v. Kennedy	205	Alsager v. Spaulding	212
v. McCulloch	634	Alsbrook v. Reid	476 a
v. McMurray	234, 559	Alsbury, <i>In re</i>	545
v. Mills	784	Alsop v. Bell	908
v. Mullins	882	Alston v. Trollope	481
v. Pendleton	218, 219	Alsworth v. Cordly	131
v. Saulsbury	685	Altimus v. Elliott	915
v. Summey	456	Alverson v. Jones	677
v. Warrance	140, 143, 144, 324	Amand v. Bradbourne	894
v. Wellington	29, 69	Ambrose v. Ambrose	77, 82, 126, 137
v. Williams	863	Amer. Acad. v. Harvard College	700, 701, 724, 748
Aleyn v. Belchier	511, 511 a	Amer. Bible Soc. v. Marsh	748
Alger v. Fay	602 k	v. Wetmore	748
v. North End Savings Bank	82	Am. Box M. Co. v. Crosman	894
Alison v. Goldtree	875	American Exchange Bank v. Inloes	590
Alkire v. Alkire	122	v. Walker	593
Allard v. Skinner	184	Amer. Sugar Ref. Co. v. Fancher	166, 837
Allen, <i>Ex parte</i>	189, 618	Ames v. Armstrong	426
v. Addington	179	v. Browning	205
v. Allen	41, 629	v. Downing	428, 526, 847, 910
v. Arkenburgh	127	v. Foster	686
v. Backhouse	581, 597	v. Heslet	242
v. Bartlett	869	v. Holderbaum	511 b
v. Baskerville	315	v. Parkinson	440, 461, 469
v. Chambers	84	v. Port Huron	194
v. Chatfield	199, 602 v	v. Scudder	471
v. Coburn	678	Amesbury v. Brown	571
v. Coster	614, 615	Amherst College v. Ritch	171
v. De Groodt	856	Ammont v. New Alexandria, &c.	
v. De Witt	765	Turnpike Co.	757, 759
v. Gaillard	458, 460	Amory v. Green	460
v. Gillette	195	v. Lord	391, 396
v. Henderson	366, 380	v. Lowell	552, 554
v. Hightower	678	v. Meredith	337, 511 c
v. Imlett	17, 328	v. Reilly	239
v. Jackson	206	Amos v. Herne Bay P. &c. Co.	877
v. Knight	218	Amphlett v. Parke	151
v. Macpherson	182	Ancaster v. Mayer	562, 567
v. Maddock	93	Anderson, <i>In re</i>	280
v. Mattison	568	v. Anderson	646, 652, 672
v. Montgomery Railway	757	v. Austin	602 n
v. Papworth	654	v. Baumgartner	602 n
v. Parkham	380	v. Burchell	228

[References are to sections.]

Anderson v. Burwell	229, 869	Antrim v. Buckingham	48
v. Cullen	658	Antrobus v. Smith	97, 100, 103, 107, 108, 367
v. Daley	330	Aplyn v. Brewer	416, 421
v. Dawson	511 b, 655	App v. Lutheran Congregation	733
v. Earle	262, 281	Apple v. Allen	646
v. Fuller	591	Appleton v. Boyd	136
v. Holloman	602 i	Appley, <i>In re</i>	277
v. Jones	126, 602 j	Apreece v. Apreece	119
v. Lemon	538	Arbuckle v. Kirkpatrick	828
v. Mather	334, 603, 605, 610	Arbutnot v. Norton	69
v. Miller	426	Archer v. Hudson	201
v. Neff	918	v. Moss	182
v. Northrop	277, 428, 856	v. Preston	71
v. Simms	921	v. Rooke	647, 648, 652
v. Stacher	873	Archibald v. Wright	511 b
Anderton v. Yates	613	Ardill v. Savage	274
Anding v. Davis	75, 91	Arend v. Cottle	891
Andover v. Merrimack County	642	Arglasse v. Muschamp	71
Andres v. Miller	599	Arguello's Estate	443
Andrew v. Andrew	547	Arlin v. Brown	232, 235
v. Bible Society	45, 402	Arms v. Ashley	83
v. Cooper	873	Armstrong v. Armstrong	380
v. Ludlow	592	v. Campbell	195, 602 v, 863
v. Schmitt	469	v. Lane	892, 901
v. Trinity Hall	272	v. Miller	462, 468
v. Wrigley	228, 809, 810, 830, 865	v. Morrill	259, 264
Andrews, <i>Ex parte</i>	427, 433, 487, 863	v. Park	500
<i>Re</i> , Edwards v. Dewar	671	v. Ross	232
v. Andrews	700, 701, 736	v. Stoval	661
v. Atlanta R. E. Co.	82	v. Walkup	462
v. Bank of Cape Ann	117	Armstrong's Estate	892, 918
v. Barnes	894	Arnold v. Arnold	114
v. Bishop	561	v. Byard	918
v. Clark	154	v. Chapman	160
v. Essex Ins. Co.	186	v. Congreve	385
v. Hobson	98, 428	v. Cord	135, 172
v. Jones	200, 627, 632, 642, 645	v. Garner	431, 432, 904
v. M'Guffog	727	v. Gilbert	391, 511
v. Partington	117, 612, 615, 620	v. Macungie Bank	247 a
v. Salt	603	v. Ruggles	639, 640
v. Smithwick	864	Arnony v. Steinbrenner	891
v. Sparhawk	598, 795, 798, 802	Arnot v. McClure	602 v
Angell v. Dawson	466, 476	Arran v. Tyrawley	861
Angerstein v. Martin	461, 550, 551	Arrington v. Yarborough	639
Angier v. Angier	672, 673	Artcher v. McDuffie	843
v. Stannard	351, 476 a, 901, 922, 927, 928	Arthur v. Arthur	184, 665
Angle, <i>Ex parte</i>	848, 876	v. Comm. Bank	31, 588, 590, 757
Angus v. Angus	72	v. Marster	468
v. Clifford	177	Arundel v. Phillpot	248
Ankeney v. Hannon	655	Assay v. Hoover	336, 768
Annesley v. Ashurst	474	Asche v. Asche	329
v. Simeon	330, 520	Ash v. Bowen	387, 652, 670
Annis v. Wilson	124	Ashburnham v. Thompson	468, 900
Annis's Case	693	Ashburton v. Ashburton	605, 610
Anon. 116, 126, 136, 144, 157, 192, 219, 226, 244, 255, 270, 275, 330, 402, 415, 416, 421, 428, 431, 432, 453, 463, 474, 511 b, 581, 596, 597, 600, 602 g, 618, 621, 649, 663, 695, 701, 710, 712, 725, 770, 782, 795, 796, 810, 815, 816, 818, 819, 827, 835, 839, 841, 903 a, 904		Ashby v. Ashby	626, 641
Ansley v. Pace	820 a	v. Blackwell	929
v. Pasahro	233	Ashcroft v. Little	647, 648, 649, 651
Anson, Petitioner	277	Ashley, <i>In re</i>	615
Anstice v. Brown	863	v. Bailey	222
Anthony v. Rees	805	Ashton v. ———	581
Antones v. Eslava	730, 731, 743	v. Ashton	371, 515
		v. Atlantic Bank	225, 814
		v. Langdale	61, 86, 704
		v. McDougall	213, 653
		v. Thompson	200
		v. Wood	340, 695, 705
		Ashton's Charity	725
		Ashurst v. Ashurst	780
		v. Given	66, 299, 305, 386 a, 555

[References are to sections.]

Ashurst <i>v.</i> Martin	592	Att'y-Gen. <i>v.</i> Brettingham	737
<i>v.</i> Mill	185	<i>v.</i> Brewer's Co.	745, 863, 871, 900, 901
Ashurst's App.	207, 230, 865, 866	<i>v.</i> Brickdale	412
Ashworth <i>v.</i> Outram	666	<i>v.</i> Briggs	700, 727
Aspinall <i>v.</i> Jones	529	<i>v.</i> Bristol	156, 725, 745
Assets Realization Co. <i>v.</i> Trustees, &c., Ins. Corp.	279	<i>v.</i> Brown	707, 724, 879
Associate Alumni <i>v.</i> General Theol. Seminary	433	<i>v.</i> Browne's Hospital	742
Aster <i>v.</i> Wells	222	<i>v.</i> Buckland	255
Astley <i>v.</i> Milles	347	<i>v.</i> Bucknall	699, 746
Aston <i>v.</i> Aston	665	<i>v.</i> Buller	336, 337
<i>v.</i> Galloway	576	<i>v.</i> Bunce	733
<i>v.</i> Wood	157	<i>v.</i> Burdett	739
Aston's Estate	462, 468, 918	<i>v.</i> Bushly	704
Trusts, <i>In re</i>	275	<i>v.</i> Butler	732
Astreen <i>v.</i> Flanagan	143, 144	<i>v.</i> Caius College	42, 276, 900, 901
Atcherley <i>v.</i> Vernon	38, 231, 616, 648	<i>v.</i> Calvert	733
Atcheson <i>v.</i> Atcheson	637, 644	<i>v.</i> Carroll	724
<i>v.</i> Robertson	420, 894, 900	<i>v.</i> Chester	701, 736, 741
Atchin's Trusts, <i>In re</i>	714	<i>v.</i> Chesterfield	907
Athenæum <i>v.</i> Pooley	831	<i>v.</i> Christ Church	725
Atherton <i>v.</i> Mowell	634	<i>v.</i> Christ's Hosp.	745, 865, 900
<i>v.</i> Worth	594	<i>v.</i> Clack	232, 283, 293, 474, 508
Athey <i>v.</i> Knotts	632	<i>v.</i> Clapham	733
Athol <i>v.</i> Derly	71	<i>v.</i> Clare Hall	743
Atkin <i>v.</i> Lord	678	<i>v.</i> Clarendon	42, 209, 742, 743
Atkins <i>v.</i> Allen	545	<i>v.</i> Clark	732
<i>v.</i> Atkins	299	<i>v.</i> Clarke	698, 699
<i>v.</i> Kron	55, 64, 554	<i>v.</i> Clergy Society	734, 748
<i>v.</i> Rowe	135	<i>v.</i> Clifont	278
Atkinson, <i>In re</i>	82, 438	<i>v.</i> Clifton	733
<i>v.</i> Atkinson	114, 242, 812	<i>v.</i> Cock	701, 702
<i>v.</i> Jordan	592, 694	<i>v.</i> Columbine	724
<i>v.</i> Marietta	757	<i>v.</i> Combe	730
<i>v.</i> Weidner	658	<i>v.</i> Comber	699, 712
Atlantic Trust Co. <i>v.</i> Woodbridge &c. Co.	386	<i>v.</i> Coopers' Co.	276, 725
Atterberry <i>v.</i> McDuffee	443	<i>v.</i> Cordwainers' Co.	725
Att'y-Gen. <i>v.</i> Ailesbury	605	<i>v.</i> Coventry	745
<i>v.</i> Alford	471	<i>v.</i> Cowper	278
<i>v.</i> Andrew	700, 729	<i>v.</i> Craven	704, 724, 725
<i>v.</i> Andrews	478, 704	<i>v.</i> Crook	742
<i>v.</i> Arran	283	<i>v.</i> Cullum	696, 747
<i>v.</i> Aspinall	23, 31, 384	<i>v.</i> Cuming	278, 413, 414, 490, 888, 894
<i>v.</i> Bacchus	637	<i>v.</i> Dallgars	848
<i>v.</i> Bain	739	<i>v.</i> Daugers	903
<i>v.</i> Baliol Coll.	724, 725, 883	<i>v.</i> Daugous	278
<i>v.</i> Barbour	286	<i>v.</i> Dedham School	742, 743
<i>v.</i> Baxter	702, 718, 724	<i>v.</i> Dixie	725, 742
<i>v.</i> Bedford	742	<i>v.</i> Dixon	441
<i>v.</i> Beverley	725, 745	<i>v.</i> Dodd	448
<i>v.</i> Biddulph	737	<i>v.</i> Downing	38, 248, 249, 694, 701, 730, 736
<i>v.</i> Black	743	<i>v.</i> Doyley	271, 273, 715, 721
<i>v.</i> Blizzard	698, 699, 733	<i>v.</i> Drapers' Co.	725, 900, 901
<i>v.</i> Bolles	700	<i>v.</i> Drummond	275, 733, 901
<i>v.</i> Boucherett	185	<i>v.</i> Dublin	694, 724
<i>v.</i> Boulton	721, 724, 725, 729, 730	<i>v.</i> Dudley	195, 230
<i>v.</i> Bouchette	733	<i>v.</i> Duley	867
<i>v.</i> Bovill	698, 699, 725, 733	<i>v.</i> Dulwich College	742
<i>v.</i> Bowyer	693, 700, 730, 736, 739, 818	<i>v.</i> Dyson	283
<i>v.</i> Brackenbury	511 c	<i>v.</i> Eastlake	478, 707
<i>v.</i> Bradlee	715	<i>v.</i> East Retford	844, 900
<i>v.</i> Brandeth	698, 733	<i>v.</i> Evart Booming Co.	732
<i>v.</i> Brazenose College	745	<i>v.</i> Exeter	698, 733, 745, 855, 863, 869
<i>v.</i> Brecon	478	<i>v.</i> Federal St. Meeting-House	710, 712, 732, 734, 745, 860, 864
<i>v.</i> Brentwood School	694, 695	<i>v.</i> Fishmongers' Co	718, 725, 745
<i>v.</i> Brereton	694, 701, 732, 746	<i>v.</i> Fletcher	721, 724, 729
		<i>v.</i> Floyer	295, 414, 490

[References are to sections.]

Att'y-Gen. v. Forster	23, 384	Att'y-Gen. v. Mathews	699, 719, 729
v. Foster	746	v. Mercers' Co.	747
v. Foundling Hospital	42, 742, 816	v. Merchant Tailors' Co.	747
v. Galway	725, 746	v. Merrimack Manuf. Co.	732
v. Garrison	732, 734, 748	v. Middleton	694, 724, 732, 742, 746
v. Gascoigne	725	v. Minshull	724, 725
v. Gaunt	742	v. Monro	432, 734, 745, 747, 863
v. Geary	477	v. Moor's Ex'rs	747
v. Gibson	724	v. Moore 476 a, 694, 733, 742, 748, 866,	923
v. Gill	380, 736	v. Moseley	511
v. Gladstone	701, 702, 721, 731	v. Murdoch	733, 734
v. Glasgow College	724, 725, 733	v. Newark	737
v. Gleg	19, 408, 414, 699, 721, 733	v. Newbury Corp.	875
v. Glyn	724, 725, 729	v. Newcombe	23, 384
v. Goldsmiths' Co.	733	v. Newman	695, 724
v. Gould	733	v. Northumberland	699
v. Goulding	725, 729	v. Norwich	478, 890, 910, 915
v. Green	724, 730	v. Oakaver	701
v. Greenhill	383	v. Oglander	729, 730, 746
v. Greenhouse	847	v. Old South Society	699, 743, 745,
v. Grocers' Co.	746, 747		748
v. Guardians of Poor	478	v. Owen	484
v. Guise	724, 725, 729	v. Oxford	724, 726
v. Haberdashers' Co.	119, 156, 710,	v. Painters' Co.	699
	712, 725, 746	v. Parker	701, 732, 746
v. Hall	113, 116, 736	v. Parnter	189, 190, 665
v. Hamilton	769	v. Payne	745
v. Hartley	735, 746, 747	v. Peacock	699
v. Heelis	23, 384, 704, 707, 885	v. Pearce	699, 720
v. Heiner	732	v. Pearson,	275, 290, 702, 733, 734,
v. Herrick	729		746, 915
v. Hewer	710	v. Pitter	451
v. Hickman	249, 701, 702	v. Platt	693, 730, 733
v. Hicks	724, 725	v. Poulden	151, 395, 397
v. Higham	440	v. Power	718, 726
v. Hobart	900	v. Price	256, 698, 699
v. Holland	419	v. Pyle	724
v. Hotham	699	v. Rance	699, 729
v. Hungerford	737	v. Randell	416, 417, 443
v. Hurst	726, 903 a	v. Ref. Prot. Dutch Church	745
v. Hutton	734	v. Rochester	425, 733, 734, 745
v. Ironmongers' Co.	42, 699, 723, 724,	v. Ruper	701
	725, 729	v. Rye	739
v. Jackson	710, 729, 746	v. St. Cross Hospital	742
v. Jeanes	732, 746	v. St. John's Hospital	42, 727, 745
v. Johnson	699	v. Sands	3, 64, 327, 434
v. Jolly	701, 724, 726, 728, 730, 731, 748	v. Scott	19, 301, 304, 323, 408, 409,
v. Kell	692, 733, 747		413, 490, 745
v. Kerr	737	v. Shearman	413
v. Landerfield	42	v. Sherborne School	733
v. Lawes	701, 702, 724, 725, 903 a	v. Shore	275, 287, 733
v. Leeds	325	v. Shrewsbury	23, 384, 707
v. Leicester	246, 846, 907	v. Skinners' Co.	694, 725, 745
v. Lepine	741	v. Smart	732, 746
v. Litchfield	295, 414, 490	v. Solly	468
v. Liverpool	816	v. Sothen	192
v. Llandaff	725	v. South Molton	725
v. Locke	414, 694, 742	v. Speed	699
v. London	276, 282, 701, 724, 725, 729,	v. Stafford	42
	741, 894	v. Stamford	278, 748
v. Lonsdale	700, 704	v. Stephens	249, 282, 283
v. Magdalen College	742, 800	v. Stepney	701
v. Manners	480	v. Sturge	741
v. Mansfield	696, 733, 735	v. Syderfin	719, 724, 729
v. Marchant	725	v. Tancred	694
v. Margaret & Regius Prof. Cam-		v. Todd	718
bridge	700, 733	v. Townsend	694
v. Master of Catharine Hall	725, 742,	v. Trinity Church	699, 725, 746
	745		

[References are to sections.]

Att'y-Gen. v. Utica Ins. Co.		42	B.	
<i>v. Vigor</i>		511 <i>c</i>		
<i>v. Vint</i>	699, 718, 724, 729		<i>Baal v. Morgher</i>	647
<i>v. Vivian</i>	701, 733, 746, 747		<i>Babb v. Reed</i>	705, 710
<i>v. Wallace</i>	694, 701, 728, 748		<i>Babbitt v. Babbitt</i>	117, 248, 275
<i>v. Wansay</i>		730	<i>Babcock v. Case</i>	179
<i>v. Warren</i>	737, 746		<i>v. Hubbard</i>	426
<i>v. Warrick</i>	724		<i>Baber, Re</i>	593
<i>v. Wax Chandlers' Co.</i>	725, 744		<i>Back v. Andrew</i>	144, 146
<i>v. Weymouth</i>		160	<i>v. Gooch</i>	587
<i>v. Wharwood</i>	42, 700, 729, 732		<i>Backhouse v. Middleton</i>	581, 828
<i>v. Whitechurch</i>	709, 724		<i>Bacon v. Bacon</i>	404, 409, 417
<i>v. Whiteley</i>	732, 746		<i>v. Bronson</i>	173
<i>v. Wilkinson</i>	668, 698, 699, 733		<i>v. Devinney</i>	147
<i>v. William and Mary Coll.</i>		735	<i>v. McIntire</i>	856
<i>v. Williams</i>	700, 709		<i>v. Proctor</i>	380, 896
<i>v. Wilson</i>	31, 161, 848, 875, 879, 900		<i>v. Ransom</i>	114
<i>v. Winchelsea</i>		287	<i>v. Rives</i>	863
<i>v. Windsor</i>	157, 745		<i>v. Taylor</i>	299
<i>v. Winsor</i>		725	<i>Bacon's App.</i>	304, 311, 359
<i>v. Wisbert</i>		725	<i>Bacon's Will In re</i>	327
<i>v. Wyville</i>		888	<i>Bacot v. Hayward</i>	440, 481
<i>v. York</i>		742	<i>Baddam, Ex parte</i>	555
<i>Atwater v. Perkins</i>	511 <i>b</i>		<i>Badger v. Badger</i>	862, 869
<i>v. Russell</i>		83	<i>Badham v. Mee</i>	15, 118, 784
<i>Atwaters v. Burt</i>		784	<i>Bægle v. Wentz</i>	171, 172, 215
<i>Atwood v. Small</i>		171	<i>Baer v. Pfaff</i>	678
<i>v. Vincent</i>		232	<i>Baer's Appeal</i>	443
<i>Aubrey v. Brown</i>		636	<i>Bagenal v. Bage</i>	584
<i>v. Middleton</i>		570	<i>Baggett v. Meux</i>	647, 671
<i>Aubuchon v. Bender</i>		104	<i>Baggot v. Baggot</i>	900
<i>v. Lory</i>		414	<i>Bagley v. Kennedy</i>	329
<i>Auby v. Doyl</i>		121	<i>Bagot, In re</i>	329
<i>Augusta v. Walton</i>		277	<i>v. Bagot</i>	276
<i>Aultman v. Bishop</i>		60	<i>Bagshaw v. Newton</i>	903 <i>a</i>
<i>Austin v. Austin</i>	275, 649		<i>v. Spencer</i>	305, 315, 358, 359, 366, 371
<i>v. Bank of England</i>		242	<i>v. Winter</i>	636, 645
<i>v. Bell</i>	591, 592, 593		<i>Bahin v. Hughes</i>	420 <i>a</i> , 669, 848
<i>v. Brown</i>	64, 131, 140		<i>Bailey v. Aetna Ins. Co.</i>	199, 602 <i>bb</i>
<i>v. Halsey</i>		569	<i>v. Bailey</i>	93, 245, 289
<i>v. Hatch</i>		790	<i>v. Brown</i>	500
<i>v. Johnson</i>		591	<i>v. Colton</i>	815 <i>c</i>
<i>v. Martin</i>	273, 804		<i>v. Ekins</i>	260
<i>v. Munro</i>		526	<i>v. Elkins</i>	802
<i>v. Shaw</i>		411	<i>v. Gould</i>	898, 902
<i>v. Taylor</i>	298, 357, 359, 372		<i>v. Harris</i>	75
<i>v. Wilson</i>		810	<i>v. Hawkins</i>	371
<i>Australian &c. Co. v. Mounsey</i>	486, 754		<i>v. Hemenway</i>	127
<i>Aveline v. Melhuish</i>		851	<i>v. Hollister</i>	331
<i>Aveling v. Knipe</i>	133, 136		<i>v. Inglee</i>	838, 877
<i>Averill v. Loucks</i>	590, 602 <i>ff</i>		<i>v. Irwin</i>	86
<i>Avery v. Avery</i>	277, 428		<i>v. Jackson</i>	654, 658
<i>v. Griffin</i>		48	<i>v. Lloyd</i>	511 <i>c</i>
<i>v. Osborne</i>		900	<i>v. Merritt</i>	602 <i>ff</i>
<i>v. Tyringham</i>		734	<i>v. Pearson</i>	661, 675, 680
<i>Avison v. Holmes</i>		388	<i>v. Robinson</i>	205, 602 <i>v</i>
<i>Awdley v. Awdley</i>		611	<i>v. Stiles</i>	183
<i>Aycenena v. Peries</i>		843	<i>v. Watkins</i>	206, 209
<i>Ayer v. Ayer</i>		310	<i>v. Wilson</i>	217
<i>v. Bangor</i>		43	<i>v. Winn</i>	166
<i>Aylesford v. Morris</i>		188	<i>v. Young</i>	440
<i>Aylife v. Murray</i>	195, 347, 904		<i>Bailey, Petitioner</i>	502
<i>Aylsworth v. Whitcomb</i>		104	<i>Baillie v. Treharne</i>	678
<i>Aylward v. Kearne</i>	200, 230		<i>Bain v. Buff</i>	114
<i>v. Lewis</i>		279	<i>v. Lescher</i>	648
<i>Aymar v. Roff</i>		603	<i>Bainbridge v. Ashburton</i>	337
<i>Aynsworth v. Pratchett</i>		615	<i>v. Blair</i>	275, 279, 282, 432, 818, 820,
<i>Ayres v. Methodist Church</i>	45, 748			885, 895, 904
<i>v. Ward</i>		270	<i>Bainbrigg v. Browne</i>	201

[References are to sections.]

Baines v. Dixon	581	Ballard v. Carter	336
v. McGee	205, 225	v. Taylor	647
Baird v. Hall	455	Ballew v. Clark	35
Baird's Appeal	344	Ballin v. Merchants' Exchange Bank	242
Baker v. Barney	672	Ballou, Pet'r	282
v. Bartlett	223	Balls v. Strutt	520, 816
v. Biddle	843, 855	Balsh v. Hyham	485, 909, 915
v. Bliss	225, 814	Balteil v. Plumer	254
v. Bradley	201, 670	Baltimore v. Caldwell	195
v. Brown	815 a	Baltimore Ins. Co. v. Dalrymyle	199
v. Carter	658, 849, 900	Baltimore S. D. Co. v. Sutro	499
v. Crookshank	598	Bambaugh v. Bambaugh	610
v. Disbrow	466, 843	Bampton v. Birchall	862
v. Dumaresque	72	Bancroft v. Ashhurst	602 bb, 603 h
v. Dutton	701	v. Cousen	127, 814
v. Evans	98	v. Lepieur	920
v. Foster	202	v. Russell	137
v. Gregory	684	Bangor v. Beal	454, 828
v. Hall	639	Bangs v. Smith	337
v. Hathaway	685	Banister v. McKenzie	460
v. Hollabaugh	84	Bank v. Benning	602 aa
v. Leathers	143, 144, 147	v. Campbell	239
v. Lee	293	v. Guttschlick	602 bb
v. Lorillard	610	v. Looney	790
v. McAden	920	v. Macy	199
v. Monk	189	v. Morrow	503
v. Moseley	112	v. Payne	222
v. Paine	226	v. Rutland	72
v. Read	205, 229	v. Simonton	127
v. Reel	118, 121	v. Tyrrell	202
v. S. & W. Mo. R. Co.	129	v. Weeks	526
v. Smith	724, 748	Bank Com'rs v. B'k of Buffalo	207
v. Sutton	705	Bank of America v. Pollock	127, 128, 135
v. Tibbetts	246	Bank of England v. Lunn	242
v. Tucker	201	v. Moffat	242
v. Updike	237	v. Parsons	242
v. Vining	126, 132, 137, 139	Bank of Mobile v. Clark	591
v. Washington	330	Bank of Orleans v. Torrey	205, 206
v. Whiting	863, 864	Bank of Republic v. Baxter	179
v. Wind	226	Bank of Turkey v. Ottoman Co.	827
Bakewell v. Ogden	783	Bank of U. S. v. Beverley	308, 559, 571, 576
Balbeck v. Donaldson	162	v. Biddle	229, 230
Balch v. Hallett	545	v. Carrington	75, 126
Balchen v. Scott	261, 262, 402	v. Daniels	855
Balkow v. Herne Bay Pier Co.	752	v. Davis	222
Baldrige v. Walton	602 g, 602 p, 602 t, 602 u	v. Hirst	918
Baldwin v. Allison	195, 602 n	v. Housman	162
v. Baldwin	626	v. Huth	588, 593
v. Bannister	243, 431	Bank of Virginia v. Adams	72
v. Campfield	131, 164	v. Clegg	610
v. Humphrey	95, 343	v. Craig	242
v. Johnston	127	Bank of Wellsborough v. Bache	247 a
v. Porter	262	Banks v. Booth	750
v. Tuttle	861	v. Judah	206
Baldy v. Brady	559	v. Le Despencer	390
v. Hunter	468	v. May	97
Bale v. Coleman	357, 359, 360	v. Phelan	730, 748
Bales v. Perry	402, 409	v. Sutton	323
Balfe v. Lord	761	v. Wilkes	415, 421
Balford v. Crane	147	Baptist Assoc. v. Hart	46, 693, 724, 748
Balfour v. Welland	593, 596, 597, 793, 794	Baptist Soc. v. Hazen	17, 299, 312, 328
Balguey v. Hamilton	835	Barber, Ex parte	338
Ball v. Alexander	748	v. Barber, In re	56
v. Ball	440	v. Barber	169, 212, 862
v. Coutts	633, 636	v. Bowen	195
v. Harris	597, 768, 802, 809	v. Cary	784
v. Maurice	189	v. Slade	639, 640
v. Montgomery	213, 632, 633, 634, 901	Barbin v. Gasford	137

[References are to sections.]

Barbour v. Johnson	127	Barnhart v. Greenshields	226
Barclay v. Goodloe	858	Barnsley v. Powell	171, 182, 480
v. Maskelyne	699, 700	Barnum v. Baltimore	43
v. Russell	327	v. Barnum	383
v. Wainwright	544, 545	v. Hampstead	590
Barcroft v. Murphy	806	Barnwall v. Barnwall	871, 872
Bardston, &c. R. R. Co. v. Metcalfe	754, 756	Barnwell v. Cawdor	566
Bardswell v. Bardswell	112, 113, 115	Barr v. Cabbage	828
Bardwell v. Bardwell	572	v. Weld	478
Barford v. Street	655	Barr's Trusts	438
Barger's Appeal	554	Barrack v. McCulloch	664, 665
Barger v. Barger	133, 145, 166	Barratt v. Wyatt	543
Baring, <i>Re</i>	477	Barrell v. Joy	79, 82
Barker, <i>In re</i>	331, 460	v. Hanrick	226
v. Barker	127, 401, 812, 843	Barrett v. Brown	873, 875
v. Devonshire	795	v. Buck	150
v. Frye	82	v. Buxton	191
v. Furlong	330	v. French	299
v. Hall	586, 589, 591	v. Hartley	429, 904
v. Hill	231	v. Marsh	115, 119
v. Greenwood	305, 306, 307, 312	v. Reids	592
v. Ins. Co.	206	v. Whitney	202
v. Laney	891	Barrett's Succession	443
v. May	17	Barribeau v. Brant	136
v. McAuley	456	Barrings v. Willing	404
v. Peile	282	Barrington v. Liddell	397, 584
v. Richardson	330, 520	v. Tristram	903 <i>a</i>
v. Woods	645, 748	Barrington's Estate	452, 477
Barker's Estate	453	Barroilhet v. Anspacher	126
Barkley v. Dosser	329	Barroll v. Foreman	415
v. Lane	226	Barron v. Barron	82, 127, 137, 627, 628, 629, 633, 634, 635, 636, 639, 647, 654, 673
v. Reay	819	v. Greenbough	181, 226
v. Tapp	127	v. Wadkin	64, 327, 434
Barksdale v. Finney	428, 836	Barrs v. Fewke	152, 157
Barksworth v. Young	82, 84	Barry v. Hill	245
Barlow v. Barlow	147	v. Ley	701
v. Devany	646	v. Marriott	457
v. Grant	119, 615, 618, 915	v. Merchants' Exchange Co.	31
v. Heneage	103	v. Missouri, K. & T. Ry. Co.	875
Barnaby v. Griffin	361	v. Woodham	888
Barnard v. Adams	727, 894	Barrymore v. Ellis	670
v. Bagshaw	418	Barstow v. Kilvington	226
v. Duncan	780, 786	Barter v. Wheeler	761
v. Hunter	202, 831	Barth v. Koetting	206
v. Jewett	133	Bartle v. Wilkins	891, 892
v. Minshall	112	Bartlett v. Bartlett	149, 162, 602 <i>b</i> , 680, 826
Barnardiston v. Lingwood	188	v. Downes	352, 355
v. Soame	17	v. Gage	602 <i>ff</i>
Barnes v. Addy	246, 846	v. Gouge	332
v. Dow	827 <i>a</i>	v. Green	363
v. Gay	324	v. Janeway	640
v. Grant	112, 117, 120	v. Johnson	747
v. Kirkland	272	v. King	701, 709, 724, 748
v. McChristie	222	v. Nye	724, 748
v. Pearson	641	v. Pickersgill	76, 126, 133, 135, 137, 206
v. Robinson	634	v. Remington	82, 359
v. Taylor	150, 855	v. Salmon	171
Barnett v. Barnett	855	v. Southerland	499
v. Clarke	388	Bartlett, Petitioner	705
v. Dougherty	75	Bartley v. Bartley	503, 807
v. Lichtenstein	660	Bartol's Estate	460, 468
v. Spratt	187	Barton v. Barton	514, 516
Barnett's Appeal	299, 305, 311	v. Briscoe	652, 653
Barney, <i>In re</i>	246, 265	v. Magruder	126
v. Arnold	378	v. Tunnell	414
v. Douglas	438	Barton's Estate	140, 459, 465, 467, 918
v. Griffin	590		
v. Saunders	453, 462, 463, 468, 470, 918		

[References are to sections.]

Barton's Trust	545	Baylies v. Baylies	329
Bartram v. Whichcote	769	v. Payson	17, 82
Bartz v. Paff	82	Baylis v. Newton	147, 151
Barwell v. Barwell	428, 869	v. Staats	275
v. Parker	600	Baylor v. Hopf	126
Barwick v. White	828	Baynard v. Woolley	418, 848, 884, 931
Bascomb v. Albertson	384, 724, 738, 741, 748	Bayne v. Crowther	118
Basford v. Peirson	685	v. Wylie	592
Baskerville v. Baskerville	359	Bazemore v. Davis	836
Bass v. Scott	299, 310	Beable v. Dodd	652
v. Williams	866	Beach v. Beach	17, 328, 330, 353, 520, 672
Basset v. St. Levan	448	v. Dyer	171, 172
Bassett v. Fisher	602 <i>ee</i>	v. Fulton Bank	600
v. Granger	284	Beaches v. Dorwin	843
v. Nosworthy	218, 220	Beadmore v. Gregory	889
v. Spofford	128	Beal v. Beal	584
Bassil v. Lister	400	v. Burchstead	72
Bastard v. Proby	371	v. Harman	610
Basy v. Magrath	192	v. Symonds	435
Batchelor, <i>In re</i>	627	v. Warren	104, 108, 685
Bate v. Hooper	439, 449, 467, 902, 932	Beale v. Coon	330
Bateman v. Bateman	308	Beales v. Spencer	649
v. Davis	453, 460, 467, 784, 849, 851	Beall v. Fox	724
v. Faber	671	Beals v. Lee	189
v. Hotchkin	396	Bean v. Bridgers	145
v. Margerison	885	v. Simpson	438
v. Ross	672	Bear v. Bear	677
Bates v. Bates	511 <i>b</i>	v. Koenigstein	126
v. Coe	586	v. Whistler	232
v. Dandy	633, 640, 641	Beard v. Campbell	184
v. Heard	183	v. Kimball	586
v. Johnson	829	v. Nutthall	111, 367
v. Kelly	126, 133, 828	v. Stanton	865
v. Mackinley	544, 545	v. Westcott	379
v. Norcross	241	Bearden v. White	66
v. Preble	861	Beardsley v. Ontario Bank	759
v. Scales	419, 462, 468	Beasley v. Magrath	613, 618
v. State	261 <i>a</i>	v. Wilkinson	339, 494
v. Underhill	418, 458	Beatson v. Beatson	102, 105
Bath v. Abney	325	Beattie v. Butler	602 <i>g</i> , 602 <i>h</i> , 602 <i>r</i> , 602 <i>x</i>
v. Bradford	600, 764, 770, 915	v. Davis	591
Bath and Montague's Case	189, 509 <i>b</i>	v. Johnston	877
Bath Gas Light Co. v. Claffy	21	Beatty v. Clark	199, 475, 490
Bath Savings Inst'n v. Hathorn	79, 82, 163	v. Knowler	44
Batho, <i>In re</i>	58	v. Kurtz	748
Bathurst v. Murray	636	v. Marine Ins. Co.	44
Baton v. Jacks	509 <i>c</i>	Beaubien v. Poupard	205
Batteley v. Windle	158	Beauclerk v. Ashburnham	509
Battinger v. Budenbecker	66	Beaudry v. Montreal	869
Baud v. Fardell	455, 467	Beaufort v. Collier	646, 647, 653
Bauerman v. Radenius	330	Beauland v. Bradley	194
Baugh v. Price	187	v. Halliwell	550
v. Reed	903 <i>a</i>	Beaumont v. Boulton	178, 863
Baum v. Grigsby	232, 237, 238	v. Bramley	186
Baumgartner v. Guessfield	126, 132	v. Meredith	827
Bawtree v. Watson	188	v. Oliveira	704
Baxter v. Costin	205, 428	v. Salisbury	317, 319
v. Wheeler	591	Beavan v. Oxford	438
Bayard v. Colefax	602 <i>aa</i> , 602 <i>dd</i>	Beaver v. Beaver	82, 225
v. Farmers', &c. Bank	225, 242, 814	v. Filson	730
Bayer v. Cockerill	299	Beck v. Graybill	126, 133
Bayles v. Baxter	126, 137, 139, 215	v. Pierce	658
Bayley, <i>In re</i>	357	Beck's Appeal	926
v. Boulcott	75, 77, 86, 97	Becker's Estate	448, 449
v. Cumming	273, 502	Beckett v. Allison	76
v. Greenleaf	232, 233, 234, 239	v. Cordley	53
v. Mansett	277, 287	Beckford v. Beckford	144
v. Powell	900	v. Close	862
v. Williams	194	v. Kemble	72

[References are to sections.]

Beckford v. Wade	228, 855, 863, 865	Belt v. Ferguson	213
Beckley v. Newland	68	Beman v. Rafford	757
Beckwith v. Union Bank	438	Bemis v. Call	684
v. St. Philip's Parish	701, 732, 735 a	Benbore v. Davies	901
Beddoe, <i>In re</i>	898	Benbow v. Moore	145, 448
Beddoes v. Pugh	433, 926	v. Townsend	75, 77, 86, 139
Bedell v. Scoggins	79	Bench v. Biles	569, 570
Bedford v. Abercorn	375	Bendall v. Bendall	894, 918
v. Bedford	700	Bender v. Reynolds	649, 651
v. Woodman	811	Bendy, <i>In re</i>	841
Bedford's Appeal	380	Bendyshe, <i>In re</i>	630
Charity	282, 697, 742	Benedict v. Moore	166
Bedilion v. Seaton	182	v. Webb	511 b
Bedingfield and Herring's Contract,		Benee, <i>In re</i>	382
<i>In re</i>	773	Benett v. Wyndham	744, 914
Bedwell v. Froome	144	Benford v. Daniels	918
Beebe v. De Baum	602 p, 602 dd, 782	Benger v. Drew	137, 144
Beech v. Keep	98, 100, 101	Bengough v. Edridge	379, 390
v. Vincent	584	Benham v. Rowe	602 v
Beecher v. Major	130, 139	Benjamin v. Gill	433
v. Wilson	147	Benlow v. Townsend	98
Beeching v. Morpew	654	Benn v. Dixon	449, 451, 547
Beekman v. Bonsor	259, 384, 402, 748	Bennesson v. Savage	248
v. Hendrickson	104	Bennet v. Davis	38, 51, 121, 277, 322, 324
v. People	748	Bennett, <i>Ex parte</i>	197, 207, 209
Beeman v. Beeman	143	Bennett, <i>In re</i>	477, 554
Beer v. Tapp	899	v. Atkins	892, 901
Beer's Goods	264	v. Austin	245
Beere v. Beere	122	v. Bennett	147, 827 a
v. Hoffmister	511 a	v. Biddle	636, 899
Beery v. Trick	456	v. Brundage	602 u
Beeson v. Beeson	195, 205, 207, 209, 428, 850, 853	v. Colley	467, 532, 534, 535, 851, 863, 867
Beevor v. Partridge	119	v. Denniston	602 s
Begbie v. Crook	270, 273	v. Dillingham	627, 632, 639
Belch v. Harvey	855	v. Foster	885
Belcher v. Belcher	191	v. Fulmer	77
v. Parsons	411, 914	v. Going	892, 901
v. Saunders	172	v. Hayter	714, 729
Belchier, <i>Ex parte</i>	404, 406, 409, 411, 416, 421, 441, 443, 779	v. Honeywoo	256, 276, 282
Belknap v. Belknap	279, 919	v. Hutson	126
v. Scaley	186	v. Judson	172, 173
Bell v. Bell	627, 631, 632, 639, 645, 828, 863	v. Lowe	380
v. Goodnature	169	v. Lytton	924
v. Hallenback	149	v. Mayhew	837
v. Henderson	175	v. Merriman	185
v. Hyde	48	v. Merritt	813
v. Kellar	660	v. Oliver	636
v. Phyn	380	v. Preston	843
v. Scammon	299	v. Robinson	514
v. Stewart	145	v. Union Bank	590, 602 d
v. Turner	902	v. Vade	171, 182, 189
v. Webb	205, 299	v. Whitehead	871
Bell's Estate	918	Bennett's Estate	917
Bellamy, <i>Re</i>	656	Bennington Iron Co. v. Isham	757
v. Bellamy	428	Benscotter v. Green	95
v. Burrow	82	Bensell v. Chancellor	189
v. Sabine	172	Benson v. Benson	260, 653
Bellas v. McCarthy	211	v. Bruce	918
Bellasis v. Compton	75, 77, 83, 86, 139	v. Hawthorne	207
Bellinger, <i>In re</i>	511 b, 552	v. Heatham	206
Bellington v. Shaffer	606	v. Whittam	117, 119
Bellington's Appeal	458	Bensusan v. Nehemias	852
Bellow v. Russell	202	Bent v. Priest	128
Bellows v. Partridge	590, 600	Bentham v. Hincourt	243
Belmont v. O'Brien	288, 294, 414	v. Smith	254
Belote v. White	858	v. Wiltshire	501, 803
Beloved Wilkes Charity, <i>Re</i>	511 a	Bentley, <i>In re</i>	329
		v. Craven	427, 430

[References are to sections.]

Bentley v. Mackay	82, 96	Bickford v. Bickford	79
v. Phelps	226	Bickham v. Cruttwell	571
v. Shreve	468	v. Smith	900
Benton, <i>In re</i>	671	Bickley v. Guest	765
Benvoize v. Cooper	338	Bicknell v. Field	72
Benzien v. Lenvir	217	v. Gouch	861
Berchard v. Scott	731	Biddle v. Perkins	506
Berdoo v. Dawson	291	Biddles v. Biddles	117, 620
Beresford, <i>In re</i>	635	Bifield v. Taylor	673, 874
v. Armagh	665	Bigelow v. Cady	382
v. Beresford	845	v. Morang	903 a
v. Hobson	636	Bigler v. Walker	602 t
Bergen v. Bennett	602 h, 602 t	Bigley v. Jones	127
v. Rendall	765	Bignell, <i>In re</i>	820
Bergengren v. Aldrich	329, 528	Bignold's Settlement, <i>In re</i>	292
Berger v. Duff	402, 770, 779	Bilbie v. Lumley	184
Bergman v. Bogda	560	Bill v. Cureton	104, 593
Beringer v. Beringer	182	v. Kynaston	541
v. Lutz	124, 126	Billing v. Brogden	440
Berkeley v. King's College	69	v. Southee	204, 210
v. Partington	117	Billingham v. Lawthen	108
v. Ryder	512, 517	Billings v. Billings	590
v. Swinburne	118, 620	v. Clinton	133
Berkhamstead School, <i>Ex parte</i>	742	Billingslea v. Moore	272
Berkin v. Marsh	863	Billingsley v. Crichtett	613
Berkmeyer v. Kellerman	197	v. Matthew	414
Birmingham v. Wilcox	848	Billington's Appeal	607
Bernard v. Bongard	132, 133	Bills v. Bills	114
v. Minshall	112	Bingham, <i>Re</i>	448
Bernstein, <i>Re</i>	493	v. Bingham	184
Berrien v. Thomas	783	v. Clannorris	270
Berry v. Briant	117, 118	v. Stewart	158, 814
v. Hamilton	511	v. Weiderwax	757
v. Norris	48, 86	Bingham's Appeal	511 c
v. Skinner	602 h	Binion v. Stone	54, 145
v. Usher	244	Binks v. Rokeby	597, 787, 792, 795, 796
v. Wiedman	126, 145	Binney v. Plumly	330
v. Williamson	276, 359	Binsse v. Page	432
Berryhill's Appeal	851, 912, 918	Birch, <i>In re</i>	518
Berthold v. Holmes	602 g	v. Blagrave	103, 147, 151, 165
Bertie v. Falkland	514	v. Ellames	217
Berwick v. Murray	468	v. Wade	112, 258
Besland v. Hewett	239	Birch's Trustees, <i>In re</i>	612
Bessey v. Windham	587	Birchall, <i>In re</i>	264
Besson v. Eveland	145	Bird v. Bird	456
Best v. Blackburn	173	v. Graham	863
v. Campbell	141, 865	v. Hunsden	516
v. Donmall	619	v. Johnson	386
v. Storr	173	v. Maybury	117
Bethea v. McColl	612, 615	v. Pegram	668
Bethune v. Dougherty	259	v. Pickford	382
v. Kennedy	451, 547	v. Stride	511 b
Bettle v. Wilson	673	Bird's Estate	918
Betts v. Betts	678	Birdsall v. Hewlett	575, 903 a
Betty v. Elliott	357	Birdwell v. Cain	195
Beulah Marble Co. v. Mattice	127	Birkett v. Hibbert	636
Beurhaus v. Cole	699	Birkhamstead School Case	725
Bevan's Trusts, <i>In re</i>	622	Birkhead v. Edwards	84
Beverly v. Brooke	818	Birks v. Micklethwait	848, 901
Beverleys v. Miller	463, 468	Birley v. Birley	511 a
Beverly's Case	191	Birls v. Betty	417, 848, 876
Bholen v. Cleveland	438	Birmingham v. Kirwin	572
Bibb v. Hunter	80, 126	v. Lesan	511 a
v. McKinley	639	Birmingham School, <i>In re</i>	742
v. Pope	680	Biron v. Mount	593
v. Smith	97	v. Scott	875
Ribby v. Thompson	117	Biscoe v. Jackson	727
Bick v. Matthews	423	v. Kennedy	657
v. Motley	423	v. Perkins	305, 307

[References are to sections.]

Bishop v. American Preservers' Co.	21	Blandford v. Thackerell	379, 710
v. Curtis	327	Blaney v. Blaney	566
v. Halcomb	438	Blann v. Bell	450, 451
v. McCelland	97	Blasdell v. Locke	98
v. Talbot	216	Blatch v. Wilder	121, 501, 787
Bishop Gore's Charity	701, 714	Blatchford v. Woolley	658, 849
Bishop of Oxford v. Leighton	294	Blauvelt, <i>Re</i>	415, 453
Bissell v. Continental Trust Co.	280	v. Ackerman	429, 469, 918
Bittenger v. Railroad Co.	589	Bledsoe v. Games	232
Bixler v. Taylor	260	Bleeker v. Bingham	367
Bizzell v. McKinnon	482	Bleight v. Bank	499
Black v. Black	79, 137	Blenkinsop v. Blenkinsop	213, 641
v. Blakely	918	Blennerhasset v. Day	228, 229, 230, 782, 861, 867
v. Creighton	827	Blennon's Estate	748
v. Irwin	402, 779	Blevins v. Buch	573, 677, 862
v. Ligon	528, 529, 538	Blewitt v. Olin	246
v. McCaulay	380	Blight v. Bank	218, 219, 239
v. Ray	546	v. Ewing	765
Blackburn v. Blackburn	79	v. Schenck	404, 409, 591, 779
v. Byne	612	Blin v. Pierce	58, 330
Blackburne, <i>Ex parte</i>	276, 504	Blindell v. Hagan	21
v. Edgeley	201	Blinkhorne v. Feast	54, 153
v. Gregson	232, 236, 237, 239	Bliss v. American Bible Society	701, 724, 747, 748, 892, 903 <i>a</i>
v. Stables	359, 360, 366, 390	v. Bridgewater	260
Blackley v. Holton	109	v. Matteson	207, 212
Blacket v. Langlands	219	v. West	122
Blackford v. Christian	189	Blithe's Case	48, 489
Blackie v. Clarke	172, 204	Blithman, <i>In re</i>	927
Blackley v. Fowler	199, 602 <i>v</i>	Blodgett v. Hildreth	81, 162
Blacklow v. Laws	649, 783	Blogg v. Johnson	468, 472
Blackmore v. Shelby	200	Blois v. Hereford	636
Blackshear v. Burke	815 <i>b</i>	Blood v. Blood	299
Blackstone v. Henworth Hospital	694	Bloodgood v. Bruen	785
Blackstone Bank v. Davis	386, 386 <i>a</i>	v. Sears	186
v. Ascott	555, 652	Bloom v. Rensselaer	602 <i>d</i> , 602 <i>x</i> , 602 <i>bb</i>
Blackwood v. Burrows	419, 453, 778, 851	v. Waldron	581, 768, 774
Blagden v. <i>Ex parte</i>	626, 632	Bloomar, <i>In re</i>	56
Blagge v. Miles	511 <i>c</i> , 610	Bloomfield v. Eyre	245, 871
Blagrove v. Blagrove	309, 312, 315	v. Stowe Market	724
v. Hancock	376, 383, 390	Blound v. Bestland	639
v. Routh	202	Blount v. Burrow	900
Blair v. Bass	137	v. Carroway	602 <i>g</i>
v. Bromley	172, 236, 861	v. Robeson	863
v. Nugent	863	Blue v. Everett	855
v. Ormond	869	v. Marshall	482, 528
v. Owles	222	v. Patterson	182, 843, 863
Blaisdell v. Locke	99	Blumenthal v. Brainard	762
v. Stevens	836	Blundell, <i>In re</i>	246, 702, 902
Blake v. Allman	621	Blunder v. Barker	201
v. Blake	82, 918	Blunt v. Blunt	72
v. Bunbury	329	v. Burrow	87
v. Foster	856	Blyholder v. Gilson	75, 137
v. Heyward	218	Blyth v. Fladgate	846
v. Hungerford	218	Board v. Wilson	234
v. O'Reilly	549	Board of Ed. v. Bakewell	700
v. Sanderson	769	Boardman v. Halliday	586, 590
v. Trader's Nat'l Bk.	229	v. Larrabee	347
Blakeley v. Brady	98, 101	v. Mossman	419
Blakely, Petitioner	460	v. Willard	99
Blakeney v. Blakeney	117	Boards, <i>In re</i>	568
Blaker v. Cooper	672	Boaz v. Boaz	275
Blanchard, <i>Re</i>	292	Boazman v. Johnson	585, 596, 597
v. Moore	226	Bobb v. Bobb	162
v. Tyler	221	Bochler v. McBride	770
Blanchet v. Foster	213	Boddington v. Castelli	345
Bland v. Bland	113, 116, 160, 827 <i>a</i>	Boddy v. Dawes	616
v. Dawes	337, 647	v. Lefevre	244
v. Fleeman	869		

INDEX TO CASES CITED.

xli

[References are to sections.]

Boden v. Jaco	602 f	Booth, <i>Ex parte</i>	402
Bodenhan v. Hoskins	246, 813, 907	<i>Re</i>	875
Bodine v. Edwards	142, 143	v. Alington	254
v. Moore	602 bb, 602 ff	v. Ammerman	47
Bodley v. Goodrich	590	v. Baptist Church	729
Bodwell v. Nutter	82, 128	v. Booth	114, 262, 419, 454, 460, 467, 508, 848, 849
Boehl v. Wadgyrmar	133	v. Bristol County S. Bank	82
Boehm v. Clark	380	v. Clark	70, 72
Bogardus v. Trinity Church	45	v. Field	315
Bogert v. Hertell	501, 768	v. McNair	590
v. Perry	132	v. Oakland S. Bank	82
Boggs v. Varner	221, 222	v. Purser	475
Bogle v. Bogle	276, 280, 900	v. Sineath	613
Bohannon v. Strespley	863	v. Warrington	861
Bohm v. Bohm	171, 209, 226	v. Wilkinson	443
Bohlen's Estate	248	Bootle v. Blundell	566, 768
Bold v. Hutchinson	359, 361	Boozer v. Teague	133
Bohrer v. Otterback	902	Borden v. Sumner	592
Boies v. Benham	237	Boreham v. Bignall	476 a, 928
Bolin, <i>In re</i>	82	Borel v. Robbins	769
Bolles v. State Trust Co.	13	Bork v. Martin	131, 142, 299
Bolm v. Headley	639	Borneman v. Sedlinger	87
Bolton v. Bolton	107, 108	Borough of Hertford	v. Poor of
v. Curre	848	Hertford	900
v. Deane	871	Borst v. Corey	234
v. Gardner	423	Borum v. King	98
v. Jacks	498	Bos v. Ewing	237
v. Jenks	765	Bosanquet v. Dashwood	192
v. Lambert	206	Boschette v. Power	826, 827
v. Myers	451	Bosken v. Giles	647
v. Powell	859	Boskerch v. Herrick	520
v. Stannard	805	Bosler's Estate	910
v. Williams	658, 659	Bosom v. Stratham	88, 90, 93, 216
Bomar v. Mullins	836	Boss v. Goodsall	460
Bond, <i>Ex parte</i>	615	Bostick v. Elliott	426
v. Barksdale	225	v. Wenton	254
v. Brown	228, 229	Bostleman v. Bostleman	126, 135
v. Hopkins	228, 855	Bostock v. Blakeney	475, 477, 552, 913
v. McWatty	890	v. Floyer	402, 441, 444, 929
v. Moore	160	Bostock's Case	379
v. Nurse	17	Boston v. Boston	641
v. Simmonds	637	Boston, &c. Co. v. Boston	761
v. Turner	918	Boston & C. S. Co. v. Reed	166
v. Ziegler	225, 814	Boston Franklinite Co. v. Condit	499
Bondfield v. Hassell	388	Boston Safe Deposit & Trust Co. v.	
Bondholders of York and Cumberland		Mixer	780, 782
R. R. Co., <i>In re</i>	753	Bostwick, Matter of	615, 617, 618
Bone v. Cook	417, 418	v. Atkins	200, 205
v. Pollard	136, 144	v. Estate of Dickson	863
Boney v. Hollingsworth	201	Bosvil v. Brander	627, 633, 640
Bonham v. Newcomb	107	Boswell v. Coaks	195
Bonifaut v. Greenfield	270, 273, 499	v. Cunningham	206
Bonithon v. Hockmore	904	v. Dillon	359
Bonn v. Davant	918	v. Parker	585
Bonner v. Bonner	573	Bosworth, <i>In re</i>	910
v. Holland	828	Boteler v. Allington	13, 321, 347, 520
Bonney v. Ridgard	225, 228, 769, 809, 810, 811, 855, 865	Bothen v. McColl	918
Bonsall's Appeal	458, 606, 607, 836, 842	Bothomly v. Fairfax	600
Bonser v. Kinnear	112, 258	Botsford, <i>In re</i>	699
Book v. Justice M. Co.	127	v. Burr	126, 132, 133, 134, 137, 139, 161
Booker v. Anderson	187, 770	Bouch v. Sproule	545
Bool v. Mix	33	Boughton v. Boughton	103, 104, 162
Boon v. Barnes	239	v. James	160, 383, 393
v. Murphy	237	v. Langley	306
Boone v. Baines	220	Bouldin v. Alexander	277, 733
v. Chiles	218, 219, 222, 229, 855, 863	Boulton v. Stubbs	210
v. Citizens' Savings Bk.	82	Boulton, <i>Ex parte</i>	438
Booram v. Wells	490, 771, 783		

[References are to sections.]

Boulton v. Beard	901, 927	Boyne v. Crowther	119
Bourdillon v. Adair	633	Boynton v. Brastow	195
Bourke, <i>In re</i>	511 a	v. Dyer	468
v. Callanan	133, 206	v. Housler	172
Bourne v. Buckton	397	v. Hubbard	188
v. Mole	826, 827	v. Rees	218, 222
Bourset v. Savage	334, 828	v. Richardson	900
Bousfield v. Hodges	780	Boys v. Boys	451, 466
Bouvé v. Cottle	595	Boyse v. Rossborough	189
Bovey v. Smith	217, 222, 521, 828, 830	Brabrook v. Boston Five Cts. Sav.	
Bowden, <i>In re</i>	863	Bank	98, 99, 100
v. Bowden	451	Brace v. Ormond	903 a
v. Laing	117, 118	Bracken v. Beatty	451
v. Parrish	223	v. Miller	218, 222
Bowditch v. Andrew	118, 920	Brackenbury v. Brackenbury	103, 104, 165
v. Ayrault	451	Brackenridge v. Holland	195, 205
v. Bannelos	280, 282, 297	Brackett v. Baum	602 bb
v. Soltyk	899, 903 a	Bradford v. Belfield	294, 344, 408, 494
Bowen, <i>In re</i>	384	v. Brownjohn	196, 533
v. Evans	218, 230	v. Burgess	328
v. Idley	183	v. Greenway	655, 660
v. Lewis	358	v. Harper	39
v. McKean	127	v. King	878
v. Penny	437 b	v. Marvin	237
Bowers v. Clark	673	v. Monks	408
v. Heaf	188	v. Romney	186
v. Keesecker	324	Bradford School of Industry, <i>Re</i>	727
v. Seeger	404, 412, 415	Bradish v. Gibbs	48, 367
v. Toronto	207, 430	Bradley v. Chase	185
Bowes, <i>Ex parte</i>	336, 337	v. Emerson	654
v. East London	484, 529, 851, 872	v. Luce	133, 843
v. Strathmore	526, 913	v. McBride	230
Bowie v. Berry	324	v. Peixoto	386
Bowker v. Bowker	251	v. Phil. R. R. Co.	602 c
v. Pierce	465, 918	Bradlin v. Hord	219, 222
Bowlby v. Thunder	112	Bradner v. Falkner	547
Bowler v. Curler	162	Bradshaw v. Bradshaw	414, 614
Bowles v. Bowles	231	v. Ellis	308, 765
v. Drayton	472	v. Fane	769
v. Orr	72	v. Skilbech	380
v. Stewart	851	v. Thompson	714
v. Weeks	277, 287	Bradstreet v. Butterfield	282
Bowling v. Bowling	632	v. Kinsella	419 a
v. Cobb	918	Bradwell v. Catchpole	416, 419, 830
v. Winslow	632, 636	v. Weeks	64
Bowman v. Bates	180	Brady v. Dilley	910
v. Wathen	756, 757, 855	v. McKosker	182
Bowman's Appeal	607	Bragg v. Carter	251
Bowra v. Wright	54	v. Paulk	82
Boyce v. Corbally	502	Brainerd v. Dunning	597
v. Grundy	171	Braman v. Oliver	195
v. Hanning	506	v. Stiles	121, 386 a, 555, 765
v. Stanton	181	Bramhall v. Ferris	118, 386 a, 555
Boycote v. Cotton	584	Bramlet v. Bates	380
Boyd v. Boyd	77, 137, 415, 420, 426, 861, 863	Bran v. Marlborough	219
v. Cleghorn	77	Branch v. Griffin	815 c
v. Gill	875	v. Ward	656
v. Hawkins	195, 917, 918	Brandeis v. Cochrane	104, 346
v. McClure	127	Brandenburg v. Thorndike	920
v. McLean	126, 137	Brander v. Brander	544, 545
Boydell v. Golightly	390	Brandon v. Aston	388, 555, 619
Boyer v. Cockerell	298	v. Brandon	347
v. Decker	277	v. Carter	264, 277
v. Libey	126	v. Hogart	468
Boyes v. Cook	511 c	v. Robinson	386, 652
Boykin v. Ciples	51, 240, 277, 647	v. Woodthorpe	633
Boylan v. Deinzer	166	Brandt v. Gelston	359
Boyle v. Boyle	114	Brandt's Appeal	569
		Brannin v. Brannin	215

[References are to sections.]

Brashear v. Marcy	380	Brierley, <i>In re</i>	295
v. West	438, 585, 592, 593	Briers v. Hackney	851
Brasier v. Hudson	792	Brigel v. Tug River Co.	903
Brassey v. Chalmers	493, 503, 769	Briggs v. Davis	334
Brasswell v. Morehead	541	v. French	72
Brathwaite v. Brathwaite	431	v. Hartley	700, 702, 718
Bratt v. Bratt	232	v. Hill	238
Braunstein v. Lewis	671	v. Light-boats	40, 41
Brawley v. Catron	233, 235	v. Oxford	396, 540
Braxton v. State	426	v. Palmer	334
Bray, <i>Ex parte</i>	910	v. Penny	93, 112
v. West	270, 271	v. Planters' Bank	238
Braybrooke v. Inskip	274, 336, 337, 597, 801	v. Terrell	757
Brazel v. Fair	127	v. Titus	681
Brazer v. Clark	417, 420, 426	v. Wilson	481
Brazier v. Camp	907	Briggs and Spicer, <i>In re</i>	593
Breck v. Cole	212	Brigham v. Henderson	72
Breckenridge v. Brooks	918	v. Newton	202
v. Ormsby	35, 189	Bright v. Bright	109
Bredenburg v. Bardin	248	v. Egerton	864
Bredin v. Kingland	918	v. Knight	133
Breedon v. Breedon	582, 610, 793	v. Larcher	570
Breit v. Yeaton	828	v. Legerton	850
Brenan v. Boyne	357	v. North	478, 915
Brendle v. German Ref. Con.	734, 748	Brightwell v. Jordan	815 b
Brennon's Estate	710	Brinckerhoff v. Lansing	602 ee
Brent v. Sandwich	734	Bringham v. Cuthbert	311
Brereton v. Brereton	507, 508, 510, 511	Brinkerhoff v. Vanschoven	232
Brest v. Otley	112	Brinkley v. Willis	863, 872
Brett v. Cumberland	536	Brinley v. Grou	547
v. Forcer	635	Brinsden v. Williams	846
v. Greewell	636	Brinton's Estate	900
Brettell, <i>Ex parte</i>	337	Brisbane v. Stoughton	602 g, 602 bb
Brevard v. Neely	602 e	Brisco v. Minah C. M. Co.	234
Brewer v. Boston Theatre	242	Briscoe v. Briscoe	361
v. Brewer	386 a, 555	v. Bronaugh	239
v. Hardy	299	v. State	919
v. Swirls	467, 669, 849	Bristed v. Williams	242
v. Vanardsdale	851	Bristol v. Hungerford	152
v. Winchester	602 h, 602 n	v. Whitton	737
Brewerton's Case	693, 701	Bristow v. Bristow	699
Brewster v. Angel	288, 375, 767	British Museum v. White	704
v. Demarest	453	British South Africa Co. v. Companhia de Moçambique	72
v. McCall	748	Brittle, <i>In re</i>	671
v. Power	142	Brittlebank v. Goodwin	863
v. Striker	305, 308, 312, 315	Britton v. Lewis	199, 414, 768
Briant, <i>In re</i> , Poulter v. Shackel	627	v. Twining	358
Brice v. Brice	189, 201	Broad v. Bevan	112
v. Miller	658	Broadhurst v. Balguy	261, 417, 418, 419, 463, 466, 508, 509, 851
v. Stokes	416, 418, 419, 421, 424, 466, 467, 508, 589, 849	Broadrup v. Woodman	85
Brickell v. Earley	137	Broadway Nat'l Bk. v. Adams	827 a
Bride v. Smyth	312	Brock v. Barnes	202
Bridenbecker v. Lowell	127, 135	v. Brock	79, 142, 226
Bridge v. Beadon	438	v. Phillips	224
v. Bridge	96, 98, 101, 102, 105, 108	Brocklebank v. Johnson	118
v. Brown	477, 615, 618, 910, 913	Brocksope v. Barnes	904, 906, 910
Bridger v. Rice	770	Brockway Manuf. Co., <i>In re</i>	242
Bridgers v. Howell	149	Broder v. Conklin	195, 865
Bridges v. Longman	768	Broderick v. Broderick	171
v. Pleasants	701, 713, 730, 748	Brodie v. Barry	665, 818
v. Wilkins	646	v. St. Paul	747, 891, 892
v. Wood	648	Brodley's App.	927
Bridget v. Himes	884	Brogden v. Walker	189
Bridgman, <i>In re</i>	275, 279, 292	Brokaw v. Brokaw	873
v. Gill	246, 745, 859, 884	Brome v. Berkeley	578
v. Green	71, 104, 189, 211	Bromfield, <i>Ex parte</i>	605, 611
Brier, <i>In re</i>	813	v. Wytherley	464

[References are to sections.]

Bromley v. Holland	873, 878	Brown v. Cross	467, 850, 869
v. Kelley	460, 461, 467	v. De Tastet	430, 454, 470, 906
v. Smith	885	v. Dewey	226
Brompton v. Barker	219	v. Doane	245
Brouson v. Kinsie	602 c, 602 x	v. Dysinger	215
v. Strouse	706	v. East	231
Brooke v. Berry	172, 187, 189, 206	v. Elton	627
v. Brooke	32, 112, 116, 248, 664	v. French	456
v. Bulkeley	217, 828	v. Gellatly	551
v. King	122	v. Gilman	237
v. Turner	511 c	v. Groombridge	908
Brooke's App.	82	v. Guthrie	141
Brooker v. Brooker	890	v. Heathcote	239
Brookman v. Hales	157, 196	v. Hicks	556 a
Brooks v. Brooks	51, 843	v. Higgs 68, 112, 160, 248, 249, 251, 256, 257, 258, 272, 507, 508, 714	499, 500
v. Burt	878	v. Hobson	900
v. Dent	127	v. How	742
v. Egbert	918 a	v. Hummell	184
v. Fowle	133	v. Ingham	648
v. Hatch	68	v. Johnson	151, 157, 158
v. Jackson	917	v. Kelsey	263, 574, 748
v. Jones	312	v. Kemper	675
v. Marbury	591, 593	v. Kennedy	202
v. Reynolds	827 a	v. Knox	592
Brookshank v. Smith	857	v. Lake	670
Broom v. Curry	540	v. Lambert's Adm'rs	846
v. Summers	734	v. Lamphear	186
Broomfield, <i>Ex parte</i>	611	v. Litton	457, 464, 906
Brophy v. Bellamy	612	v. Lockhart	880, 891, 892, 900
v. Lawler	171	v. Lutheran Church	734
Brosnell v. Downs	348	v. Lynch	215
Brothers v. Brothers	602 w	v. Lyon	592
v. Porter	132, 136, 836	v. McGill	671, 827 a
Brotherton v. Hutt	222	v. Meeting St. Baptist Soc.	737, 743
Brough v. Higgins	553	v. Meigs	254, 498, 511 a
Brougham v. Paulett	263, 908	v. Mercantile Trust Co.	104
Broughton v. Brand	127	v. Miller	451
v. Broughton	432, 895, 904	v. Minturn	593
v. James	662	v. Oakshott	823
v. Langley	298	v. Paull	118, 612, 620
Browell v. Reid	273, 818, 819	v. Petney	137
Browsers v. Fromm	748	v. Phillips	252
Brown, <i>Ex parte</i>	282	v. Pocock	250, 251, 252, 258, 652, 671
<i>In re</i>	498, 701, 730, 773	v. Postall	661
v. Addison G. Hospital	378	v. Pring	185
v. Alden	668	v. Ramsden	305
v. Anderson	760	v. Ricketts	429, 464, 468
v. Armistead	184, 500	v. Sansome	468, 472
v. Bamford	670	v. Selwyn	244
v. Bartie	602 i, 602 aa, 602 bb	v. Smith	615
v. Black	246 a	v. Southhouse	464, 472
v. Blount	883	v. Stead	347
v. Bontee	347	v. Stoughton	160, 393
v. Bradford	96, 216	v. Temperly	616
v. Brown	77, 83, 93, 206, 212, 277, 287, 315, 668, 672, 682	v. Vanlier	232, 239
v. Bryant	358	v. Whiteway	309, 312
v. Budd	28	v. Williamson	386 a
v. Campbell	465	v. Wood	218
v. Carter	201	v. Wright	397, 455, 456, 459, 843
v. Casamajor	117, 612, 620	v. Yeall	713, 719
v. Cave	133	Brown's Case	610
v. Cavendish	98, 104, 593	Estate	603
v. Chambers	511 b	Trusts	438, 668
v. Cheney	126	Will, <i>Re</i>	119
v. Cherry	874	Browne v. Stamp	137
v. Clark	632, 633, 634, 636, 649	Browne's Hospital, <i>Re v. Stamford</i>	727
v. Concord	724, 748	Brownell v. Downs	259
v. Cowell	195		

INDEX TO CASES CITED.

xl v

[References are to sections.]

Brownell v. Stoddard	145	Buckley v. Frasier	371
Browning v. Hart	590	v. Howell	774
v. Headley	627, 632, 633, 636, 639	v. Lamauze	196
Brownlie v. Campbell	178	v. Wells	678
Bruce v. Child	229, 230	Bucklin v. Bucklin	341
v. Presbytery, &c.	698, 709	Buckner v. Calcott	863
v. Roney	126, 135	Budd v. Basti	232
v. Ruler	179	v. Hiler	275
Bruch v. Lantz	195, 205, 428, 598, 795, 853	v. State	380
Brudenell v. Boughton	92, 570	Budge v. Gummon	458
Bruen v. Gillet	415	Budgett v. Budgett	401, 902
v. Hone	855	Buel v. Buckingham	195
Bruin v. Knott	613, 615	v. Yelverton	272
Brunfield v. Palmer	238, 239	Buerhaus v. De Saussure	465
Brummell v. McPherson	61	Buffalo R. R. Co. v. Lamson	127, 142, 207, 759
Brunridge v. Brumridge	417	Buffalow v. Buffalow	189, 194, 203
Brundage v. Cheneworth	96	Buffington v. Maxam	112, 131
Brundy v. Mayfield	127	Buford v. Caldwell	172
Brune v. Martyn	519	v. M'Kee	109
Bruner v. First Nat. Bank	122	Bugden v. Tylee	822
Brunnenmayer v. Buhre	732, 742	Bugg v. Franklin	638
Brunsen v. Wooldredge	255, 256, 699	Buggins v. Yates	112, 113, 116, 151
Brunsen v. Hunter	112, 115	Bulby, <i>Ex parte</i>	651
Brunson v. Henry	104, 145	Bulkley v. De Peyster	259
v. Martin	252	v. Redmond	183
Brush v. Kinsley	238	v. Staats	815 b
v. Ware	224	v. Wilford	171, 178, 181, 182, 195
Bryan v. Bradley	299	Bull, In matter of	499, 610
v. Bryan	627	v. Bull	112, 251, 254, 255, 559, 748
v. Collins	393	v. Odell	873
v. Duncan	195, 649	v. Vardy	116, 248, 252
v. Howland	82	Bullard v. Chandler	262, 699, 732
v. McNaughton	206	Bullenkamp v. Bullenkamp	142
v. Weems	312	Bullin v. Dillage	686
Bryant, <i>In re</i>	248, 612	Bullock, <i>Re</i>	827 a
v. Craig	471	v. Knight	633
v. Hendricks	137, 226	v. Menzies	634
v. Mansfield	165	v. Sadlier	220
v. Russell	594, 660, 914	v. Stones	379, 616, 622
Brydges v. Brydges	357, 358, 540	Bullowa v. Orgo	243
v. Wotton	272	Bulpin v. Clark	652, 657
Bryon v. Metropolitan, &c. Co.	752	Bumgarner v. Cogswell	412, 501
Bryson v. Nichols	160	Bump v. Pratt	97
Buchanan v. Deshon	55	Bumpus v. Platner	218
v. Hamilton	30, 275, 282, 283	Bunbury v. Bunbury	71, 72
v. Harrison	13, 347	Bunce v. Reed	602 r, 602 s, 602 t, 602 v
v. Hart	766	Bundy v. Bundy	38
v. Matlock	183	v. Monticello	828
v. Monroe	602 h	Bunn, <i>In re</i>	622
Buck, <i>In re</i>	699, 730	v. Winthrop	98, 103, 104, 109, 162, 367
v. Gibson	784	v. ———	331
v. Paine	127	Bunner v. Storm	511, 783
v. Pike	126, 133, 137	Bunnett v. Foster	885
v. Swazey	132, 166, 244	Buntin v. French	232, 237
v. Urich	127	Burbank v. Burbank	732
v. Voreis	212	v. Sweeney	252
v. Warren	132	v. Whitney	46, 724, 748
Buckels v. Carter	891	Burch v. Breckenridge	659, 660
Buckeridge v. Glasse	260, 275, 467, 835, 849, 851	Burchett v. Durdant	306
Buckford v. Wade	141	Burden v. Burden	904, 906
Buckham v. Smith	910	v. Sheridan	135
Buckingham v. Clark	171	Burdett v. Spilsbury	511 b
v. Morrison	915 a	v. Willet	835
Buckinghamshire v. Drury	34, 53	Burdick v. Garrick	468, 471
v. Hobart	348	v. Goddard	282, 503
Buckland v. Pocknell	235, 236	Burdon v. Burdon	665
Buckles v. Lafferty	205	v. Dean	632, 633, 635
Buckley v. Buckley	570	Buren v. Buren	127
		Burge v. Brutton	432, 910

[References are to sections.]

Burger v. Duff	402	Burt v. Herron	119
v. Potter	237	v. Sturt	397, 584
Burges v. Lamb	540, 776	Burting v. Stonard	809, 815
Burgess v. Burgess	272	Burton, <i>Ex parte</i>	246, 848
v. Fairbanks	238	v. Cook	119
v. Knapp	763	v. Hastings	361
v. Smith	72	v. Mount	450, 451
v. Wheate	8, 15, 40, 64, 217, 232, 248, 301, 321, 323, 325, 327, 357, 427, 434, 747, 828, 891	v. Pierpont	647
Burgoyne v. Fox	577, 785	v. Wookey	904
Burgwyn v. Daniel	869	Burton's Appeal	737
Burham v. James	863	Burt v. Wilson	232
Burke v. Adair	770	Burt's Est., <i>Re</i>	340, 495
v. Chrisman	238	Bury v. Oppenheim	188, 201
v. Gray	237	Bush v. Allen	310
v. Jones	600, 601	v. Bush	219, 221, 764, 836, 877
v. Roper	710	v. Marshall	232
v. Tuite	658	v. Shearman	197
v. Valentine	119, 308	v. Stamps	602 p
Burkett v. Whittemore	511 c	v. Stanley	126
Burleigh v. Clough	316	Bush's Appeal	299, 901
Burleson v. McDermott	223	Bushby v. Munday	72
Burley v. Russell	170	Bushell v. Bushell	511 b
Burling v. Newlands	77, 827 a	Bushnell v. Parsons	118
Burlingame v. Robbins	239	Bushong v. Taylor	437 a, 437 b, 766
Burlington Uni. v. Barrett	90	Bust v. Wilson	162
Burmester v. Norris	486	Butcher v. Johnson	509 a
Burn v. Carvalho	68, 105	v. Musgrove	69
Burnaby v. Baillie	66	Butcher, <i>Ex parte</i>	332
Burnet v. Brundage	782	Butler, <i>In re</i>	560
Burnett v. Davis	647	v. Bray	414, 505
v. Denniston	602 q, 602 x, 602 bb	v. Butler	454, 647, 873, 878
v. Kinnaston	641	v. Carter	863
v. Preston	17	v. Duncomb	578, 579, 768
Burney v. McDonald	64	v. Gazzam	511 b
v. Spear	918	v. Godley	347
Burnham v. Barth	828	v. Harrison Land Co.	242
v. Bennett	639	v. Haskell	187
v. Dalling	900	v. Hildreth	596
Burnly v. Evelyn	385	v. Hyland	865
Burns v. Allen	568	v. Ladue	602 gg
v. Ford	929	v. Merchants' Ins. Co.	58, 143, 146, 147
v. Taylor	235	v. Portarlington	82
Burnside v. Wayman	95	v. Prendergast	873, 878
Burr v. McEwen	526, 527, 780, 894, 910	v. Robertson	680
v. Sherwood	640	v. Rutledge	133
v. Sims	308, 499, 769	v. Trustees	720, 729
v. Smith	701, 724, 730, 748	v. Van Wyck	591
Burr's Ex'r	694	v. Weeks	166
Burrage, <i>In re</i>	248	Butler & Baker's Case	270
Burrill v. Boardman	382, 730, 732, 748	Butler's Trusts, <i>In re</i>	678
v. Sheil	411, 413, 417, 420, 460, 466	Buttanshaw v. Martin	520
Burritt v. Silliman	259	Butterbaugh's App.	554
Burrough v. Philcox	248, 250, 251, 258	Butterfield, <i>Re</i>	83
Burroughs v. De Couts	104	v. Reed	382
Burrows v. Alter	596	Buttrick v. Holden	814
v. Gore	863	Butts v. Wood	207
v. Greenwood	900	Buxton v. Buxton	439
v. Locke	171	Byam v. Byam	294, 364, 503, 505, 807
v. Ragland	182	Byant v. Pickett	918
v. Walls	467, 851	Bybee v. Thorp	618
v. Williams	821	Byers v. Danley	139
Burru v. Meadors	863	v. Wackman	137
Burson's Appeal	676	Byington v. Moore	206
Burt v. Dennett	877	Byne v. Blackburn	113, 117, 612
v. Freeman	800	Bynum v. Frederick	678
v. Gamble	223	Byrchall v. Bradford	263, 462, 469, 574, 844, 849
v. Gill	472	Byrd v. Bradley	590
		Byrne v. Frere	857, 861, 867

INDEX TO CASES CITED.

xlvii

[References are to sections.]

Byrne v. Gunning	520	Cameron and Wells, <i>Re</i>	367
v. Norcott	463, 472, 900	Camp, <i>In re</i>	212
v. Van Hoesen	608	Campan v. Campan	247 a
Byron v. Rayner	199	Campbell v. Baldwin	232, 237
		v. Campbell	126, 129, 228, 441, 456, 554, 905
C.		v. Carter	184
Cadbury v. Duvall	559, 598, 795, 797	v. Day	438
Cade v. Davis	127	v. Dearborn	226, 602 b
Cadell v. Palmer	379, 380	v. Drake	128, 135
v. Wilcocks	511 b	v. First Nat. Bank	124
Cadman v. Horner	176	v. Foster	386 a
Cadogan v. Essex	460	v. Foster Ass'n	511 b
v. Ewart	308, 315, 499	v. French	630
v. Kennett	542	v. Graham	869
Cadwalader's App.	195, 774	v. Hamilton	330
Cadwell's Bank, <i>Re</i>	901	v. Harding	380
Cafe v. Bent	293, 294, 450, 474, 508	v. Hooper	35
Caffey v. McMichael	618	v. Horne	476 a, 511 a, 901, 922, 928
Caffrey v. Darby	438, 847, 900, 910	v. Johnston	195, 205, 786
Cage v. Cassidy	72	v. Kansas City	727
Cagwin v. Buerkle	131	v. Leach	530
Cahill v. Cahill	647	v. McLain	209, 851
Cahoun v. Robinson	232	v. Miller	456, 914
Cain v. Cox	76	v. Moulton	210
Cairns v. Chaubert	547, 554, 918	v. Prestons	321, 329
v. Colburn	147	v. Radner	741
v. Grant	136	v. Sheldon	93
Calais Steamboat Co. v. Van Pelt	814	v. Walker	128, 195, 197, 770, 869
Caldecott v. Brown	475, 477, 552, 913	v. Wallace	93
v. Caldecott	551	v. Williams	468
Caldwell v. Brown	437 a, 783	Campbell's Estate	109
v. Caldwell	137	Trusts, <i>In re</i>	51
v. Carrington	217	Campden's Charities, <i>Re</i>	727
v. Chapline	602 <i>dd</i>	Canal Bank v. Cox	591, 592
v. Fulton	76	Canby v. Lawson	367
v. Lowden	328	Candler v. Tillett	419, 421, 422, 424, 440
v. Williams	97, 109, 111, 591	Candy v. Marcy	186
Calhoun v. Burnett	223, 843	Cane v. Allen	197, 202
v. Calhoun	655	v. Roberts	437
v. Ferguson	546, 547	Caney v. Bond	438, 440
v. King	818	Canfield v. Bostwick	570, 918
Calkins v. Ishell	602 <i>bb</i> , 602 <i>jj</i>	Cann v. Cann	185
v. Lockwood	68	Cannel v. Buckle	34
v. Long	672	Canning v. Kensworthy	122
Call v. Ewing	421	Cannings v. Flower	616, 619
v. Gibbons	188	v. Hicks	13
Callaghan v. Hall	891, 918	Cannon v. Handley	171
Callahan v. Patterson	675	Canoy v. Troutman	17, 328, 334
Callender v. Calgrove	230	Cantley, <i>In re</i>	338
v. Keystone	891	Cape v. Bent	284, 293, 294, 450, 474, 508
Callis v. Folsom	863	v. Cape	118, 647, 649
Callow v. Howle	654, 657, 659	Capehart v. Huey	891, 894
Calloway v. Calloway	453	Capel v. Wood	533
v. Wetherspoon	191	Caperton v. Callson	891
Calmes, <i>Ex parte</i>	458	Capital Nat. Bank v. Coldwater Nat. Bank	44
Calvert v. Eden	299	Caple v. McCollum	126
v. Godfrey	605	Caplin's Will	510
Calvin v. Currier	677	Caplinger v. Stokes	127, 200
Calwell's Ex'r v. Prindle's Adm'r	476	v. Sullivan	633
Cambridge v. Rous	160	Capron v. Attleborough Bank	199
Camden v. Anderson	131	Cardigan v. Montague	530
v. Bennett	126, 145	Care v. Ormond	821
v. Benson	118	Carew v. Johnson	904
v. Vail	237, 685	Carew's Case	178, 179
Cameron v. Irwin	602 i, 602 x	Carey v. Brown	815 c
v. Mason	232	v. Callan	137
v. Nelson	79	v. Goodinge	244

[References are to sections.]

Carey v. Kemper	815 <i>b</i>	Carter v. Balfour	570, 724, 726, 748
<i>v.</i> Rawson	226	<i>v.</i> Bank of Georgia	239
Carleton v. Bank	627, 628	<i>v.</i> Bennett	863
<i>v.</i> Dorset	213	<i>v.</i> Bernadiston	317
Carley v. Graves	837	<i>v.</i> Carter	218, 223, 261, 262, 627, 628,
Carmichael v. Foster	828	633, 672, 673, 676, 829	
<i>v.</i> Hughes	615	<i>v.</i> Cutting	424, 462, 468
<i>v.</i> Trustees	43	<i>v.</i> Gibson	82, 83
<i>v.</i> Wilson	615, 618	<i>v.</i> Horne	428, 431
Carne v. Long	704, 712	<i>v.</i> McManus	204
Carnes v. Colburn	162	<i>v.</i> Montgomery	357
<i>v.</i> Hubbard	239	<i>v.</i> Rolland	618
<i>v.</i> Polk	783, 786 <i>a</i>	<i>v.</i> Tuggart	645
Carney v. Byron	520	<i>v.</i> Ublein	865
<i>v.</i> Kain	259, 312, 315, 448, 920	<i>v.</i> Wolf	748
Carow v. Mowatt	891	Carter and Kenderdine's Contract, <i>In</i>	
Carpenter, <i>Re</i>	277, 284	<i>re</i>	593
<i>v.</i> Am. Ins. Co	171	Carter Bros. v. Challen	126, 815 <i>c</i>
<i>v.</i> Cameron	765	Carteret v. Carteret	351
<i>v.</i> Canal Co.	230, 863	Cartledge v. Cutliff	471
<i>v.</i> Carpenter	441	Cartmell v. Perkins	863
<i>v.</i> Elliott	192	Cartwright, <i>In re</i>	477
<i>v.</i> Heriot	201	<i>v.</i> Pettus	72
<i>v.</i> Leonard	680	<i>v.</i> Wise	143, 144, 147
<i>v.</i> Marnell	58, 345	Caruthers v. Williams	133
<i>v.</i> Miller	748	Carver v. Bowles	511 <i>a</i>
<i>v.</i> Mitchell	686	<i>v.</i> Richards	511 <i>a</i> , 808
Carpenter's Appeal	900	Carver's Estate	468
Estate	181	Carvill v. Carvill	121
Carr, <i>Ex parte</i>	171	Carwardine v. Carwardine	298, 379
<i>v.</i> Atkinson	254	Cary v. Abbott	718, 724, 729
<i>v.</i> Bedford	256, 510	<i>v.</i> Cary	112, 116
<i>v.</i> Bob	863	<i>v.</i> Eyre	217
<i>v.</i> Burlington	585, 597, 600	<i>v.</i> Mansfield	200
<i>v.</i> Eastabrook	633	<i>v.</i> Whitney	328
<i>v.</i> Ellison	326	Cary Library v. Bliss	700, 727
<i>v.</i> Erroll	373	Casaday v. Bosler	602 <i>ee</i>
<i>v.</i> Halliday	35	Casborn v. English	322
<i>v.</i> Hertz	411	Casborne v. Scarfe	324, 336
<i>v.</i> Hilton	225, 814, 861	Casburne v. Casburne	323
<i>v.</i> Hobbs	232	Case v. Coddling	126, 132
<i>v.</i> Houser	209	<i>v.</i> Gerrish	212, 591
<i>v.</i> Laird	468	<i>v.</i> Green	671
<i>v.</i> Living	117, 118	<i>v.</i> James	217
<i>v.</i> Richardson	299	<i>v.</i> Kelly	477, 915 <i>a</i>
<i>v.</i> Taylor	627, 632, 635, 640	Casey v. Wiggin	640
Carr, petitioner	511 <i>b</i>	Casey's Estate	891
Carrick v. Errington	160	Caspari v. Cutcheon	460
Carrier's Appeal	918 <i>n</i>	Cass v. Cass	552
Carrigan v. Drake	520	<i>v.</i> Stearns	891
Carrington v. Abbott	559	Cassamajor v. Pearson	550
<i>v.</i> Goddin	602 <i>aa</i>	Cassard v. Hinman	172
Carritt v. Real & P. A. Co.	849	Cassell, <i>Ex parte</i>	910, 914
Carroll v. Connett	830	<i>v.</i> Ryss	782, 783
<i>v.</i> Farmers' Bank	72	Cassell's Appeal	748
<i>v.</i> Lee	647	Cassidy v. Hynton	507
<i>v.</i> Moore	918	<i>v.</i> McDaniel	881
<i>v.</i> Renick	361	Castle v. Castle	118, 620
<i>v.</i> Shea	252	Caswell v. Sheen	56
<i>v.</i> Stewart	501	Cater v. Eveleigh	661, 675
<i>v.</i> Van Renselaer	232	Cater's Trust	922, 925
Carron Iron Co. v. Maclaren	72	Cathcart v. Nelson	82, 163
Carruth v. Carruth	264	Cathorpe, <i>Ex parte</i>	457
Carruthers v. Carruthers	404	Catlin v. Eagle Bank	31, 588
Carsey v. Barshaw	416	Caton v. Caton	208
Carson v. Carson	66, 250, 254, 262, 511	<i>v.</i> Pembroke	239, 837
<i>v.</i> Murray	672, 673	<i>v.</i> Rideout	665
<i>v.</i> O'Bannon	644	Cattlin v. Brown	385
Carter v. Abshire	774	Caulfield v. Maguire	554

[References are to sections.]

Cavagnaro v. Don	129	Chandler v. Hill	600
Cave v. Cave	34	Chandos v. Brownlow	230
Cavender v. Cavender	275	v. Talbot	641
Cavendish v. Fleming	918	Chanet v. Villeponteaux	499
v. Mercer	616, 619	Chaney v. May	885
Caverly v. Philp	873	v. Smallwood	245
Cavin v. Gleason	44, 828	Chapin v. Holyoke Young Men's Ch. Ass'n	729
Cawood v. Thompson	159	v. School District	45, 730, 744, 748
Cecil v. Butcher	103, 104, 105, 161, 162, 165	v. Universalist Society	17, 299, 305, 328
Cecil Bank v. Snively	126	v. Vermont, &c. Railway	758, 761
Cecil Nat. Bank v. Thurber	122	v. Weed	209
Central Bridge v. Bailly	754	petitioner	448
Chadwick v. Chadwick	82	Chaplin, <i>Ex parte</i>	461
v. Heatley	922, 925	v. Chaplin	151, 165, 323
Chadwin, <i>Ex parte</i>	574	v. Givens	261, 262, 264, 268, 914
Chaffe v. Watts	656	v. McAfee	126
Chaffees v. Risk	589	v. Moore	612
Chaffin v. Hull	206	v. Young	430
Chahoon v. Hollenback	330	Chapman, <i>In re</i>	465, 848, 910
Chaigneau v. Bryan	260	v. Beardsley	232, 235
Chaires v. Brady	187	v. Blissett	298, 305, 312
Chalfant v. Williams	226	v. Butler	855
Challen v. Shippam	462, 463	v. Chapman	419
Chalmers v. Bradley	228, 230, 274, 287, 401, 863, 867	v. Foster	686
v. Hack	72	v. Gibson	108
Chamberlain v. Agar	84, 181, 216	v. Gray	672
v. Brackett	728, 737	v. Kimball	277
v. Chamberlain	181, 182, 741, 748	v. Tanner	232, 239
v. Crane	209	v. Wilbur	77
v. Dummer	540	Charity Corp. v. Sutton	402, 879, 904
v. Maynes	328	Charles v. Burke	104
v. Stearns	711, 712	v. Dubois	428
v. Taylor	765	Charlton v. Durham	421
v. Temple	165	v. Low	218
v. Thompson	305, 312, 315, 318	v. Rendall	375
Chambers, <i>Ex parte</i>	616, 617, 618	Charter v. Trevelyan	923
v. Atkins	117	Chase v. Chapin	86, 99
v. Caulfield	672	v. Chase	70, 71, 112, 117, 118, 386 a, 623
v. Chambers	362, 451, 856	v. Lockerman	243, 462, 468, 562, 565, 566, 571, 918
v. Crabbe	851	v. Palmer	627
v. Emery	137	v. Parker	602 ff
v. Goldwin	615	v. Perley	79
v. Goodwin	905	v. Roberts	843
v. Howell	430	v. Stockett	91
v. Kerns	462	v. Van Meter	347
v. Manchester, &c. Ry.	752	v. York C. S. Bank	827 a
v. Mauldin	330	Chassaing v. Parsonage	636
v. Minchin	402, 404, 411, 416, 419, 421, 423	Chastain v. Smith	127
v. Perry	631	Chasteauneuf v. Capeyron	67
v. St. Louis	694, 699, 724	Chatham v. Audley	905
v. Smith	827 a	v. Brainard	748
v. Taylor	312	Chattanooga, &c. R. Co. v. Evans	242
Chambersburg Ins. Co. v. Smith	520	Chauncy v. Graydon	515
Chamness v. Crutchfield	226	Chauvete v. Mason	678
Champion, <i>In re</i>	166, 848	Chawner's Will, <i>In re</i>	768
v. Brown	232, 239	Cheatham v. Rowland	477
v. Rigby	202, 228, 229	Chedworth v. Edwards	446, 835, 837, 863
v. Smith	699	Cheek v. Watson	171
Champlin v. Champlin	124, 133, 142, 169, 672, 783	Cheever v. Wilson	684
v. Haight	810	Chelmsford's Case	694
v. Laytin	171	Chenery v. Davis	440
Chance v. McWharther	232, 239	Cheney v. Watkins	299
Chancellor, <i>In re</i>	547	Cheney's Case	701
v. Windham	299	Cherry v. Greene	511 b, 764, 795
Chandler, <i>In re</i>	846	v. Jarratt	918

[References are to sections.]

Cherry v. Mott	724, 726	Church v. Church	748
Chertsey Market, <i>In re</i>	419, 742, 745,	v. Cole	126
770, 816, 848, 849, 875		v. Jaques	27
Cheshire v. Cheshire	544, 836	v. Marine Ins. Co.	206
v. Payne	213	v. Ruland	171, 181, 182, 222
Chesley v. Chesley	770	v. Sterling	127
Cheslyn v. Dalby	202	v. Stewart	328
Chesson v. Chesson	554	v. Wood	127
Chester v. Grier	199	Church of Donington-on-Baine, <i>In re</i>	701
v. Pratt	658	Church of Latter Day Saints v. United	
v. Rolfe	480, 487, 915	States	727, 736
Chesterfield v. Janssen	167, 169, 171, 185,	Church on Brattle St. v. Grant	736
187, 189, 194, 195, 212, 851		Churcher v. Martin	131
Chestnut St. Nat. Bank v. Fidelity		Churchill v. Churchill	254
Ins. Co.	104	v. Corker	320
Chew v. Beall	660	v. Dibben	664
v. Chew	308, 511	v. Hobson	261, 402, 411, 416, 421
Chew's Appeal	827	v. Marks	388, 555
Chibnal v. Whitton	993	Chwatal v. Schreiner	371
Chicago, &c. R. Co. v. Hay	863	Citizens' Nat. Bank v. Jefferson	466
v. Titterington	861	City Council v. Paige	218
Chicago Att. Co. v. Davis S. M. Co.	82	v. Walton	277
Chicago, &c. Land Co. v. Peck	482	City National Bank v. Hamilton	127
Chidgey v. Harris	261	Clack v. Carlon	432
Chilcott v. Hart	382	v. Holland	438, 440, 831, 845
Child v. Bruce	195	Cladfield v. Cox	438
v. Child	453, 667	Clafin v. Ambrose	124
v. Gibson	464	v. Clafin	382, 386
v. Stephens	596, 597	v. Van Wagoner	660
Childers v. Childers,	76, 82, 84, 131,	Clagett v. Hall	76, 420
151, 165, 226		Clairborne v. Henderson	324
Childs v. Gramold	137	v. Holland	466, 790
v. Jordan	86, 343	Clairhorn v. Crockett	238
v. Wesleyan Cem. Ass'n	77	Clamer v. Rawlings	237
v. Woodson	75	Clanricarde v. Henning	202, 850, 855
Chillingworth v. Chambers	848	Clapp v. Emery	86
Chilton v. Braiden	232	Clapper v. House	227
Chion, <i>Ex parte</i>	835	Clapton v. Bulmer	256
Chipchase v. Simpson	649, 651	Clare v. Bedford	53
Chippendale, <i>Ex parte</i>	486, 907, 909	Clark v. Anderson	453, 910
Chisholm v. Chisholm	615, 616	v. Beers	460
v. Gadsden	171	v. Burgh	633
v. Newton	330	v. Burnham	140
v. Starke	541	v. Cantwell	129
Chism v. Williams	380	v. Chamberlain	142
Chitwood v. Brittain	84	v. Clark	126, 132, 147, 248, 347, 417,
Choice v. Marshall	359	418, 419, 423, 460, 547, 863	
Cholmeley v. Paxton	774, 776	v. Cook	633
Cholmondeley v. Cholmondelev	112	v. Cordis	482
v. Clinton	228, 855, 856, 857, 865,	v. Crego	341
867		v. Everhart	174, 178
Chowning v. Cox	602 <i>ad</i>	v. Flannery	554
Chrichton's Trust	927	v. Fuller	590
Christ's Church, <i>In re</i>	742	v. Garfield	453, 459
v. Trustees	701, 730	v. Girdwood	203
Christ's Coll., Cambridge	700, 739	v. Haney	171
Christ's Hospital v. Budgin	144, 149, 151	v. Hilton	152
v. Dffenbach	226	v. Holland	195
v. Grainger	23, 384, 736	v. Hornthal	511 <i>c</i>
v. Hames	739	v. Hunt	237, 239
Christian v. Foster	903 <i>a</i>	v. Jones	225, 766
v. Yancey	261, 602 <i>aa</i>	v. Lee	206
Christie v. Bishop	221	v. McMahon	122
Christler v. Meddis	499	v. Maguire	647
Christopher v. Covington	590, 591	v. Makenna	647, 661
Christophers v. White	432, 904	v. Malpas	189, 194
Christy v. Courtney	143, 146, 147	v. Marlow	568
v. Flemington	601	v. Martin	246 <i>a</i>
v. Pulliam	254	v. Patterson	147, 658

[References are to sections.]

Clark v. Peatridge	226	Clennell v. Lewthwaite	94
v. Platt	383, 917, 918	Clerg's Appeal	571
v. Riddle	766	Clergy Society, <i>In re</i>	724
v. Royle	236	Clerk v. Miller	654
v. Sawyer	894	Clerkson v. Bower	14
v. Seymour	773	Clermont v. Tasburgh	71, 176
v. Taylor	724, 726	Cler's Case	511 c
v. Tennison	347	Cleve's Case	161
v. Timmons	126	Cleveland, <i>In re</i>	348
v. Trelawney	466	v. Hallett	312, 315, 320
v. Van Surley	610	v. Pollard	915
v. Ward	189	v. State Bank	769
v. Washington Corp.	757	Cleveland's Settled Estates	449
v. Wilson	594	Clews v. Jamieson	206
v. Wright	828	Click v. Click	126
Clark's Appeal	417, 418	Clifford v. Francis	719, 729
Estate	468	Clifton v. Davis	191
Clarke, <i>In re</i>	618	v. Haig	55
v. Berkeley	513, 517	v. Lombe	112
v. Blount	421	Clinefetter v. Ayers	562
v. Boyce	235	Clinton v. Seymour	578
v. Clarke	171	v. Willes	658
v. Danvers	126, 144	Clippenger v. Hipbaugh	214
v. Deveau	539, 816, 922	Clive v. Carew	654, 669, 671, 849
v. Hackorthorne	217	v. Clive	544, 545
v. Hart	869	Clogett v. Hill	826
v. Jenkins	421	Cloud v. Bond	460
v. Lott	97	v. Greasley	72
v. McCreary	639	v. Ivie	132
v. Moore	764	v. Martin	118, 511
v. Parker	262, 413, 502, 507, 508, 511, 514, 517, 518, 519	Cloudsley v. Pelham	112
v. Quackenboss	137	Clough v. Bond	402, 404, 409, 417, 419, 440, 444, 453, 455, 462, 465, 847
v. Royal Panopticon	19, 768	v. Dixon	417, 422, 444, 445
v. Sawyer	182	v. Lambert	672
v. Saxon	48, 50, 540, 541	Cloutman v. Bailey	358
v. State	426	Cloyne v. Yound	157
v. Turner	257, 510	Clulow's Trust	397
v. Windham	648, 652, 653	Clute v. Bool	118, 386 a
Clarke's Appeal	448, 520	v. Frasier	195
Trusts, <i>In re</i>	671	Clutton, <i>Ex parte</i>	59, 277, 297
Clarkson v. Clarkson	358, 545	Clyde v. Simpson	794, 800
v. Creely	770	Coape v. Arnold	358, 359, 369
v. De Peyster	654	Coard v. Holderness	157
v. Hanway	187, 189	Coate's Appeal	113, 119
Clary, <i>In re</i>	454	Coates v. Robinson	655, 660
Claussen v. La Franz	48, 126	v. Williams	591
Clavering v. Clavering	103, 104, 162	v. Woodsworth	133
Clay v. Hart	499	Cobb v. Biddle	765
v. Selah V. Ir. Co.	248	v. Edwards	124
v. Sharpe	602 c, 602 bb	v. Fant	917
v. Willis	602 c	v. Knight	79, 86, 104, 816 a, 828
v. Wood	114	v. Stewart	246 a
Clayton v. Cagle	858	v. Trammell	133
Clayton v. Glengall	580, 584	Cobb's Estate	448
v. Gresham	544, 545	Coburn v. Anderson	158
Cleaver v. Mutual R. F. Life Ass'n.	181	Cochran v. Cochran	554
Clegg v. Edmondson	141, 196	v. Paris	508, 511
v. Fishwick	196	v. Richmond & A. R. Co.	902, 910
v. Rowland	528, 530	v. Van Surley	610
Cleghorn v. Obernalte	145	Cock v. Goodfellow	453, 454
Cleland v. Cleland	635	Cockburn v. Thompson	815
Clemens v. Caldwell	275, 276, 471	Cockell v. Taylor	187, 831
v. Clemens	273	Cocker v. Quayle	453, 460, 467, 509, 549, 847
v. Heckscher	790, 848	Cockerell v. Barber	272
Clemenston v. Williams	866	v. Cholmeley	776, 851
Clement v. Hyde	700	Cocking v. Pratt	178, 184, 901
Clemson v. Davidson	68	Cocks v. Haviland	848
Clenestine's Appeal	649		

[References are to sections.]

Cocksedge <i>v.</i> Cocksedge	672	Collard <i>v.</i> Sampson	511 <i>c</i>
Coddington <i>v.</i> Foley	578, 579	College of Charleston <i>v.</i> Wellington	919
Coder <i>v.</i> Haling	127	Collett <i>v.</i> Collett	903 <i>a</i>
Codman <i>v.</i> Krell	72	Collier <i>v.</i> Carey	432
Codwise <i>v.</i> Gelston	594, 596	<i>v.</i> Collier	226, 620
Coe <i>v.</i> Bradley	215	<i>v.</i> Fallon	69
<i>v.</i> Columbus, &c. Railway	754, 756, 759	<i>v.</i> Grimsey	499
<i>v.</i> Knox County Bank	759	<i>v.</i> Harkness	239
<i>v.</i> McBrown	759	<i>v.</i> McBean	308, 316, 358, 361, 829
<i>v.</i> Peacock	754, 759	<i>v.</i> Slaughter	514
<i>v.</i> Pennock	759	<i>v.</i> Walter	315
<i>v.</i> Washington Mills	730	Collin <i>v.</i> Blackburn	616
Coe's Trust	510	Collins, <i>Re</i>	615
Coffee <i>v.</i> Buffin	195	<i>v.</i> Carey	904
Coffin <i>v.</i> Cooper	517	<i>v.</i> Carlyle	112, 251
<i>v.</i> Fernyhough	196	<i>v.</i> Collins	166, 450
<i>v.</i> Morrill	642	<i>v.</i> Corson	126, 133
Cofford <i>v.</i> Allen	848	<i>v.</i> Hopkins	602 <i>h</i> , 602 <i>n</i>
Cogbill <i>v.</i> Boyd	427, 452, 463, 471	<i>v.</i> Hoxie	66, 891
Coggeshall <i>v.</i> Pelton	697, 704, 748	<i>v.</i> Lavenburg	655, 660
Coggeswell <i>v.</i> Griffith	828	<i>v.</i> McCarty	858, 869
Coggins <i>v.</i> Flythe	280	<i>v.</i> Rainey	206
Cogswell <i>v.</i> Cogswell	227, 462, 468, 544, 545, 552, 554, 826	<i>v.</i> Rudolph	648
<i>v.</i> Newburyport S. Inst'n	82	<i>v.</i> Serverson	816 <i>b</i>
Cohen <i>v.</i> Morris	602 <i>m</i>	<i>v.</i> Stocking	347
<i>v.</i> Parish	145	<i>v.</i> Sullivan	181
Coit <i>v.</i> Fougere	237	<i>v.</i> Townley	892
Colburn <i>v.</i> Morton	195, 205	<i>v.</i> Wade	468
Colchester <i>v.</i> Lowten	31	<i>v.</i> Wakeman	157
Colcord <i>v.</i> Scamonds	238	<i>v.</i> Wickwire	288
Coldwell <i>v.</i> Home	725	<i>v.</i> Will	511 <i>c</i>
Cole <i>v.</i> Cunningham	72	<i>v.</i> Williamson	206
<i>v.</i> Gibbons	188	Collinson <i>v.</i> Collinson	146, 147
<i>v.</i> Gibson	214	<i>v.</i> Lister	225, 455, 458, 810, 909
<i>v.</i> Jessup	591	<i>v.</i> Patrick	98, 102
<i>v.</i> Lake	873	Collinson's Case	693, 704, 739
<i>v.</i> Littlefield	112, 117, 386 <i>a</i>	Collis <i>v.</i> Collis	453, 826, 827
<i>v.</i> McNeill	213	<i>v.</i> Robins	558
<i>v.</i> Miles	225	Collister <i>v.</i> Fassitt	112
<i>v.</i> Moffitt	602 <i>u</i>	Collomore <i>v.</i> Tyndall	319
<i>v.</i> Moore	828	Collyer <i>v.</i> Burnett	741
<i>v.</i> Noble	865	<i>v.</i> Collins	602 <i>bb</i>
<i>v.</i> Robins	191	Colman <i>v.</i> Lord	897
<i>v.</i> Savage	602 <i>ee</i>	<i>v.</i> Lyne	228
<i>v.</i> Scott	221, 232	<i>v.</i> Sarrel	97, 100, 108, 111, 367
<i>v.</i> Stokes	195, 428	<i>v.</i> Satterfield	678, 681
<i>v.</i> Turner	570	Colmer <i>v.</i> Colmer	628, 634
<i>v.</i> Wade	19, 20, 258, 273, 280, 294, 344, 491, 496, 499, 503, 504, 508, 714, 721	Colrane <i>v.</i> Worrel	456
Cole's Estate, <i>In re</i>	477, 526	Colsten <i>v.</i> Chandos	493
Colebrook's Case	285	Colt <i>v.</i> Lasoriere	225
Colegrave <i>v.</i> Manby	532, 534, 535	Colton <i>v.</i> Colton	112, 114
Coleman, <i>In re</i>	555, 926	Columbia Bridge Co. <i>v.</i> Kline	42
<i>v.</i> Bucks & Oxon Union Bank	122	Colvin <i>v.</i> Currier	645
<i>v.</i> Columbia Oil Co.	545, 556	<i>v.</i> Mennefee	866
<i>v.</i> Hatcher	559	Colyer <i>v.</i> Finch	800, 802, 803
<i>v.</i> McKinney	785	Com. <i>v.</i> Nase	160
<i>v.</i> Parran	79	Combe <i>v.</i> Brasier	733, 748
<i>v.</i> Ross	892	<i>v.</i> Combe	580
<i>v.</i> Woolley	655, 660	<i>v.</i> Hughes	397
Coles <i>v.</i> Forrest	873	Combry <i>v.</i> McMichael	312, 318
<i>v.</i> Trecothick	183, 187, 188, 195, 199, 206, 428	Comley <i>v.</i> Dazian	206
Colesbury <i>v.</i> Dart	217, 768, 790	Commeymer <i>v.</i> United Ger. Church	55
Coleson <i>v.</i> Blanton	330	Commissioner of Roads <i>v.</i> McPherson	43
Colgate <i>v.</i> Colgate	205	Commissioners <i>v.</i> Archibald	275
Collard <i>v.</i> Hare	228, 865	<i>v.</i> Pemsel	705
		Com'srs, &c. <i>v.</i> Archbold	275, 276
		<i>v.</i> De Clifford	380, 736
		<i>v.</i> Forney	500
		<i>v.</i> Johnson	452, 890 <i>a</i>

[References are to sections.]

Com'rs, &c. v. Mateer	270	Conway v. Cutting	82, 438
v. Sullivan	699, 729	v. Fenton	477
v. Walker	39, 39	v. Green	205
v. Wybrants	802, 831	v. Kensworthy	82, 231
Commonwealth v. Duffield	511 c	v. Smith	689
v. Martin	61	Conybeare's Settlement, <i>Ex parte</i>	277, 297
v. McAlister	418	Cood v. Cood	71
v. Shelby	564	v. Pollard	236
v. Smith	756, 757	Cook v. Addison	447, 468
v. Stauffer	514, 555	v. Arnhem	862, 872
v. Tenth Mass. Turnp.	757	v. Barr	81
Company of Pewterers v. Christ's Hos- pital	736	v. Bremond	147
Compton v. Barnes	918	v. Bronaugh	133, 221
v. Collinson	48, 52, 672, 673	v. Burtchaell	206
v. Oxenden	347, 348	v. Cholmondeley	427
Condict v. Flower	585	v. Clayworth	191
Conant v. Wright	280	v. Collinridge	454, 470
Condit v. Maxwell	137, 223, 865	v. Cook	215, 499
Condy v. Adrian	541	v. Crawford	273, 284, 290, 294, 339, 340, 344, 492, 494, 495, 502
v. Campbell	380	v. Dawson	566, 802, 803
Cone v. Dunham	865	v. Dealy	150
Cong. Church v. Southwick	411, 413	v. Dillon	602 i, 602 ff
Congr'l Uni. Society v. Hale	730	v. Dunkenfield	156, 699, 729
Conkey v. Dickinson	263, 572	v. Ellington	112
Conklin v. Conklin	380	v. Fountain	104, 121, 162, 167
v. Davis	699	v. French	223
v. Egerton	500	v. Fryer	260
Conley v. Nailor	66	v. Gardner	920, 921
Connah v. Sedgwick	590, 591	v. Gilmore	910, 915 a
Conally v. Lyons	437 a	v. Gwavas	152
Connecticut v. Bradish	218	v. Husbands	50
Conn. Mut. Life Ins. Co. v. Smith	861	v. Hutchinson	150, 151, 153, 158
Conn. River S. Bank v. Albee	82, 163	v. Ingoldsby	290
Connelly v. Wells	875	v. Kennedy	647
Conningham v. Conningham	261, 262, 263	v. Lamotte	104, 194, 201, 210
v. Mellish	151, 153, 158	v. Lawrence	292
v. Plunkett	100	v. Lowry	23
Connolly v. Connolly	515	v. Nathan	184
v. Farrell	117, 118	v. Parsons	476, 915
v. Howe	236	v. Sherman	133, 195
v. Keating	142	v. Soltan	219, 352
v. Pardon	891	v. Stationers' Co.	152, 160
v. Parsons	770, 782	v. Trimble	232
Connor, <i>In re</i>	66	v. Tullis	336, 831
v. Follansbee	137	v. Wiggins	672, 674
v. Lewis	133	Cooke, <i>Re</i>	498
v. New Albany	328	v. Platt	111 a
v. Ogle	396, 612	Cooksey v. Bryan	137, 865
Conolan v. Leyland	646	Cookson v. Reay	461
Conover v. Beckett	815 c	v. Richardson	127, 187
v. Stothoff	795	Cool v. Jackman	468
v. Warren	233, 237	Cooley v. Lobdell	82
Conoy v. Troutman	602 aa	v. Rankin	191
Conrad v. Shomo	684	v. Scarlett	71
Conroe v. Birdsall	170	Coombs v. Jordan	598, 797, 798
Conron v. Conron	574	v. Read	676
Conry v. Caulfield	433, 863, 876	Coon v. Brook	660
Consistory v. Brandon	748	Cooney v. Ryter	82
Constant v. Metteson	918	Coonrod v. Coonrod	475, 794
v. Schuyler	87	Coope v. Carter	889, 890
Constantein v. Blache	585	Cooper, <i>In re</i>	615
Consterdine v. Consterdine	417	v. Cartwright	347
Contee v. Dawson	417, 420, 466, 826	v. Cockrum	126, 171
Converse v. Noyes	124	v. Cooper	254, 347, 516, 890
v. Sickles	166	v. Day	275, 282
Conway, <i>Ex parte</i>	588	v. Douglas	480
v. Alexander	226	v. Haines	253
v. Conway	578	v. Kynock	317, 319, 320

[References are to sections.]

Cooper v. Laroche	671	Cory v. Cory	185, 191, 201
v. Martin	254	v. Gertcken	53, 624
v. McClum	257	Coryell v. Dunton	511 c, 654
v. Reilly	369	v. Klehm	222, 347
v. Skeele	137	Coryton v. Hilyan	7
v. Spottiswood	236	Cosser v. Radford	600
v. Stevens	602 ee	Costabadie v. Costabadie	117, 511
v. Thomason	82	Costeker v. Horrox	827
v. Thornton	117, 118, 624	Coster v. Coster	636
v. Whitney	322, 585	v. Griswold	72, 187
v. Wyatt	388, 555	v. Murray	863
Cooper's Estate	382	Cotham v. West	615
Cooth v. Jackson	137	Cottage St. M. E. Church v. Kendall	729
Cope v. Barry	873	Cottam v. E. Counties R. R. Co.	416, 418
v. Clark	849	Cotteen v. Missing	97, 102
v. Cope	564	Cotter v. Burchard	843
Copeland v. Ins. Co.	206	Cotterel v. Hampson	30
v. Summers	104	v. Purchase	226, 861
Copeley v. O'Neil	606	Cotterell v. Long	602 d
Copeman v. Gallant	58	Cotting v. De Sartiges	287
Copis v. Middleton	197	Cottingham v. Shrewsbury	876
Coppage v. Barnett	133	Cottingham v. Fletcher	82, 84, 137, 151,
Coppard v. Allen	876		152, 165, 216
Copper Mining Co. v. Beach	786	Cottle v. Harrold	125
Copperthwaite v. Tuite	654	Cottman v. Grace	386, 700, 732
Coppin v. Coppin	236	Cotton, <i>In re</i>	615
v. Fernyhough	533, 834	v. Clark	898, 900, 902
v. Gray	657	v. Cotton	450, 547
Copping v. Cooke	243	v. King	103
Coquard v. National Linseed Oil Co.	21	v. Penrose	903 a
Corbally v. Grainger	665	v. Wood	134, 137
Corbett v. Barker	856	Cotton's Trustees, <i>In re</i>	272
v. Laurens	552	Cottrell v. Cottrell	787
v. Maydwell	578, 579	v. Hughes	218, 354
Corbin v. Wilson	615, 616	Cough v. Bond	914
Corby v. Corby	121	Coulson v. Walton	855
Cordell's Case	217	County Att'y v. May	724
Corder v. Morgan	602 c, 602 bb	Course v. Humphrey	888
Cordwell v. Mackrill	833, 834	Court v. Jeffery	812, 881
Corgell v. Dunton	667	v. Robarts	472
Corie v. Bertie	694	Courtenay v. Courtenay	268, 280, 401
Corkers v. Minons	516	v. Taylor	260
Corley v. Corley	627, 629	Courtier, <i>In re</i>	437 a, 477
v. Stafford	202, 203	Cousett v. Bell	877, 907
Corlies v. Corlies	276, 459	Cousin's Estate	457
Cormerais v. Genella	602 gg	Coutts v. Acworth	104
Cormick v. Holbrook	680	Covar v. Cantelou	874
Corn Exchange v. Babcock	660	Covenhoven v. Shuler	541, 546, 547
Cornell, <i>In re</i>	845	Coventry v. Coventry	52, 108, 268, 276,
v. Green	500		280, 282, 884, 899, 901, 908, 924
v. Lovett	514	v. Hall	872
Cornell's Estate	545, 549, 917	v. Higgs	513, 517
Cornfoot v. Fowke	172	Coverdale v. Eastwood	208
Corning v. Lewis	680	Covington v. Anderson	828
v. White	594	v. McEntire	546
Cornish v. Wilson	558, 570	Cowdery v. Way	654
Cornwell v. Orton	299	Cowdry v. Day	203
Cornwise v. Bourgum	466, 618	Cowell v. Gatcombe	402, 417
Corp. of Carlisle v. Wilson	871	v. Hicks	358
Corp. of Reading v. Lane	600	Cowgill v. Oxmantown	539, 777
Corp. of Sons of Clergy v. Mose	743	Cowing v. Howard	918
Corrance v. Corrance	627	Cowles v. Brown	511
Correll v. Lauterbach	248, 277	Cowley v. Hartstonge	461, 511
Corrie v. Byron	286	v. Wellesley	546
Corse v. Chapman	490, 671	Cowman v. Colquhoun	820 a
v. Corse	490	v. Hall	322
v. Leggett	81, 82	v. Harrison	113, 117
Corser v. Craig	438	Cowper v. Cowper	183, 357
Corson, <i>Re</i>	189	v. Mantell	119, 256

INDEX TO CASES CITED.

lv

[References are to sections.]

Cowper v. Stoneham	848	Crawley v. Dixon	551
Cowperthwaite v. Bank	181	Crawshaw v. Collins	906
Cowstad v. Gely	878	Crawshay v. Collins	430, 454, 470
Cox v. Arnsmann	171	Creagh v. Blood	13, 269, 347
v. Bassett	714	v. Wilson	514, 515
v. Bateman	137, 260, 837	Creaton v. Creaton	305, 308, 315
v. Bennett	917	Credant's Estate	310 a
v. Chamberlain	785	Creed v. Creed	876
v. Coleman	668	v. Lancaster Bank	126, 130, 139, 149
v. Cox	124, 556 a, 794, 799	Creesy v. Willis	560
v. Dolman	863	Creigh v. Henson	863, 866
v. Edwards	299	Creighton v. Ringle	225, 456
v. Fenwick	232, 237	Creney v. Dupree	75
v. Halstead	602 r, 602 u	Crener v. Williams	700
v. John	197	Cresop v. McLean	602 dd
v. Ledward	347	Cressman's Appeal	82, 101, 109
v. Martin	466	Cresson v. Ferree	498, 506, 783
v. Parker	160, 434	Cresson's Appeal	704
v. Sprigg	98, 109	Cresswell's Adm'r v. Jones	82
v. Walker	17, 328, 411, 520	Creswell v. Dewell	849, 851, 926
v. Wills	540, 894	Creuze v. Hunter	600
v. Wood	232	Creveling v. Fritts	195
Coykendall v. Rutherford	499	Crewe v. Dicken	271, 273, 408, 411, 497, 502, 503, 806
Cozine v. Graham	84	Cribbins v. Barkwood	188
Cozzens' Estate	415	Crichton v. Crichton	467, 828
Crabb v. Crabb	75, 77, 147	v. Grierson	712
v. Young	401	Cridland's Estate	453
Crackett v. Bethune	466, 468, 900	Cripps v. Jee	82, 151
Craddock v. Owen	327, 437	Crisfield v. State	863
v. Piper	432, 895	Crisp v. Spranger	246, 403
Crafton v. Frith	699	Crispell v. Dubois	201, 204, 210
Craig v. Craig	274, 280, 281, 393, 396, 398, 766	Crissman v. Crissman	86
v. Hone	277, 381	Critchfield v. Haynes	602 v
v. Leslie	64	Critton v. Fairchild	334
v. Radford	55	Crocheron v. Jaques	39
v. Wheeler	450, 451	Crocker v. Dillon	281, 841
Craigdallie v. Aikman	734	v. Lowenthal	26g
Craig v. Holmes	191	v. Robertson	602 d, 602, 620
Crallan v. Oughton	601	Crockett v. Crockett	112, 117, 118, 386 a
Cram v. Mitchell	195, 206, 586, 590	v. McGuire	241
Crampton v. Seymour	910	Croft v. Adam	249, 251
Cranch v. Cranch	449	v. Arthur	149
Crane v. Bolles	315, 448	v. Lathrop	72
v. Caldwell	238	v. Powell	602 c
v. Conklin	187, 191	v. Slee	152, 655
v. Crane	17, 328	Crofton v. Davies	360
v. Drake	225, 810, 815	v. Ormsby	217, 828
v. Gough	110	Crofts v. Evett	718
v. Hearn	419	v. Middleton	184, 657
v. Inglehart	459	Croker v. Hertford	93
v. Kelley	680	Cromie v. Bull	510
v. Palmer	239	Crommelin v. Crommelin	513, 514, 517
v. Reeder	780	Crompton v. Vaser	97
v. Ruder	327	Cronnin v. Louisville, &c. Soc.	715, 748
Cranson v. Wilsey	281	Crook v. Brooking	82, 86
Craston, <i>In re</i>	705	v. De Vandes	380
v. Crane	602 w, 602 x, 779	v. First Nat. Bank	82
v. Plumb	674	v. Glen	858
Cranstown v. Johnston	71, 72	v. Ingoldsby	259
Crate v. Luippold	437 a	v. Tull	678
Craven's Case	459	v. Turpin	626, 628, 630, 632
Crawford v. Bertholf	38, 231	Crooke v. Kings County	23
v. Langmaid	96	Crop v. Norton	126, 132, 133, 196
v. North Eastern Ry.	545, 556	Cropster v. Griffith	52
v. Patterson	612	Crosby v. Church	658, 669
v. Wearn	511 b	v. Hillyer	593, 596
Crawford's Appeal	96	v. Huston	284, 602 d, 602 p
Crawley v. Crawley	397, 449, 551		

[References are to sections.]

Crosby v. Mann	928	Cunliffe v. Cunliffe	112
v. Mason	476 a	Cunnack v. Edwards	727, 730
Croskill v. Bower	195, 432, 461	Cunningham v. Antrobus	633
Cross v. Beavan	617	v. Davenport	82, 225
v. Cross	380	v. Foot	166
v. Kennington	570	v. Freeborn	585, 593
v. Norton	82	v. Gray	577
v. Petree	438	v. McKinley	863, 864, 865
v. Smith	407	v. Moody	323
v. U. S. Trust Co.	72, 382	v. Parker	511 a, 570
Cross's Estate, <i>Re</i>	150	v. Pell	876, 879, 881
Crossling v. Crossling	252, 507	v. Schley	539
Croton, &c. Co. v. Ryder	761	Cunningham & Frayling, <i>In re</i>	248
Croughton's Trusts, <i>In re</i>	671	Curd v. Field	790
Crowe v. Ballard	192, 206	Cureton v. Watson	456
v. Crisford	451	Curling v. Curling	724, 728
Crowley v. Richardson	858	v. Shuttleworth	602 c, 602 p
Crowther, <i>In re</i>	348, 466	Curnick v. Tucker	113
v. Crowther	858, 871	Curran v. Green	277
Croxall v. Shererd	6, 301, 321	Curran v. Jago	144
Croxton, <i>Ex parte</i>	891	Currence v. Ward	126, 166
Crozier v. Crozier	371	Curren v. Walkley	795
v. Young	149	Currey, <i>Re</i> , Gibson v. Way	671
Cruce v. Cruce	471	Currie v. Hart	590
Crue v. Caldwell	104	v. Pye	747
Cruger v. Cruger	660, 667	v. Steele	185
v. Halliday 268, 274, 280, 285, 401,	901	v. White	82, 122, 231
v. Heywood	612	Currier v. Studley	865
v. Jones	334	Curry v. Allen	861
Cruikshank v. Parker	506	v. Hill	764
Cruikshanks v. Roberts	72	v. Shrader	675
Cruise v. Christopher	189	Curteis v. Candler	280, 476 a, 894, 899,
Cruiston v. Olcott	452		922, 928
Crump, <i>In re</i>	654	Curtis, <i>In re</i>	593
v. Baker	913	v. Brown	728
v. Gerack	468	v. Buckingham	602 ee
Cruse v. Barley	152, 160, 499	v. Curtis	871
v. McKee	251, 254, 255	v. Daniel	864
Cruselle v. Chastain	437 b	v. Engel	660
Crutcher v. Hord	215	v. Fullbrook	501
Crutchfield, <i>Ex parte</i>	606	v. Hutton	709, 741
Cruwys v. Colman	112, 248, 256, 285	v. Lakin	861
Cryder's Appeal	795, 798	v. Lanier	218
Cuddy v. Waldron	886	v. Leavitt	592
Cueman v. Broadnax	301	v. Luken	160, 381, 385, 393, 532, 535
Cuff v. Hall	490, 771	v. Mason	417, 419
Culbertson v. The H. Witbeck Co.	166	v. Perry	165
Culpepper v. Aston 152, 597, 764, 770, 785,	789, 795, 796	v. Price	305, 319
Culross v. Gibbons	83	v. Ripon	112, 113, 116
Culver v. Culver	205	v. Smith	71, 275, 280, 615, 843
Cumberland v. Codrington	98, 562	Curtis's Estate	917
Cumberland Coal Co. v. Hoffman Coal		Curtiss, <i>In re</i>	280
Co.	206	Curton v. Jellicoe	797
Cumberland Coal Co. v. Sherman	207	Cusack v. Cusack	361
Cumick v. Tucker	113	v. White	214
Cuming v. Robins	137	Cushing v. Blake	324, 357, 358, 359
Cummings v. Boswell	544, 545	v. Danforth	206
v. Cummings	127	v. Spaulding	299, 386
v. Fullam	438	Cushman v. Bonfield	428, 760
v. Miller	680	v. Coleman	359
v. Sharp	662	Cushney v. Henry	38, 240
v. Williamson	660, 768	Custance v. Cunningham	151
Cummins v. Bromfield	888	Cuthbert v. Baker	793
v. Cummins	260, 261, 262, 264, 429,	v. Chauvet	920
	454	v. Rolf	648
Cumston v. Bartlett	511 c	Cutler v. Babcock	245
Cunard's Trusts, <i>Re</i>	264	v. Griswold	149
Cuniston v. Bartlett	253	v. Tuttle	126, 131, 132, 133, 137, 149,
			165

[References are to sections.]

Cutler's Trusts	633, 636	D'Arcy v. Hall	428, 431
Cuyler v. Bradt	82, 136, 865	Dare v. Allen	639
		Dargan v. Richardson	589, 593
		Darke v. Martyn	443, 453
		v. Williamson	476, 907
		Darkin v. Darkin	127
		Darley v. Darley	107, 310, 612, 647, 648, 651
		Darling, <i>In re</i>	699, 701
		v. Hammer	469
		v. Potts	166, 195, 428
		Darlington, <i>Ex parte</i>	615
		v. Darlington	448
		v. McCooke	97
		Darlington's Estate	206
		Darnaby v. Watts	415, 790
		D'Army v. Chesneau	345
		Darrah v. McNair	94, 327, 436
		Darrow v. Calkins	127, 343, 451
		Dartmouth College v. Woodward	30, 44, 737, 742
		Dartnall, <i>In re</i>	177
		Darwell v. Darwell	421
		Darwin v. Hanley	591
		Dashell v. Earle	639
		Dashiel v. Att'y-Gen.	160, 724, 748
		Dashwood v. Bulkeley	511, 512, 515, 517, 518, 519
		Daubigny v. Duval	243
		Daubrey v. Cockburn	511 a
		Daughady v. Payne	232, 237
		Davall v. New River Co.	434
		Davant v. Guerard	330
		Davenport v. Coltman	160
		v. Davenport	680
		v. Farrar	324
		v. Kirkland	451
		v. Prewett	633
		v. Stafford	440
		Davenport Plow Co. v. Lamp	828
		Daveron, <i>In re</i>	382
		Davey v. Durant	768, 780
		David v. Froud	924
		Davidson v. Bowden	52
		v. Foley	152
		v. Gardner	654
		v. Little	187, 188
		v. Moore	275
		Davidson's Ex'r v. Kemper	815 a
		Davie v. Beardsham	38, 231
		Davies v. Bush	784
		v. Davies	160, 361, 618, 834
		v. Hodgson	53, 671
		v. Lee	540
		v. Speed	379
		v. Thornycroft	646, 652, 671
		v. Topp	563
		v. Westcombe	776
		Davies to Jones	313
		Davis, <i>Ex parte</i>	286
		v. Austin	618, 624
		v. Barnstable	732
		v. Barrett	431
		v. Bay State League	894
		v. Bessehl	890 i
		v. Boyden	865
		v. Browne	816
		v. Cain	647, 648
		v. Charles River R. Co.	17, 328
D.			
Dabney v. Manning	308		
Da Costa v. Da Pas	702, 715, 718, 724, 729		
Daggett v. White	264		
Dagley v. Tolferry	624		
D'Aguilar v. Drinkwater	511, 517, 518		
Dailey v. New Haven	43, 277		
Dakin v. Beresford	649		
v. Demming	918		
v. Savage	298		
Daland v. Williams	245		
Dale v. Hamilton	82		
Daley v. Desbouvrie	512, 517, 518, 519		
Dallieguay v. Tabor	246 a		
Dallam v. Fidler	591		
v. Wampole	667, 679		
Dallmeyer, <i>In re</i>	397, 622		
D'Almaine v. Anderson	286		
Dalrymple v. Taneyhill	610		
Dalston v. Coatsworth	183		
Dalton v. Dalton	828		
v. Hewen	795		
v. Jones	200		
v. Young	802		
Dalton's Settlement	612		
Daly v. Beckett	530		
v. Bernstein	260		
Dalzell v. Crawford	598, 794, 795, 796, 798		
Dame v. Annas	784		
Dammert v. Osborn	382, 729		
Damon v. Bibber	602 a		
Damon's Case	739		
Dan v. McKnight	218		
Dana v. Bank of United States	31, 588, 590, 592		
v. Dana	124, 127		
v. Davenport	602 aa		
v. Farrington	602 g, 602 r, 602 t, 602 u, 602 x		
v. Lull	591		
v. Murray	382, 511 b		
v. Newhall	218		
v. Petersham	231		
Dance v. Goldingham	86		
Dandridge v. Minge	562		
Danforth v. Briggs	145		
Danforth's Estate	468		
D'Angibau, <i>In re</i>	52		
Daniel v. Daniel	330		
v. Davidson	217, 828		
v. Hollingshead	218		
v. Newton	623		
v. Robinson	660		
v. Uhley	50		
v. Warren	451		
Daniels v. Eldridge	386, 555		
Danser v. Warwick	86		
Danson, <i>In re</i>	394		
Darby v. Calligan	686		
Darcy v. Kelley	727		
D'Arcy v. Blake	323, 871		
v. Croft	487, 649		

[References are to sections.]

Davis v. Coburn	86, 864	Dean v. Sandford	277
v. Cotton	865	Deans v. Scriba	918
v. Davis	124, 127, 639, 891	Dearin v. Fitzpatrick	627, 929
v. Dendy	912	Dearle v. Hall	438
v. Eastman	471, 869	Deatly v. Murphy	189
v. Gardner	569	De Barante v. Gott	28
v. Hamlin	206	Debenham v. Ox	214
v. Harkness	618	De Bevoise v. Sandford	128, 195, 921
v. Harman	441, 456	De Biel v. Thompson	208
v. Hayden	302	Debney v. Eckett	477
v. Hodgson	849	De Bouchout v. Goldsmid	243
v. Howcote	783	De Caters v. Chaumont	195, 593
v. Jackson	545	De Celis v. Porter	195
v. Johannot	610	De Chambrun v. Cox	428
v. Lamb	232	v. Schermerhorn	212
v. Marlborough	69, 188	Deck v. Tabler	145
v. McNally	192	Decouche v. Lavetier	228
v. McNeil	411	Dedham Bank v. Richards	593
v. Newton	627, 629, 632	Deem v. Millikin	181
v. Otty	84, 226	Deen v. Cozzens	275, 619, 620
v. Prout	648	Deerhurst v. St. Albans	339, 360, 373, 390
v. Rhodes	521	Deering v. Adams	262, 308, 312, 315
v. Roberts	618	v. Kerfoot	560
v. Schmidt	658	v. Tucker	920
v. Scovern	206	De Forrest v. Bacon	593
v. Settle	166	Deg v. Deg	82, 137, 511 c, 837
v. Simpson	195	De Garcin v. Lawson	718, 726, 741
v. Spurling	246, 402, 403, 404, 417	Degman v. Degman	511 c
v. Stambaugh	84, 91, 245	De Graffenreid v. Green	541
v. Tingle	170, 849	Dehon v. Foster	72
v. Vincent	511 c	Deibert's Appeal	299, 305, 310
v. Wetherell	133	Deihl v. King	380
v. Whitehead	79	De Jarnette v. De Jarnette	453, 461
v. Williams	312	Deklyn v. Watkins	71
Davis, Petitioner	610	Delafield v. Anderson	187
Davis's App.	786 a	v. Calden	891
Estate	590	Delagarde v. Lampriere	630, 645
Trusts, <i>Re</i>	727	Delane v. Delane	141
Davoue v. Fanning	195, 197, 205, 294, 428, 499, 501	Delaplaine v. Lawrence	774
Davy v. Hooper	250, 251, 255	Delaplane v. Lewis	259
v. Seys	892	Delassus v. Poston	232
Dawes v. Betts	787	De Laurencel v. De Boom	257
Dawson, <i>In re</i>	382	Delavante, <i>In re</i>	890
Dawson v. Clarke	152, 157, 158, 160, 910	Dellinger's App.	672
v. Dawson	38, 93, 97, 98, 104, 240, 280	Delmar's Trust, <i>In re</i>	701, 720
v. Hearne	119	Deloney v. Hutcheson	136
v. Jay	603	Delorane v. Brown	855, 862, 868
v. Lawes	210	Delouche v. Savetier	863
v. Massey	200, 468	Demall v. Morgan	602 g
v. Parrot	901	De Manneville v. Crompton	171, 213, 460, 466, 508, 509
v. Small	706	v. De Manneville	603
Day v. Arundel	219	Demaree v. Driskill	149
v. Croft	818	Demarest v. Wynkoop	218, 602 t, 602 bb, 680, 855
v. Davis	866		
v. Day	891, 894	De Montmorency v. Devereaux	202
v. Roth	86, 126, 127, 135	Demott v. Muller	680
v. Thwaites	511 b	Den v. Crawford	299
Dayton v. H. B. Clafin Co.	837	v. Hanks	299
Deaderick v. Cantrell	404, 416, 418, 420, 421, 466	Denholm v. McKay	607
v. Watkins	187	Denike v. Harris	440, 452
Dean, <i>In re</i>	705	Dening v. Ware	100, 111
v. Adler	104	Denn v. McKnight	217
v. Dean	75, 76, 84, 85, 126, 232, 378, 855	Denne v. Judge	263, 273
v. Home for Aged Women	903 a	Dennett v. Dennett	299
v. Long	520	Dennis v. Badd	611
v. Mitchell	322	v. Dennis	528
		v. Holsapple	288
		v. McCagg	215

INDEX TO CASES CITED.

lix

[References are to sections.]

Dennis v. McCoy	206	Dial v. Dial	518, 890
Dennison v. Goehring	98, 104, 109, 111, 140, 143, 359, 361	Dias v. Brunell	843
v. Nigh	642	Dibble v. Mitchell	237
Denny v. Allen	918	Dibbs v. Goren	931
v. Kettel	257	Dick v. Dick	79
Dent v. Alleroff	709	v. Harby	248, 253
v. Bennett	189, 190, 204, 210	v. Pitchford	386 a, 555, 646, 652, 653, 921
v. Dent	477, 552	Dick's Estate	468
Denton v. Davis	83, 841, 844, 965	Dickason v. Fisher	237
v. Denton	329	v. Williams	347
v. Donner	187, 188	Dickel v. Smith	166
v. McKenzie	167	Dickenson v. Davis	143
Denyer v. Druce	722, 729, 731	Dickerman v. Abrahams	660
De Peyster v. Beekman	873	Dickerson v. Carroll	815 c
v. Clarkson	463, 468	v. Smith	175
v. Clendinning	240, 259, 262, 263, 275, 280, 541	Dickerson's App.	86, 104
v. Farrars	343, 411, 414	Dickinson, <i>Ex parte</i>	332
v. Gould	126, 137, 138	v. Chase	238
v. Michael	537	v. Coates	87
De Peyster's Case	918	v. Codwise	127, 129
De Puy v. Standard M. Co.	72	v. Conniff	526
Derasmes v. Dunham	275	v. Dickinson	76, 582, 772
Derbshire v. Home	671, 846, 849	v. Hoomes	71
Derby v. Derby	699, 720, 724, 748	v. Player	454
Deringer v. Deringer	242	v. Shaw	145
Derome v. Vose	843	v. Teasdale	863
Deroy v. Richards	279	Dickinson, Appellant	453
Derry v. Derry	127, 828	Dickson, <i>In re</i>	615
v. Peck	177	v. Harrison	877
Derush v. Brown	322	v. Lockyer	225
De Ruyter v. St. Peter's Church	588, 754	v. Montgomery	724, 728, 731, 748
De Saussure v. Lyons	499	Dickson's Trust	555, 930
Desbody v. Boyville	513	Diefendorf v. Spraker	268, 401, 921
Desborough v. Harris	792	Dietterich v. Heft	471
De Silver's Estate	189	Diffenderfer v. Winder	463, 468, 471, 472, 918
De Tabley, <i>In re</i>	477	Digby v. Irvine	658
De Teissier's Settled Estates, <i>Re</i>	552	Diggles's Case	511 b
De Teissier's Trust, <i>In re</i>	477	Diggles, <i>In re</i>	114
De Themmines v. De Bonneval	702, 715, 718, 726, 741	Diggs v. Walcott	72
De Vaughn v. Hutchinson	358	Dike v. Ricks	785, 789
Devaynes v. Robinson	768, 800, 822, 823, 845, 878	Dilkes v. Broadmead	932
Devenish v. Baines	169, 181, 182	Dill v. McGehee	843
Devey v. Thornton	901, 927	Dillard v. Crocker	126, 219, 221
Devin v. Henderchott	321	v. Dillard	149, 248
De Vinney v. Norris	202	v. Tomlinson	462, 468
v. Reynolds	783	Dillaye v. Commercial Bank	218, 225
De Visne, <i>In re</i>	144	v. Greenough	95, 158
Devon's Settled Estates, <i>In re</i>	503	Diller v. Brabaker	851
De Voss v. Richmond	225	Dillinger v. Llewelyn	97
Devoy v. Devoy	144, 147	Dillon v. Bone	100
Dewall v. Covenhoven	629, 654	v. Coppin	97, 98, 100, 103, 107, 111
Dewdney, <i>Ex parte</i>	223, 481, 855	v. Grace	656
De Weever v. Rockport	623	Dilworth v. Rice	500
Dewey v. Adams	591	Dimes v. Scott	402, 422, 450, 467, 547, 548, 549, 551, 847
v. Littlejohn	591	Dinn v. Grant	231
v. Long	126	Dinsmore v. Biggert	318, 319
Dewey's Ex'rs v. Ruggles	795	v. Racine	757
De Witt v. Eldred	643	D'Invernois v. Leavitt	590
De Wolf v. Chapin	585	Dinwiddie v. Bailey	871
Dexter v. Arnold	228	Dipple v. Corles	86, 97
v. Cotting	277, 426	Disher v. Dishar	97
v. Evans	114	Dismukes v. Terry	137
v. Gardner	705, 706, 724, 737, 748	Dissenger, <i>Re</i>	613
v. Stewart	231	Ditmars v. Smith	76
Deys v. Van Valkenberg	602 i	Dix v. Akers	874
		v. Burford	263, 417, 419

[References are to sections.]

Dix v. Cobb	438	Doe v. Hughes	501, 597, 802, 803, 805
v. Read	272	v. Ironmonger	305
Dixon v. Caldwell	211, 218	v. Keen	871
v. Dixon	238, 640	v. Keir	511 <i>b</i>
v. Gayfere	235	v. Langdon	349
v. Hill	221	v. Lightfoot	338
v. Homer	275, 287, 918	v. Lloyd	354
v. Horner	272	v. Martin	785
v. McCue	456	v. Nepeau	929
v. Miller	661, 675	v. Nichols	311
v. Olmius	181, 648	v. Passingham	301, 304
v. Saville	323	v. Phillips	866
v. Smith	817	v. Pitcher	706
Dobbins v. Stevens	202	v. Pratt	570
Dobson v. Land	431, 437	v. Price	346
v. Leadbeater	219	v. Read	350
v. Pearce	72	v. Roake	511 <i>c</i>
v. Racey	195, 197, 199, 206, 228	v. Robinson	408, 602 <i>k</i> , 602 <i>aa</i>
Docker v. Somes	427, 429, 430, 454, 464, 470	v. Roe	490
Dockey v. McDonald	914	v. Routledge	165, 303
v. McDowell	456	v. Scott	305
Docksey v. Docksey	150	v. Scribner	592
Dod v. Dod	361	v. Simpson	308, 313
Dodd v. Geiger	642	v. Smeddle	312
v. Ghiselin	52	v. Smith	270
v. Wake	380, 383	v. Stace	809
v. Winship	927	v. Steaple	353
Dodds v. Hills	829	v. Stephens	529, 530
Dodge v. Cole	127	v. Sybourn	349, 350, 351, 352, 355
v. Essex Ins. Co.	855	v. Thorley	511 <i>b</i>
v. Hogan	568, 583	v. Vincent	511 <i>c</i>
v. Hollinshead	685	v. Walbank	308
v. Manning	576	v. Walker	93
v. Pond	748	v. Willan	308, 312, 318
v. Stevens	195, 816 <i>a</i>	v. Williams	530
v. Tulleys	875	v. Woodhouse	313
v. Williams	398, 448	v. Wrighte	352, 355
v. Woolsey	816	Doebler's App.	358
Dodkin v. Brunt	38, 240	Doering v. Doering	260
Dodson v. Ball	304, 311, 320, 652	D'Oeschener v. Emerson	171, 230
v. Dodson	366	v. Scott	670
v. Hay	323, 324, 371	Doggett v. Hart	17, 328
v. Samnell	455	v. Lane	204
v. Simpson	225, 810	Dolan, <i>In re</i>	305
Doe v. Aldridge	703	v. Mayor of Baltimore	768
v. Bennett	338	v. McDermot	699, 705
v. Biggs	297, 305, 306	Dolbiac v. Dolbiac	665
v. Cafe	308, 315, 357	Dold v. Geiger	628
v. Cavan	511 <i>b</i>	Dolder v. Bank of England	826
v. Claridge	308, 310, 312, 317	Dole v. Lincoln	87
v. Collier	298	v. Wilson	863
v. Cook	355	Dollinger's Appeal	77
v. Copesteak	703	Dolliver v. Dolliver	828
v. Duval	602 <i>h</i>	Dolman v. Nokes	179
v. Edlin	305	Domestic & F. Mis. Society v. Gaither	729
v. Ewart	305	Dominick v. Michael	34, 499, 500
v. Field	304, 312	v. Sayre	250, 414
v. Godwin	414, 505	Dommett v. Bedford	388, 555
v. Halcombe	530	Donahoe v. Chicago Cricket Club	96, 202
v. Hardwicke	530	v. Conrahy	83
v. Harris	261, 267, 270	Donalds v. Plumb	347, 660
v. Hawthorne	702	Donaldson v. American Tract Soc.	391, 748
v. Hicks	312, 319	v. Donaldson	98, 100, 102, 105
v. Hilder	349	v. Pusey	918
v. Hole	530	v. West Bank	640
v. Homfray	305, 313	Doncaster v. Doncaster	359, 372, 373
v. Howells	698, 699	Donegal's Case	189
v. Howland	315	Doniphan v. Paxton	602 <i>ff</i>

[References are to sections.]

Donisthorpe v. Porter	348	Dowling v. Hudson	795
Donlin v. Bradley	126	v. Maguire	653, 657, 658
Donne v. Hart	633	Downman v. Rust	569, 570, 796
v. Lewis	563	Down v. Morris	327, 435
Donnelly v. Boston Cath. Cem. Ass'n	729	v. Worrall	714, 721, 731
Donohue v. Chase	602 s	Downer v. Church	152
Doolan v. Blake	670	v. Downer	507
Doolittle v. Lewis	500, 602 g, 602 n, 602 ee	Downes v. Bullock	851, 932
Doran v. Doran	127	v. Grazebrook	128, 195, 347, 770, 786
v. Simpson	225	v. Harper Hospital	729
v. Wiltshire	597, 776, 794, 796	v. Hodgson	931
Dorance v. Scott	661	v. Jennings	183, 208
Dorchester v. Effingham	390, 443	v. Thomas	883
Doremus v. Lewis	591	v. Timperon	656
Dorland v. Dorland	499, 501	Downey v. Bullock	618
Dormer v. Fortescue	871, 872	Downing v. Marshall	894
v. Thurland	511 b	v. Townsend	109
Dornford v. Dornford	468, 472, 847	Downs v. Richards	129
Dorr v. Clapp	315	Dowse v. Gorton	466
v. Davis	127	Doyle v. Blake	259, 261, 262, 264, 268, 401, 403, 421, 422, 914, 927
v. Wainwright	262, 263, 574	v. Coyle	511 c
Dorrah v. Hill	60	v. Peerless	246 a
Dorrance's Estate	913	v. Sleeper	126, 149
Dorris v. Miller	468	v. Whalen	727
Dorsett v. Dorsett	555	Doyley v. Att.-Gen.	249, 255, 258, 503
Dorsey v. Banks	878	D'Oyley v. Loveland	598
v. Clarke	126, 133, 135	Doyley v. Sherratt	411
v. Dorsey	209, 918	Drake v. Crane	455, 466
v. Garcey	15, 843	v. Drake	371
v. Gilbert	610	v. Moore	602 dd
v. Thompson	275	v. Pywall	17
v. Wolcott	189	v. Rogers	592
Doswell v. Anderson	118, 386 a	v. Whitmore	768
v. Buchanan	221	v. Wild	863
Doty v. Hubbard	607	Drakeford v. Wilks	226
v. Mitchell	655, 661	Drane v. Dayliss	500
v. Wilson	100	v. Gunter	268, 274, 336, 602 m
Dougars v. Rivaz	742	Draper v. Minor	275
Dougherty v. Shillingsburg	163	v. Stone	844
Douglas, <i>In re</i>	347	Drapers' Company v. Davis	203
v. Corry	863	Drasier v. Brereton	96, 417, 447
v. Cruger	920	Drayton v. Drayton	501
Douglass v. Allen	597	v. Grimke	500
v. Andrews	613	v. Pocock	764, 770, 787, 807
v. Archbutt	432, 904	Drennen v. Walker	215
v. Browne	402	Dresser v. Dresser	112
v. Congreve	359, 551	Drever v. Mawdesley	600
v. Culverwell	202	Drew v. Martin	144
v. Horsefall	874	v. Norbury	223
v. Lucas	141	v. Wakefield	891, 899
v. Price	143	Dring v. Greetham	481
v. Russell	68	Drinkwater v. Combe	348
v. Satterlee	421	Driver v. Fortner	602 o, 602 cc
v. Stephenson's Ex'or	443	Drohan v. Drohan	484, 809
Douthitt v. Stinson	890 a	Drovers' & M. Nat. Bank v. Roller	828
Dove v. Everard	261	Druce v. Denison	635
Dover, <i>Ex parte</i>	263, 281	Druid Park Heights Co. v. Oettinger	249, 508
v. Gregory	570	Drummond v. St. Albans	872
v. Kennedy	780	v. Tracy	49, 50
v. Rhea	79	Drury v. Connor	245
Dow v. Dawson	438	v. Cross	207
v. Dow	276	v. Drury	34
v. Jewell	126, 132, 140, 141, 865	v. Hook	214
v. Platner	590	v. Natick	500, 700, 724, 748
Dow's Petition	610	v. Scott	626, 668
Dowd v. Tucker	171, 181, 182	v. Smith	87
Dowell v. Dew	656	Drusadow v. Wilde	511 c, 783
Dowling v. Belton	611		
v. Feeley	209		

[References are to sections.]

Dryden v. Frost	238	Duncommer's Appeal	417, 419
<i>v. Hannaway</i>	133	Dundas v. Biddle	48, 511 <i>b</i>
Dryden Ad. v. Stephens	770	<i>v. Blake</i>	559
Drysdale's Appeal	205, 918	Dungannon v. Smith	385, 389
Duberly v. Day	633	Dunham v. Chatham	75
Dubless v. Flint	826, 827	<i>v. Isett</i>	757
Dublin Case	42, 732, 733, 734, 744, 745, 748	<i>v. Milhous</i>	589
Dubois, <i>Ex parte</i>	332	<i>v. Presby</i>	21
<i>v. Hall</i>	232	<i>v. Waterman</i>	590
Dubose v. Dubose	602	Dunkley v. Dunkley	626, 632, 635, 636
Dubs v. Dubs	323, 324, 652	Dunklin v. Wilkins	69
Ducie v. Ford	79	Dunlap v. Dunlap	82
Ducker v. Burnham	252	<i>v. Harrison</i>	65
Duckett v. National M. Bank	122, 860	<i>v. Mitchell</i>	195, 205, 428
<i>v. Skinner</i>	610	<i>v. Plumb</i>	655
Duckworth v. Ocean S. Co.	411	Dunlop v. Burnett	232, 239
Dudgeon, <i>In re</i>	699	<i>v. Dunlop</i>	85
<i>v. Connley</i>	988	<i>v. Hepburn</i>	55
Dudley, <i>Ex parte</i>	613	<i>v. Hubbard</i>	891
<i>v. Batchelder</i>	133	Dunman, <i>Ex parte</i>	780
<i>v. Bosworth</i>	139, 143, 146, 147	Dunn v. Berkshire	82
<i>v. Dudley</i>	122	<i>v. Chambers</i>	187, 188, 189
Duff v. McDonough	223	<i>v. Dunn</i>	195, 453, 455, 460, 847
<i>v. Wilson</i>	211	<i>v. Raley</i>	95
Dufford v. Smith	453, 863, 917	<i>v. Sargeant</i>	639
Duffy v. Calvert	284, 598, 602 <i>m</i> , 787, 791, 796, 797	<i>v. Seymour</i>	873
<i>v. Duncan</i>	468, 918	<i>v. Zwilling</i>	245
<i>v. McGuiness</i>	347	Dunnage v. White	157, 184, 185
<i>v. Masterson</i>	134	Dunne v. Dunne	457, 552
Duffy's Trust, <i>In re</i>	634	Dunnica v. Coy	164
Dugan v. Vattier	221	Dunning v. National Bank	500, 501
Dugas v. Gilbeau	204, 205	<i>v. Pike</i>	686
Dugdale, <i>In re</i>	378	Dunscomb v. Dunscomb	240, 462, 468, 900
<i>v. Dugdale</i>	903 <i>a</i>	<i>v. Greenacre</i>	629, 633
Duggam v. Kelly	515	Dunster v. Glengall	438
Duggan v. Slocum	472, 700, 709, 741	Dunwoodie v. Reed	523
Du Hourmelin v. Sheldon	64	Duplex v. Roe	295
Duke v. Fuller	705, 710, 730, 748	Dupont, <i>Ex parte</i>	55
Duke of Norfolk v. Brown	161	<i>v. Johnson</i>	612
Duke of Norfolk's Case	377, 379, 382, 383	Dupre v. Thompson	98
Dulaney v. Willis	95, 260	Durand v. Durand	672
Dulany v. Middleton	382	Durant v. Fitley	672
Dulin v. McCaw	658	<i>v. Lalley</i>	639
Dumas, <i>Ex parte</i>	345	<i>v. Ritchie</i>	32, 299, 301
Dummer v. Chippenham	42, 511 <i>a</i>	<i>v. Smith</i>	114
<i>v. Pitcher</i>	144, 146, 162	Durfee, <i>In re</i>	276
Dumoncel v. Dumoncel	64	Durham v. Crackles	633
Dumond v. Magee	627, 629	Durkin v. Langley	437 <i>a</i>
Dunbar, <i>In re</i>	77, 83	Durling v. Hammer	429
<i>v. Meyer</i>	680, 686	Durnford v. Lane	34
<i>v. Tredennick</i>	206, 217, 828	Durour v. Motteux	701, 706
<i>v. Woodcock</i>	451	Durpee v. Pavitt	142
Duncan v. Camberlayne	438	Durr v. Bowyer	627, 632
<i>v. Campbell</i>	634	Durrett v. Com'th	453
<i>v. Dixon</i>	627	Dustan v. Dustan	901
<i>v. Findlater</i>	744, 914	Dutch Church v. Mott	349, 351
<i>v. Forrer</i>	136	Dutch Reformed Church v. Bandon	393
<i>v. Jaudon</i>	225, 814	Dutton v. Cotton	602 <i>p</i> , 602 <i>q</i>
<i>v. Johnson</i>	221	<i>v. Morrison</i>	587, 590
<i>v. McCalmont</i>	72	<i>v. Poole</i>	181, 182
Duncan's Appeal	213	Duval v. Getting	110
Dunch v. Kent	428, 585, 593, 597, 795, 796	Duval's App.	768
Dunklee v. Butler	398	Du Val v. Marshall	133
Duncomb v. N. Y. H. & No. R. R. Co.	129	Duval v. Duval	82
Duncombe v. Alston	480, 487	Duval v. Bibb	232, 239, 299
		<i>v. Covenhoven</i>	843
		<i>v. Farmers' Bank</i>	627, 632
		<i>v. Graves</i>	647
		Dwight v. Pomroy	226

INDEX TO CASES CITED.

lxiii

[References are to sections.]

Dye v. Beaver Creek Church	730	Eddleston v. Collins	52
Dyer v. Dyer	126, 143, 145, 146, 161, 162, 611	Eddowes, <i>In re</i>	252
v. Jacoway	836	Eddy v. Hartshorne	121
v. Leach	277	v. Smith	602 ff
v. Potter	891	v. Traver	258
v. Riley	415	Edelen v. Edelen	679
v. Shurtleff	199	Eden v. Foster	734, 742
Dyer's App.	82	Edgar v. Donnelly	127
Dyett v. Central Trust Co.	299, 520, 790	Edge v. Salisbury	256
v. Coal Co.	655, 660	Edgell v. Haywood	570
Dykes v. McVay	849	Edgerly v. Barker	277, 371, 382, 736
Dyott's Estate	463, 468, 918	Edgington v. Williams	149
		Edie v. Applegate	818
		Edmonds v. Bird	189
		v. Crenshaw	205, 418, 422, 432, 918
		v. Dennington	653
		v. Peake	444, 786
		v. Townshend	630
		Edmeston v. Lyde	594
		Edminster v. Higgins	232
		Edmondson v. Dysod	359, 370
		v. Walsh	602 t, 602 w
		Edmund's App.	310 a
		Edson v. Bartow	160
		Edwards v. Bates	843
		v. Bohannon	238
		v. Burt	188
		v. Carter	34, 627
		v. Culberson	166, 245
		v. Edwards	126, 133, 144
		v. Fashion	136
		v. Field	144
		v. Freeman	17, 577
		v. Graves	17, 249
		v. Grove	615
		v. Hall	709
		v. Harvey	747, 774, 891
		v. Jones	97, 98, 101
		v. Lewis	196
		v. Lowndes	17
		v. Mevrick	197, 202
		v. Millbank	529
		v. Morgan	871, 872
		v. Pike	216
		v. Roberts	228
		v. Sheridan	639
		v. Tuck	397, 584
		v. Warwick	367
		v. Williams	869
		Eedes v. Eedes	633, 634
		Efland v. Efland	324
		Egbert v. Brooks	910, 916
		v. Butler	419, 424, 440
		v. Schultz	380
		Egerton v. Brownlow	359, 380
		v. Carr	99
		v. Conklin	500
		v. Egerton	900
		Eglin v. Sanderson	900
		Egmont v. Smith	877
		Ehlen v. Ehlen	275
		Eichelberger v. Barnitz	380, 541, 547
		Eidsforth v. Armistead	802, 803, 805
		Eipper v. Benner	79, 82, 83
		Eland v. Baker	768
		v. Eland	597, 795, 800, 801, 802, 810
		Elborne v. Goode	307, 903 a
		Elder, <i>Ex parte</i>	665
		Eldredge v. Greene	465
E.			
Eade v. Eade	112, 113, 116		
Eager v. Barnes	418, 846		
Eagle Fire Company v. Lent	33		
Eales v. England	112, 116, 325		
Eames v. Hardin	126		
v. Wheeler	98		
Earl, <i>In re</i>	460		
Earl of Bath's Case	171, 180		
Earl of Bute v. Short	112		
Earl of Darlington v. Putney	511 b		
Earl of Oxford v. Albemarle	768		
Earle v. Earle	260, 417		
v. Huntingdon	858		
v. Wood	705, 724, 733, 748		
Earle's Trusts, <i>In re</i>	93		
Earlom v. Saunders	461		
Early v. Doe	602 r		
Earnhart v. Earnhart	358		
Earp's Appeal	299, 305, 545		
Will	556		
Ease v. Howard	298		
East v. East	440		
v. Lowndes	395		
v. Ryall	747, 901		
v. Twyford	359, 372		
East Greenstead's Case	830		
Easterbrooks v. Tillinghast	160, 724, 748		
Easterly v. Keney	386 a		
Eastern R. R. Co. <i>In re</i>	280		
Eastham v. Roundtree	127		
Eastman v. Cooper	814		
v. Davis	863		
Easton v. Carter	262		
Eaton v. Eaton	75, 77		
v. George	685		
v. Green	226		
v. Landor	902		
v. Smith	273, 284, 290, 294, 497, 507, 508, 721		
v. Wason	680		
v. Whiting	602 bb, 602 d		
v. Wits	115		
Eaves v. Hickson	402, 851, 929, 931		
Ebberts's App.	127		
Eberhardt v. Perolin	114		
Eberts v. Eberts	200		
Ebrand v. Dancer	54, 130, 144		
Eccleston v. Skelmersdale	876		
Echliiff v. Baldwin	602 ee		
Echols v. Dimik	602 dd		
Eckels v. Stewart	304		
Eckford v. De Kay	458, 606		

[References are to sections.]

Eldredge v. Heard	248, 510, 511	Elmlie v. McAulay	225
v. Knott	866	Elmore's Trusts	451
v. Preble	676, 677	Elms v. Hughes	639
v. Smith	195, 199	Elmsley v. Young	257
Eldridge v. Putnam	882	Elsee, <i>Ex parte</i>	910
Elias v. Schweyer	275, 873	Elsey v. Lutyens	47, 891
Elibank v. Montolieu	629, 635	Elstner v. Fife	259, 500
Elijah v. Taylor	679	Elthan Parish v. Warreyn	704
Elkins v. Fresham	173	Elton v. Elton	375
Ellenborough v. Canterbury	891, 894	v. Harrison	501, 802
Ellerson v. Westcott	181	v. Shepherd	318, 655
Ellett v. Paxson	780	Elve v. Boyton	453
Ellice, <i>Ex parte</i>	457	Elwell v. Chamberlain	172
Ellicombe v. Gompertz	380	Elworthy v. Bird	672, 673
Ellicott v. Barnes	122	v. Wickstead	633
v. Chamberlin	209	Elwyn v. Williams	641
v. Welch	239	Ely v. Cook	591
Elling v. Naglee	918	v. Hair	590
Elliot v. Ince	35	v. Turpin	602 c
Ellinwood v. Holt	347	Emblym v. Freeman	157
Elliott v. Armstrong	126, 137, 139, 347	Emelie v. Emelie	455
v. Boaz	174	Emerick v. Emerick	229
v. Connell	226	Emerson v. Cutler	920
v. Cordell	626, 634	v. Galloupe	83
v. Deason	520	v. Spicer	608
v. Edwards	236, 239	Emery v. Batchelder	452
v. Elliott	54, 143, 145, 146, 147, 151, 161, 851	Emery v. Chase	299
v. Hancock	569, 570	v. Grocock	349, 352
v. Hart	149	v. Hill	741
v. Lewis	880	Emery's Trusts, <i>Re</i>	627
v. Merriman	597, 598, 795, 796, 798, 802, 810, 814, 867	Emmet v. Clarke	286
v. Pool	195	v. Dewhirst	184
v. Sparrell	263, 468, 471	v. Emmet	471
v. Waring	632	Emmons v. Cairns	541, 547
v. Wood 199, 602 d, 602 g, 602 p, 602 v	632	v. Shaw	288
Elliott's Executors, Appeal of	101	Emperor v. Rolfe	580
Ellis v. Allen	202	Encking v. Simmonds	602 h, 602 z
v. Amason	438	Enders v. Public Works	754
v. Atkinson	670	Enfield Toll Bridge v. Hartford	757
v. Baldwin	639	Engel's Estate	169
v. Barker	427, 433, 900	England, <i>In re</i>	613, 618
v. Boston, Hartford & Erie R. R.	273, 284	v. Downes	213, 267, 901
Co.	613	v. Slade	349, 351, 355
v. Cary	113, 253, 901, 908	English v. McIntyre	72, 467, 468
v. Ellis	98	v. Miller	72
v. Essex Merrimack Bridge	312, 315	v. Russell	232
v. Fisher	243	Ennis v. Leach	602 aa
v. Guavas	79	Ennis v. Smith	511 c
v. Hill	680	Enos v. Hunter	137
v. Kenyon	395, 397	Ensley v. Valentine 126, 128, 134, 135, 137	550
v. Maxwell	107, 108, 109	Entwistle v. Markland	71
v. Nimmo	151, 159, 711, 712	Episcopal Church v. Wiley	112, 248
v. Selby	648	Erickson v. Willard	511 a
v. Woods	671	Erismen v. Directors of Poor	839, 840, 859
Ellis's Trusts, <i>In re</i>	569	Errat v. Barlow	616, 619
Ellison v. Airey	96, 98, 100, 104, 107, 367	Errington, <i>Re</i>	400, 472
v. Ellison	626	v. Chapman	616, 619
v. Elwin	828	v. Evans	245
v. Moses	546	Erskine v. Townsend	226
v. Woody	270, 271	Erskine's Trusts	634
Ellison's Trust, <i>In re</i>	385	Ervin's Appeal	610, 783
Ells v. Lynch	640	Erwin v. Hall	815 c
Ellsworthy v. Hinds	238	v. Parham	187, 188
Elmendorf v. Beirne	418	v. Seigling	918
v. Lansing	228, 855	Escheator v. Smith	55, 310
v. Taylor	694, 724	Eschrich, <i>In re</i>	471
Elmer v. Scott		Esham v. Lamar	187
		Eshelman v. Lewis	127

lxv

[References are to sections.]

VOL. I. — *e*

[References are to sections.]

Farmers' Loan &c. Co. v. New York & N. Ry. Co.	242	Fellrath v. Peoria G. S. Ass'n	848
Farmer's Nat. Bank v. Moran	312, 520	Feltham v. Clark	438
Farmers and Traders' Bank v. Kimball Milling Co.	166	v. Turner	511
Farnam v. Brooks	178, 195, 206, 210, 230, 855, 863	Felton v. Deal	757
Farneyhough v. Dickerson	918	Fendall v. Nash	619
Farnsworth v. Child	223	Fenner v. Tucker	602 r
Farquharson v. Eichelberger	314	Fennimore v. Fennimore	421
v. Seton	876	Fenno v. Sayre	231
Farr v. Farr	229, 230	Fenwick v. Chapman	571
v. Gilreath	300	v. Greenwell	248, 250, 260, 417, 845
v. Sherriffe	886, 888, 903 a	Ferchen v. Arndt	828
Farrance v. Viley	624	Ferdey's Appeal	313
Farrand v. Beshoar	79	Ferebee v. Pritchard	122
v. Land Co.	861	Ferebere v. Proctor	765
Farrant v. Blanchford	851	Ferguson v. Ferguson	184
Farrar v. Barraclough	457, 467	Fergus v. Gove	601
v. Farley	205	Ferguson v. Franklin	55
Farrell v. Lloyd	137, 142	v. Hass	226
v. Smith	294, 928	v. Livingston	862
Farrelly v. Ladd	343, 843	v. Sutphen	133
Farrier v. Cames	891	v. Tadman	122
Farringer v. Ramsey	126, 137	v. Williamson	172
Farrington v. Barr	162	Ferraby v. Hobson	528
v. Knightly	17, 154	Ferraria v. Vasconcellos	733
v. Putnam	160, 699	Ferraris v. Hertford	93
Farris v. Dunn	223	Ferrars v. Cherry	217, 828, 830
Farwell v. Kroman	828	Ferres v. Ferres	189
Fassit v. Phillips	592	Ferrier v. Trépannier	437 a
Fast v. McPherson	212	Ferrin v. Errol	828
Fatheree v. Fletcher	143	Ferris v. Gibson	380
Fatjo v. Swasey	274	v. Henderson	229, 230
Faucett v. Faucett	195	Ferry v. Laible	121, 511 b
Faulkner v. Daniel	347	Ferson v. Sanger	173
v. Davis	249	Fesmire v. Shaannon	421
v. Hendy	828	Fesmire's Estate	415, 421, 848
Fawcett v. Fawcett	145, 863	Festing v. Allen	385
v. Gere	212	Festorazzi v. St. Joseph's Cath. Church	715, 729
v. Lowther	327	Fettiplace v. Gorges	655, 668
Fawell v. Heelis	236, 239	Feversham v. Ryder	704, 709
Fawkner v. Watts	612	Fiddler v. Higgins	611
Fay v. Fay	75, 126, 308	Fidelity Ins. Co.'s App.	903 a
v. Howe	471	Field v. Arrowsmith	195, 240, 260, 280, 602 e, 602 v
v. Morrison	147	v. Brown	611
v. Petis	757	v. Donoughmore	593, 600, 927
v. Slaughter	739	v. Evans	20, 670
v. Taft	121	v. Field	738
Feamster v. Feamster	828	v. Girard College	734
Fear v. Bartlett	242	v. Lonsdale	144, 165
Fearns v. Young	449, 450, 547, 549, 910	v. Mayor of New York	68
Fearon v. Desbrisay	511 a	v. Moore	34
v. Webb	23, 384	v. Peckett	439, 479, 570
Fears v. Brooks	646, 647, 649, 655, 660	v. Schieffelin	225, 608, 610, 809, 812, 814
Featherstonough v. Fenwick	196, 453, 470, 538	v. Sowle	658, 661
Feedey's App.	313	v. Wilbur	477, 526
Feeney v. Howard	142	v. Wilson	229, 230
Fehlinger v. Wood	437 a	Field's Mortgage	338
Feistal v. King's College	69	Fields v. Dennen	237
Felix v. Patrick	60, 861	Fifield v. Van Wyck	720
Fell v. Brown	71, 72, 883	Fifth National Bank v. Hyde Park	815 c
v. Lutwidge	900	Filby v. Miller	218
Fellows v. Dow	347	Filch v. Weber	157
v. Gwydyr	172	Filler v. Tyler	658
v. Heermans	95, 318, 334	Fillman v. Divers	127
v. Mitchell	411, 416, 446, 809, 849	Fillmer v. Gott	189
v. Tann	646	Finch v. Finch	126, 143, 145, 146, 147, 468
		Finch v. Hollinsworth	250, 258

[References are to sections.]

Finch v. Raynad	918	Fitzgerald, <i>In re</i>	917
v. Shaw	222	v. Chapman	627
v. Winchelsea	108, 122	v. Fauconberge	511 c
Finch's Case	13, 14, 76, 241, 346, 347	v. Field	589
Finden v. Stephens	123, 907	v. Fitzgerald	79, 162, 901
Findlay v. Riddle	359, 370	v. Jervoise	771
Findley v. Patterson	201	v. Jones	908
Fink v. Fink	748	v. O'Flaherty	901
Finlay v. Darling	841	v. Peck	184
v. Howard	275, 282	v. Pringle	453, 460, 461, 898, 901, 902
Finley v. Hunter	715	v. Rainsford	192, 538
v. Isett	83	v. Topping	334
v. Jones	891	v. Vestal	68
Finn v. Hohn	328	Fitzgibbon v. Blake	657, 671
Finney v. Cochran	863	v. Scanlan	196, 538
Finney's Estate, <i>In re</i>	337	Fitzpatrick v. Fitzgerald	17, 328
Firmen v. Pullham	900	v. Fitzpatrick	602 r
First Baptist Society in Andover v. Hazen	312, 520	Fitzroy v. Howard	533
First Congregational Society of South- ington v. Atwater	43, 46, 714	Fitzsimmons v. Joslin	172, 179
First Constitutional Presbyterian Church v. Cong. Soc.	733	Flack v. Holm	72
First Mortgage Bondholders v. Mays- ville, &c. Railway	759	Flagg v. Ely	454
First National Bank, <i>In re</i>	678	v. Mann	135, 218, 221, 226, 602 d, 843, 844
v. Dwelley	815 b	Flanagan v. Nolan	462, 900, 901
v. Fries	76, 163	Flanders v. Clark	249, 505, 510
v. Michigan Trust Co.	511 b	v. Thompson	239
v. Miller	729	Flarty v. Odlum	249, 505, 510
v. Nat'l Broadway Bank	72, 223, 511 b	Flavett v. Foster	423
v. Owen	918	Fleming v. Armstrong	671
v. Salem Capital F. M. Co.	238	v. Buchanan	573
v. Smith	594	v. Cuthbert	863
First Nat. Ins. Co. v. Salisbury	873	v. Donohoe	75, 143
First Parish in Sutton v. Cole	43	v. Gilmer	858
Fischbeck v. Gross	181, 915	v. McHale	133
Fischili v. Dumaresley	134	v. Page	828
Fish v. Howland	232, 237	v. Teran	205
v. Miller	851	v. Wilson	918
v. Prior	305	Fletcher v. Ashburner	150
v. Wilson	863	v. Ashley	213
Fishbourne, <i>In re</i>	806	v. Bartlett	206
Fisher v. Bassett	602 ee	v. Fletcher	98, 103, 111, 672
v. Boody	172	v. Green	461, 847, 848, 849, 876
v. Dickenson	277	v. Peek	218, 222
v. Fields	82, 312, 315, 320	v. Stephenson	551, 924
v. Filbert	648	v. Walker	443, 463, 900
v. Fisher	556	v. Willard	226
v. Fobes	142	Flint v. Clinton Co.	260, 262, 264, 602 e
v. Johnson	238, 239	v. Hughes	116
v. Knox	438	v. Sheldon	302
v. Shropshire	233	v. Steadman	66
v. Smart	918	v. Warren	157
v. Taylor	918	Florentine v. Barton	610
v. Webster	380	v. Wilson	672
v. Wigg	920	Flory v. Becker	640
v. Worth	594	v. Houck	122
Fisher's Will, <i>In re</i>	284	Flournoy v. Johnson	349, 353
Fisk v. Att.-Gen.	698, 706, 726	Flower v. Buller	658
v. Keen	380	Flowers v. Franklin	546
v. Patton	127	Floyd v. Barker	160
v. Sarber	205, 209, 538	v. Floyd	918
v. Stubbs	275	Floyer v. Bankes	383
Fiske v. White	748	v. Gilliam	262
Fitch v. Ayer	649	v. Sherrard	183, 187
v. Fitch	188	Flud v. Rumsey	244
Fitler v. Maitland	591	Fluke v. Fluke	766, 768
Fitzer v. Fitzer	673	Flynn v. Flynn	324
		Foden v. Finney	633
		Fogarty v. Sawyer	602 c, 602 d, 602 g
		Fogg v. Middleton	98

[References are to sections.]

Foley v. Burnell	373, 541	Foster v. Charles	171
v. Hill	855	v. Coe	318
v. Parry	112	v. Craige	501
v. Wontner	284, 414, 490, 505	v. Crenshaw	562
Foljambe v. Willoughby	615	v. Davies	276, 441
Follansbee v. Kilbreth	127, 135	v. Dawber	270, 271
Follett v. Badeau	82, 134	v. Deacon	122
v. Follett	511 b	v. Dennison	299
v. Tyrer	324	v. Durant	142
Fonda v. Penfield	383	v. Foster	144, 815 a
Fontain v. Ravenell	499, 687, 721, 724, 729, 731	v. Glover	299
Fooose v. Whitmore	114	v. Goree	602 p
Foot v. Bryant	137, 142	v. Gover	602 dd
v. Colvin	126	v. Hodgson	862
v. Foote	179	v. Kerr	649
Foote's App.	545, 556	v. Latham	585
Forbes v. Allen	471	v. Marriott	538
v. Ball	112, 248, 256	v. McMahon	928
v. Forbes	704	v. Mix	438
v. Hall	223	v. Pennsylvania Ins. Co.	645
v. Halsey	205	v. Roberts	188
v. Lathrop	815 a	v. Saco Manuf. Co.	591
v. Linwood	593	v. Willson	114
v. Moffatt	347	Foster's Will, <i>In re</i>	282, 453
v. Peacock	499, 501, 597, 765, 786, 790, 795, 796, 800, 801, 802, 812	Fothergill v. Fothergill	107
v. Phillips	639	Fountain Spring Park Co. v. Roberts	207
v. Ross	453, 461, 462, 468	Fountaine v. Pellett	526, 554, 912, 913, 915
v. Ware	471	Fourdrin v. Gowdy	64
Ford v. Battey	119	Fournier v. Ingraham	918
v. Belmont	765	Fourth St. Nat. Bank v. Yardley	87
v. Cook	858, 890 a	Fouvergus v. New Orleans	182
v. Ford	448, 706	Foveaux, <i>In re</i>	705
v. Hopkins	837	Fowey's Charities	282
v. Lewis	131	Fowke v. Slaughter	133, 135
v. Ryan	794	Fowle v. Merrill	199
Forde v. Herron	187, 602 z	Fowler, <i>In re</i>	275
Fordham v. Wallis	932	v. Bowers S. Bank	559
Fordyce v. Bridges	248, 251, 255, 503	v. Colt	462
v. Willis	29, 75, 76, 77, 86, 102	v. Fowler	665
Forest v. Forest	100	v. Garlike	112, 159, 711, 712
Forman v. Marsh	610, 611	v. Hunter	117, 251
Forney v. Remey	163	v. Ingersoll	382
Forney's Estate	520	v. Jones	308
Forrest v. Elwes	466, 905	v. Reynall	453, 461, 466, 875
v. Porch	66	v. Rust	232, 237
v. Robinson	660	v. True	828
Forrester v. Moore	126	v. Webster	126
Forshaw v. Higginson	476, 482, 786	v. Willoughby	571
Forster v. Blackstone	438	v. Wyatt	922, 923
v. Cockerell	438	Fowler's Appeal	72
v. Hale	79, 81, 82, 83, 86	Fox v. Adams	592
v. Hoggart	602 c	v. Citizens' Bank & Trust Co.	225
v. Ridley	906	v. Cook	863
Forsythe v. Clark	126, 133, 226	v. Dougherty	127
Fort v. Fort	639	v. Fox	112, 113, 119, 144, 146
Fortescue v. Barnett	98, 101, 247 a, 438	v. Jones	679
Forward v. Armstead	97	v. Mackreth	180, 189, 195, 197, 201, 206
Fosbrook v. Balguy	196, 428	v. Phelps	583
Foscue v. Foscue	863	v. Rumery	511 a
Fosdick v. Fosdick	393	v. Storrs	312
v. Hempstead	699	v. Tay	863
Foss v. Crisp	55	v. Wright	188
v. Foss	665	Foxworth v. White	197
v. Sowles	264	Fozier v. Andrews	900, 901
Foster v. Athenæum Trustees	126, 133, 237	Frail v. Ellis	235, 239
v. Bailey	910	Frampton v. Frampton	509 c, 672, 673
v. Boston	961	France v. Woods	443
		Francis v. Brooking	626
		v. Clemon	570

INDEX TO CASES CITED.

lxix

[References are to sections.]

Francis v. Cline	127	French v. Davidson	507, 508, 511
v. Francis	453, 461, 904	v. French	191, 299
v. Gower	558	v. Griswold College	907
v. Harrison	279, 875	v. Harrison	835
v. Hazelrigg's Executors	237	v. Hobson	419, 454, 851
v. Roades	137	v. St. George	533
v. Wigzell	658, 662	Freto v. Brown	613
v. Wilkinson	143, 189	Frewen v. Frewen	873
Franciscus v. Reigart	299, 310	Frey v. Frey	462, 900
Franco v. Bolton	214	Freyer, <i>In re</i>	415, 416, 418, 890
v. Franco	419, 633, 884	Freyvogel v. Hughes	304, 310 a, 311, 652
Frank v. Frank	185	Frick Co. v. Taylor	82
Frank's App.	429	Frickett v. Durham	133
Franklin v. Armfield	694, 737, 748	Friend v. Young	246
v. Bank of England	242	Frier v. Peacock	730
v. Firth	468	Friesenhahn v. Bushnell	467
v. Green	602 t, 602 dd, 615, 618, 619, 915	Frink v. McComb	202, 248
v. Hayes	275	Frith v. Cartland	433, 463, 835, 837, 863
v. McElroy	468	Fritts' Estate	472
v. Osgood	411, 499, 602 m	Fromme v. Gray	903 a
Franklin's Appeal	669	Frost, <i>In re</i>	382
Franklin Bank v. Cooper	179	v. Beekman	220, 221
Franklin S. Bank v. Taylor	873	v. Belmont	214
Franklyn, <i>Ex parte</i>	456	Frothingham v. March	602 r
Franks v. Price	372	Fry v. Capper	671
Frary v. Booth	660	v. Fry	487, 629, 771
Fraser v. Murdoch	485	v. Lane	184, 188
Frauenfeldt's Estate	640	v. Tapson	404
Frayser v. Rd. Co.	438	Fry's Estate	511 c
Frazee v. Frazee	658	Frye v. Porter	357, 514, 517
Frazer v. Bailie	633	v. Shelbourne	580
v. Beville	541	Fulbright v. Yoder	315
v. Moore	862	Fullager v. Clark	167
v. Page	476 a	Fullam v. Rose	669
v. Palmer	432, 902	Fuller v. Bennett	222
Frazier v. Brownlow	660	v. Cushman	869
v. Center	32, 661	v. Dame	214
v. Frazier	65, 160, 251, 255	v. Johnson	770
v. Smart	918	v. Knight	770, 877, 884
v. Vaux	918	v. O'Neil	779
Freake v. Cranefeldt	558, 559	v. Redman	481
Frederic v. Haas	126, 132	v. Wilson	172
v. Hatwell	667	Fuller's Will	729
Freedman's S. Co. v. Earle	346	Fulton v. Gilmore	922
Freeland v. Pearson	254, 258	v. Whitney	196
Freeman v. Butters	288	Fulton Bank v. New York Coal Co.	222
v. Cook	184, 540, 541, 843, 844, 927	Funk v. Eggleston	253
v. Curtis	184	v. Lawson	82
v. Fairlee	463, 821, 826, 827, 905	Ferguson v. Smith	654
v. Flood	670, 671	Furiam v. Saunders	521
v. Freeman	75, 77, 647	Furman v. Coe	624, 914
v. Harwood	195	v. Fisher	82, 259
v. Kelly	127, 133, 137, 138	v. Rapelje	848
v. Mebane	238	Furness v. Caterham Ry.	752
v. Moore	667	Furrin v. Newcombe	160
v. Parsley	632, 633	Fursaker v. Robinson	109, 111
v. Prendergast	873	Fussell v. Dowding	920
v. Tatham	85	Fust, <i>Ex parte</i>	457
v. Thompkins	915	Futter v. Jackson	826, 827
Freeman's Estate	511 b, 769	Fyler v. Fyler	246, 466, 847, 849, 907
Freemout v. Dedire	122	v. Pole	862
Freeport v. Bartol	83		
Freer v. Lake	82		
Freke v. Lord Carbery	395		
Frelick v. Turner	618		
Frelinghuysen v. Nugent	828		
Fremer v. Woods	443, 914		
French v. Barron	904		

G.

Gabb v. Prendergast	66
Gabee v. Sneed	232
Gabriel v. Sturgis	901
Gadsden, <i>Ex parte</i>	812

[References are to sections.]

Gadsden v. Whaley	79, 86	Garforth v. Bradley	635, 640
Gaffee, <i>In re</i>	653, 670, 671	Garland, <i>Ex parte</i>	454
Gage, <i>In re</i>	380	v. Harrington	438
Gage v. Dauchy	679	v. Loring	610
v. Gage	142	Garner v. Dowling	259
v. Rogers	891	v. Garner	38, 95, 109, 240, 359, 370
Gaillard v. Pardon	361	v. Ger. L. Ins. Co.	104
Gaines v. Chew	126, 142, 182, 183	v. Moore	438, 474
v. Drakeford	137	v. Stroude	891
v. Hennen	183	Garnett v. Armstrong	347
v. Poor	672	v. Macon	225, 562, 598, 794, 795, 800, 801
Gainus v. Cannon	76, 127	Garniss v. Gardner	462, 463, 468, 471
Galbraith v. Elder	538	Garnistone v. Gaunt	581, 605
Gale v. Coburn	299	Garnous v. Knight	103
v. Gale	169	Garnsey v. Gardner	247 a
v. Harby	127, 137	v. Gothard	260
v. Mensing	602 aa	v. Mundy	104
Gale's Petition	275	Garr v. Drake	603
Gallagher v. Yosemite M. Co.	917	Garrard v. Fankell	186
Gallagher's Appeal	570	v. Lauderdale	98, 100, 108, 585, 593, 596, 597
Gallatin v. Cunningham	200	v. Railroad Co.	225, 810
v. Erwin	218	v. Tuck	354, 866
Gallego v. Att.-Gen.	724, 748	Garrett v. Carr	468
v. Gallego	627, 643	v. Garrett	126, 127, 836
Galley v. Panther	500	v. Noble	771
Galliers v. Moss	337	v. Pretty	512, 513
Gallion v. McCaslin	218	v. Wilkinson	144
Galloway v. Finley	232	Garrick v. Taylor	130, 139
v. Hamilton	234	Garrison v. Little	384, 705
Galway v. Butler	888	Garrow v. Davis	69
Gambell v. Trippe	248	Garson v. Green	232, 236, 237, 239
Gamber v. Gamber	677	Garth v. Baldwin	305, 315, 357, 358
Gamble v. Queen's County W. Co.	242	v. Cotton	871
Gambriel v. Gambriel	552, 554	v. Townsend	254
v. Roberts	553	Gartland v. Mayatt	294
Game, <i>In re</i>	450	Gartside v. Isherwood	178, 189
Gandy v. Gandy	875	v. Gartside	275, 875
Gann v. Chester	238, 239	v. Radcliffe	183, 187
Gannon v. McGuire	97	Garvey v. McDavitt	386 a
v. Ruffin	843	v. Owens	891, 910
v. White	102	Garvin v. Williams	200
Gantert, <i>Re</i>	448	Garwood v. Eldridge	226
Gapen v. Gapen	863	Gary v. Colgin	782
Gardenhire v. Hinds	312, 648	v. May	601
Gardiner v. Tyler	918	v. Whittingham	889
Gardner, <i>In re</i>	114	Gascoigne v. Thwing	137
Gardner v. Adams	69	Gashe v. Young	206
v. Astor	347	Gaskell v. Chambers	206, 207
v. Barker	118	v. Gaskell	165, 262
v. Brown	262	Gaskill v. Green	277
v. Downes	276, 476 a, 922, 928	Gasque v. Small	187
v. Fell	871	Gass v. Gass	126
v. Gardner	347, 560, 598, 647, 660, 666, 678, 680, 795, 797	v. Mason	194
v. Heyer	66	v. Porter	783
v. Hooper	324	v. Ross	748
v. Marshall	636	v. Wilhite	384, 705, 715, 724, 728, 730, 748
v. Merritt	97	Gassett v. Grout	627, 632
v. Ogden	203	Gaston v. Frankum	657
v. Rowe	58, 77, 82, 86	Gaston's Trust	821
v. Stevens	360	Gate v. Debrett	602 e
v. Walker	629	Gatens v. Madderly	648
v. Weeks	277	Gates v. Jones	710
Gardner Bank v. Wheaton	137	Gault v. Saffin	677
Garesche v. Levering Inv. Co.	511 b	Gaunt v. Taylor	886, 888
Garey v. Whittingham	903 a	Gause v. Hale	361
Garfield v. Hatmaker	144	Gaves v. Hickson	441
Garfoot v. Garfoot	121		

[References are to sections.]

Gay v. Ballou	613	Gibson v. Green	225
v. Edwards	863	v. Jeyes	187, 195, 202
Gayden v. Gayden	425	v. Jones	602 t, 602 x, 602 aa, 602 ee,
Gaylord v. Lafayette	104		782
Gaylords v. Kelshaw	806	v. McCall	720, 748
Gazzam v. Poyntz	590, 592	v. McCormick	562
Geary v. Bearcroft	325	v. Montford	308, 312, 315, 317
Geddes v. Pennington	174	v. Russell	189, 204, 210
Geddings v. Geddings	129	v. Scudmore	605
Gee v. Gee	133	v. Winter	328
v. Liddell	96	Gibson's Case	240, 277, 780, 918
v. Thraikill	142	Giddings v. Giddings	196, 538
Genet v. Beekman	386 a	v. Palmer	82
v. Hunt	511 c	Gidney v. Moore	171
v. Talmadge	608, 611	Giffen v. Taylor	162, 166
Gent v. Harris	636	Gifford v. Bennett	828
Gentry v. Law	172	v. Hort	856
v. McKeynolds	664	v. Manley	260
George, <i>In re</i>	615	Gift v. Anderson	602 dd
v. Bank of England	86	Gilbert v. Bennett	117
v. Braddock	705	v. Chapin	113, 251
v. Goldsby	639	v. Colt	72
v. Howard	151	v. Cooley	602 bb
v. Lansley	511 c	v. Gilbert	142, 184
Georges v. Pye	836	v. Kolb	453
Gerard v. Buckley	520	v. Lewis	648, 649
Gerard Ins. Co. v. Chambers	305	v. Overton	101, 102, 105
Gerber v. Bauerline	613	v. Sleeper	828, 863
German v. Gabbald	75	v. Stockman	212
German Am. Sem. v. Keifer	865	v. Sutliff	918
German, &c. Assoc.	730	Gilbert's App.	927
German, &c. Congr. v. Repler	732	Gilbertson v. Gilbertson	908
German Nat. Bank v. Burns	44	Gilchrist, <i>Ex parte</i>	646
Geroe v. Winter	501	v. Brown	133, 147
Gerrard v. Gerrard	578	v. Cator	634
Gerrish v. New Bedford Inst. for Sav-	86, 99	v. Stevenson	100, 104, 879, 921
ings		Giles v. Anslow	114, 166
Gerry v. Stimson	78, 133, 162	Gill, <i>In re</i>	917
Gest v. Flock	499	v. Att.-Gen.	417, 422
Getman v. Beardsley	891	v. Carmine	437 a
v. Getman	133	v. Logan	312
Gevers v. Wright	367	v. Lyon	602 ee
Geyer v. Branch Bank	649, 651	Gillam v. Taylor	699
Gheen v. Osborn	556	Gillbrand v. Alexander	924
Ghiselin v. Ferguson	232, 233, 239	v. Gould	582, 772
Ghost v. Waller	402, 444, 463, 806	Gillespie v. Burleson	648, 649
Gianella v. Momsen	828	v. Moore	186
Gibboney v. Kent	855	v. Smith	248, 591, 774, 779
Gibbons v. Baddall	236, 239	v. Somerville	324
v. Caunt	185	Gillett v. Hickling	602
v. Mahon	545	v. Peppercorne	206
v. Maltyard	693, 700, 701	v. Stanley	33
v. Taylor	445, 847	v. Wray	514
Gibbs v. Bunch	678	Gillette v. Wiley	855
v. Cunningham	602 s, 780, 782	Gilliland v. Gilliland	147
v. Guignard	262	Gilman v. Hamilton	694, 724, 728, 733, 748
v. Harding	672	Gilman C. & S. R. R. Co. v. Kelly	207
v. Herring	421	Gilman v. Brown	232, 234, 235, 236, 237
v. Johnson	347	v. Healey	129
v. Marsh	38, 248, 253, 284, 499, 602 m	v. McArdle	86
v. Rumsey	158, 159, 160, 507, 711	Gilman Linseed Oil Co. v. Norton	206
v. Smith	276	Gulmer v. Billings	863
Gibson v. Armstrong	151	Gilmore v. Ham	863
v. Barbour	195	v. Johnson	172
v. Bott	551, 915	v. Tuttle	918
v. Burgess	72	Gilpatrick v. Glidden	171, 245
v. Crehore	918	Gilruth v. Decell	846
v. Foote	79, 147	Gindrat v. Montgomery Gas Light	
v. Gossom	202	Co.	511 c

[References are to sections.]

Girard Ins. Co. v. Chambers	555	Goldsmid v. Stonehewer	875
Girard Life Ins. Co. v. Chambers	386 a	Goldsmith v. Goldsmith	82, 162, 245
Girard Will Case	697	v. Osborne	602 c, 602 cc
Girard, &c. v. Philadelphia	742, 748	v. Swift	545
Gisborn v. Charter Oak L. Ins. Co.	79.	Goldstein v. Goldstein	828
	206, 863, 910, 915	Goleborn v. Alcock	218
Gist v. Frazier	187, 192	Golson v. Dunlap	195
Gitting v. Steel	571	Gomez v. Gomez	529, 902
Gizelman v. Starr	494	v. Tradesman's Bank	82, 126, 133, 322
Gladding v. Yapp	150	Gomley v. Wood	432, 904
Gladdon v. Stoneman	816, 818	Gooch v. Vaughan	770
Gladsden v. Desportes	358	Goochenaux's Estate	628, 639
Gladstone v. Hadwen	58	Good v. Cheesman	593
Glaister v. Hewer	144, 626, 628, 639	v. Fichthorn	114
Glansys, <i>Ex parte</i>	58	v. Harris	648, 651
Glaser v. Priest	242	v. McPherson	744
Glass v. Gilbert	863	Goodale v. Mooney	712
v. Hulbert	167	Goode v. Comfort	769
v. Oxenham	877	v. Riley	184
v. Ramsey	894	Goodell v. Freed	226
v. Warwick	662	Goodenough, <i>In re</i>	348
Glasscock v. Glasscock	238	v. Goodenough	871
v. Minor	175	v. Tremanondo	451
Glaze v. Drayton	231	Goodere v. Lloyd	157
Gleaves v. Paine	633	Goodhill v. Brigham	511 b
Glegg v. Edmondson	869	Goodhue v. Barnwell	245, 863
Glen v. Fisher	575, 576, 627	v. Clark	476 a, 928
v. McKim	415, 419, 420	Goodier v. Edmunds	448, 506
Glengall v. Barnard	547	v. Johnson	506
Glenn v. Hill	869	Goodinge v. Goodinge	256
v. Randall	126	Goodman v. Goodright	379
Glenorchy v. Bosville	357, 359, 369	v. Sayers	185
Gliddon v. Taylor	678	Goodrich v. Downes	591, 592
Glidewell v. Shaugh	126	v. Milwaukee	304
Glissen v. Ogden	201	v. Pendleton	863
Gloucester v. Wood	112, 157	v. Proctor	593, 595, 602 g
Glover v. Alcott	678	Goodright v. Hodges	126, 137, 139, 143
v. Condell	378	v. Swymmer	354
v. Hare	648	v. Wells	13, 300, 302, 347
v. Monckton	315	Goods of Lady Truro	93
v. Stamps	890 a	Goodson v. Ellison	269, 349, 351, 354,
Glover, Appellant	60	476 a, 883, 900, 901, 921, 922, 928	
Glyn v. Locke	597, 794	Goodtitle v. Cummings	218
Goad v. Montgomery	764	v. Funucan	530
Gochenauer v. Froelick	511	v. Jones	17, 328, 349, 350, 355, 520
Goddard v. Carlisle	202	v. Knott	308
v. Hapgood	592	v. Woods	379
v. Pomeroy	748	Goodwin v. Gosnell	846
v. Snow	213	v. Massachusetts Loan & Trust	
Godden v. Crowhurst	386 b, 555	Co.	790
Godfrey v. Dixon	64	v. Mix	786
v. Faulkner	452	v. Moore	633
v. Megahan	658	v. Rice	122
v. Walker	733	Goodyear v. Rumbeaugh	676, 677
Goding, <i>Ex parte</i>	780	Gordillo v. Weguelin	752
Godolphin v. Godolphin	48, 248, 489	Gordon v. Adolphus	516
Godsall v. Webb	102, 105	v. Frail	910
Godschalk v. Fulmer	79	v. Gordon	107, 178, 185
Godwin v. Younge	262	v. Green	86
Goehring's App.	768	v. Preston	754
Goelz v. Goelz	147	v. West	918
Goepf's App.	128	Gore v. Bowser	260
Goforth v. Goforth	124	v. Gibson	191
Going v. Emery	499, 694, 701, 720, 724,	v. Gore	379
	748, 766	Gorge v. Chansey	482
Gold v. Death	222	Gorge's Case	144, 146
Golder v. Bressler	284, 287, 499	Gorham v. Daniels	299
Golding v. Yapp	94	Goring v. Bickerstaff	379
Goldsmid v. Goldsmid	519	v. Nash	107, 108, 111, 367

INDEX TO CASES CITED.

lxxiii

[References are to sections.]

Gorrell v. Alsbaugh	112, 169	Graham v. Londonderry	532
Gorsuch v. Briscoe	284	v. Long	49
Gort v. Att.-Gen.	704	v. Maxwell	72
Gosling v. Carter	501, 795, 801, 802, 803, 805, 808	v. Pancoast	194
v. Gosling	389	v. Selbie	142
Goss v. Cahill	678	v. Stewart	359
v. Singleton	259, 273, 284, 602 m,	v. Torrance	863
v. Tracy	182	Gram v. Prussia	737
Gossmour v. Pigge	184	Granberry v. Granberry	272, 918
Gosson v. Ladd	312, 520	Grandom's Estate	699
Gott v. Cook	391, 508, 620	Grand Prairie Seminary v. Morgan	727
Gough v. Andrews	579	Grange v. Tiving	52
v. Boulton	256, 863	Granger, <i>Ex parte</i>	228
v. Butte	119	v. Bassett	545, 556
v. Crane	110	Grangier v. Arden	98
v. Offley	822	Grant, <i>In re</i>	37
Gould v. Choppell	441, 770	v. Bradstreet	171
v. Emerson	843	v. Campbell	905
v. Gould	182, 228	v. Dyer	518
v. Harris	918	v. Grant	72, 647
v. Hayes	918	v. Hook	598, 795, 798
v. Hill	648	v. Lunam	256, 507
v. Lamb	312, 320, 598	v. Maclaren	275
v. Mather	499	v. Mills	217, 236, 239, 828
v. Okeden	192	v. Odiorne	863
v. Taylor Orphan Asylum	448	v. Quick	72
Goulden v. Buckelew	602 ff	Grantham v. Grantham	145
Goulder v. Camm	648	v. Hawley	67
Gouldsworth v. Knight	412, 413	Granville v. McNeale	294, 499, 502
Gouverneur v. Elmendorf	226	Grapengether v. Fejervary	232, 239
v. Titus	891	Gratwick's Trust, <i>In re</i>	254, 668
Gove v. Brazier	562	Gratz v. Cohen	190
v. Knight	664	Gravenor v. Hallam	706
v. Learoyd	162	Graver's Appeal	891, 894
Governesses' Institute v. Rusbridger	824, 903 a	Graves v. Allen	65
Governor v. Gridley	43	v. Corbin	166
Governor, &c. v. Campbell	593	v. Dolphin	386
Govin v. De Miranda	79, 703	v. Dugan	133
Gowdy v. Gordon	142	v. Graves	116, 137, 162
Gower v. Eyre	447, 552	v. McCall	232, 239
v. Grosvenor	359, 364, 373	v. Safford	97
v. Mainwaring	19, 20, 255, 507, 510	v. Spier	211
v. Mead	564	v. Strahan	266, 453
v. Sternes	226	v. Ward	135
Gowing v. Rich	149	v. Waterman	195
Gowland v. De Faria	188, 867	v. White	171
Grabowski's Settlement	556 a	Graves's Appeal	463, 468, 471
Grace, <i>Ex parte</i>	196	Gray, <i>Ex parte</i>	332
v. Phillips	508	v. Bell	52
v. Webb	555	v. Bridgeforth	380
Gracey v. Davis	594	v. Chaplin	885
Graft v. Bonnett	386 a, 555	v. Corbit	126, 321
v. Castleman	225	v. Crockett	656
v. De Turk	254	v. Dougherty	892
v. Rohrer	143, 144, 162	v. Farmers' Exchange Bank	166
Graham v. Austin	419	v. Fox	453, 459
v. Birkenhead Railway	870	v. Gray	96, 112, 255, 564
v. Davidson	418, 419, 863	v. Haig	440, 821
v. Donaldson	141	v. Henderson	499, 501
v. Dyster	243	v. Hill	593
v. Fitch	654	v. Howard	602 p, 602 q, 602 r, 602 y
v. Fitts	779, 785	v. Jordan	133
v. Graham	122, 367	v. Lynch	343, 459, 914
v. King	602 f, 602 bb, 602 ff	v. Mansfield	204, 206
v. Lambert	82, 98	v. Mathias	214
v. Lee	388	v. Merriam	122
v. Little	92, 194, 785	v. Portland Bank	545
		v. Shaw	774

[References are to sections.]

Gray v. Thompson	468	Greenleaf v. Allen	891
v. Ulrich	831	v. Queen	602 i, 602 m, 602 p, 602 dd,
v. Viers	780		780, 782
v. Woods	180	Greenough v. Welles	248, 500
Gray's Estate	628, 639	Greensboro Nat. Bank v. Gilmer	133
Grayburn v. Clarkson	439	Greenslade v. Dare	35
Graydon v. Graydon	518	Greenwell v. Greenwell	613, 616, 619
v. Hicks	513, 518	Greenwood v. Coleman	312, 320
Greason v. Keteltas	528, 530	v. Roberts	385
Great Eastern Ry. Co. v. Turner	65	v. Wakeford	268, 276, 280, 282, 460
Great Falls v. Worster	72		509, 848, 884, 901, 924
Great Luxembourg R. Co. v. Maguay	207,	Greer v. Baughman	137
	430	v. McBeth	783
Great Northern Ry. Co., <i>Ex parte</i>	455	v. Stoller	21
Greatly v. Noble	658, 835	Greetham v. Colton	789, 802, 803
Greaves, <i>Ex parte</i>	267	Greeville v. Browne	570
v. Atkinson	147	Gregg v. Coates	121, 477, 540, 552
v. Simpson	358	v. Currier	414
Greedy v. Lavender	629, 638, 903 a	v. Gabbert	277, 913
Green, <i>Ex parte</i>	332, 616, 618	Gregory v. Gregory	228, 229, 416, 418,
Green, <i>In re</i>	581		421
v. Allen	713, 721, 731, 748	v. Henderson	298, 306, 307
v. Beatty	330	v. Lockyer	663
v. Belcher	581	v. Marks	639
v. Blackwell	550, 700	v. Merchants' National Bank	82
v. Borland	286	Greislev v. Chesterfield	550
v. Carlin	667	Grenfell v. Dean	69
v. Cates	76	v. Girdlestone	866
v. Claiborne	768	Grenville Academies, <i>Ex parte</i>	42, 282
v. Cook	134	Gresham v. Ware	347
v. Crockett	238	Gresley v. Mousley	202, 869
v. Demoss	238, 239	Greswold v. Marsham	347
v. Dennis	42, 748	Grey, <i>Re</i>	671
v. Dietrich	133, 137	v. Grey	54, 126, 143, 145, 146, 147, 151,
v. Drummond	134		161
v. Ekins	362, 616, 622	Gridley v. Andrews	569, 570
v. Folgham	67	Grier v. Grier	361
v. Green	322, 553, 672, 784	Grier's Appeal	607
v. Howard	255, 257, 699	Grierson v. Eyre	871
v. Lowe	560	Grieves v. Case	701
v. Marsden	112, 113	Grievson v. Kirsopp	248, 249, 250, 258
v. McBeth	511	Griffin, <i>Ex parte</i>	404, 411, 417, 441
v. Morris	186	Griffin, <i>Re</i>	87
v. Morse	600	v. Barney	591, 918
v. Mumford	331	v. Blanchard	237
v. Otte	636	v. Camack	232, 238
v. Pigot	480	v. De Veuelle	189, 193
v. Pledger	827	v. Doe	602 f
v. Putney	918	v. Fleming	554
v. Rutherford	42, 743	v. Graham	384, 700, 724, 731, 748
v. Scrannage	680	v. Griffin	196, 511 a, 538
v. Smith	38, 238	v. Macauley	416, 420, 526
v. Spicer	386, 555	v. Marine Co.	602 p, 602 v, 782
v. Stephens	372	v. Nanson	181
v. Thompson	187, 189	Griffith v. Buckle	361
v. Trieber	592	v. Chew	244
v. Winter	206, 428, 526, 910,	v. Evans	112, 251
	916	v. Griffith	51, 218, 222, 223, 240, 277,
Green's Estate	918		648
Greene v. Greene	477, 549, 729	v. Hughes	849
v. Smith	545	v. Morrison	550
v. Sprague Manf'g Co.	591	v. Pound	875
Greenfield v. Vason	815 a	v. Pownall	385
Greenfield's Estate	77, 98, 194, 202, 210	v. Robins	189, 190, 210
Greenhill v. Willis	438	v. Spratley	183, 187, 188, 192
Greenhouse, <i>Ex parte</i>	275, 733	Griffith's Estate	910
Greening v. Fox	918	Griffith Flood's Case	739
Greenland v. Waddell	920	Griffiths v. Cape	748
Greenlaw v. Kent	129	v. Porter	402, 418, 849, 931

INDEX TO CASES CITED.

lxxv

[References are to sections.]

Griffiths v. Pruett		272	Gullwer v. Ray		324
v. Ricketts		593	v. Wickett		379
v. Vanheythuysen		884	Gully v. Cregoe	112, 117,	117
v. Vere		395	v. Hall		646
Grigby v. Cox	654,	667	Gumbert's App.		159
v. Hair		238	Gunn v. Barrow		330
Griggs v. Staples		213	v. Brown		920
v. Veghte		465	Gunnell v. Cockerill		823
Grimball v. Cruse	476 a,	918	v. Whitear		433
Grimes v. Harmon	694, 713, 728, 729,	730	Gunnison v. Erie Dime S. Co.		127
Grimke v. Grimke		248	Gunter v. Gunter		348
Grimshaw v. Walker		592	v. Jones	602 p,	602
Grimsbey v. Hudnell		869	v. Thomas		184
Grimstone, Ex parte	605,	611	Guntert v. Guntert		79
Grindley, In re		848	Guphill v. Isbell		330
Grinnell v. Adams		590	Gurney, In re		861
Grinnell v. Baker		465	Gutch v. Fosdick		860
Grisby v. Mousley		229	Guth v. Guth	672,	673
Grissom v. Hill	737,	748	Guthrie v. Gardner	126, 143, 144,	149
Griswold v. Bigelow		511 c	Gutwillig, In re		593
v. Chandler	463,	468	Gutzwiller v. Lackman		536
v. Griswold		828	Guy v. Dormer		511 c
v. Penniman		639	v. Hancock	602 ee	
v. Perry	784,	785	v. McIlree		589
v. Sackett		277	Guyer v. Maynard	308,	765
Groesbeck v. Seeley	126, 136,	142	Guyton v. Shane	411,	900
Grollick v. Ward		214	G'Williams v. Rowell	121,	414
Groom v. Booth	793,	884	Gwynn v. Williams		200
Grooves v. Rush		75	Gwynn v. Gwynn		169
Groschen v. Page		592	v. Heaton	187,	188
Gross v. Reddig		678	Gyett v. Williams		570
Grosvenor v. Day	602 bb				
v. Sherratt		194			
Grotou v. Ruggles		262	H.		
Grouch v. Hazlehurst L. Co.	181,	206			
Grouv v. Van Schoonover		365	Haaven v. Hoass		142
Grover v. Wakeman		590	Haberdashers' Co. v. Att.-Gen.		900
Groverman v. Diffenderfer	627,	645	Habergham v. Vincent	13, 93, 151,	347,
Groves v. Clark		145			511 b
v. Groves	126, 131, 137, 140,	141	Habershon v. Vardon	701,	710
v. Perkins	185,	645	Hackett v. Hackett		511 b
v. Price		438	Hackman v. MaGuire		437 a
v. Wright		547	Hackney v. Brooman	86,	99
Grosvenor v. Cartright		464	v. Butts		206
Growing v. Behn		239	Haddelsey v. Adams		371
Gruhn v. Richardson	147, 238,	245	Hadden v. Chorn		748
Grumbles v. Grumbles		864	Haddock v. Perham		539
Grundly v. Drye		277	Hadley, In re	272,	291
Grute v. Locroft		637	v. Hadley	411, 499,	920
Gubbins v. Creed		427	v. Hopkins Academy	700, 743, 744,	748
Gude v. Worthington		249	v. Latimer		189
Guerrant v. Fowler		71	v. Pickett		237
Guerreiro v. Peile		243	v. Stuart		128
Guest v. Farley		299	Hadow v. Hadow	112, 117, 118, 612,	620
Guibert's Trust		297	Haffey v. Birchetts		238
Guiddy's Case		694	Hafner v. Irwin	590,	592
Guild v. Guild	71, 627,	631	Hagan v. Platt		545
Guilfoil v. Arthur	260,	730	v. Powers		124
Guill v. Northern		794	Hagell v. Currie		827
Guilford v. Minneapolis, &c., Ry. Co.		225	Hagler v. McCombs		918
		584	Hahn v. Hutchinson		225
Guillam v. Holland		680	v. Pindell		782
Guion v. Doherty		282	Haigh v. Kay	85, 162, 165,	226
v. Melvin		473	v. Pearson		185
v. Pickett	248, 290,	473	Haigood v. Wells		618
Gulick v. Griswold		252	Hain v. Robinson		75
v. Gulick		104	Hain's Estate		200
Gullin v. Gullin		630	Haines v. Ellis		645
			v. Hay		919

[References are to sections.]

Haines v. O'Connor	141	Halmon's Appeal	900
Hake v. Fink	639	Halseil v. Wise County Coal Co.	206, 207
Halcott v. Morkant	137	Halsey v. Cheney	206
Haldenby v. Spofford	768, 877	v. Halsey	636
Hale v. Burrowdale	451	v. Tate	864
v. Hollon	188	v. Whitney	592, 593
v. Horne	152	Halstead v. Bank of Kentucky	218, 219
v. Lamb	107, 110, 111	Haly v. Bannister	395
v. Layton	75	Ham v. Ham	412
v. Penn	390	Hambel v. Hambel	358
v. Sheldrake	457	Hamberlin v. Terry	160, 182
v. Stone	647	Hambrooke v. Simmons	87
Haley v. Bannister	613, 619	Hamer v. Sidway	93
v. Bennett	232	v. Tilsley	477, 552
Haleyburton v. Kershaw	562	Hamersley v. De Biel	208, 368
Halford v. Stains	150, 397, 584	v. Lambert	64
Hall, <i>In re</i>	846	v. Smith	310 a, 646, 652, 653
v. Bliss	199	Hamerton v. Whittoa	367
v. Bumstead	559	Hamet v. Dundass	187
v. Carter	416, 421, 578, 580, 581, 584	Hamilton, <i>In re</i>	114
v. Congdon	126	v. Bishop	647, 651
v. Coventry	872	v. Buchanan	147
v. Culver	490	v. Buckminster	766
v. Cushing	262, 263, 272, 574	v. Crosby	511 c, 735
v. Denison	591, 602	v. Dooly	195
v. Dewes	344, 414, 492	v. Downer	83, 863
v. Doran	141, 148	v. Fowlkes	239
v. Franck	412	v. Frye	276, 280
v. Gambrill	248	v. Grant	855
v. Hall	84, 104, 147, 371, 636	v. Hall	171
v. Hallett	202, 894	v. Hamilton	627, 671
v. Harris	602 <i>ad</i> , 843, 877	v. Hector	672
v. Hill	632	v. Houghton	585, 594 595, 597, 600
v. Hugonin	633	v. Lubukee	602 <i>p</i>
v. Irwin	500	v. Mills	626
v. Jones	232, 414	v. Mound City M. L. L. Co.	217
v. Kappenberger	145	v. Royce	222
v. Laver	894, 907	v. Tighe	903 a
v. Livingston	226	v. Watson	179
v. Lock	884	v. Wright	197, 427, 904
v. Maccubbin	238	Hamlen v. Bennett	656
v. May	294, 340, 495, 505	Hamley v. Gilbert	612, 620
v. McLain	639	Hamlin v. Hamlin	324
v. Otis	828	Hammatt v. Emerson	171
v. Palmer	103	Hammerston's Case	298
v. Read	184	Hammett v. Stricklin	237
v. Sayre	649	Hammond v. Granger	287
v. Sprigg	126	v. Hammond	459
v. Sullivan R. R. Co.	756, 757, 758, 761	v. Hicks	863
v. Timmons	170, 849	v. Hopkins	195, 861
v. Towne	602 <i>p</i> , 602 <i>v</i>	v. Messenger	859
v. Vanness	129	v. Neame	117, 118, 612, 620
v. Waterhouse	656	v. Walker	826
v. Williams, <i>et al.</i>	386 <i>b</i>	Hamnett's Appeal	127
v. Wilson	918	Hampden v. Hampden	183
v. Young	126, 132, 639	v. Miller	232
Hallack v. Smith	236, 238, 239	v. Rice	704, 748
Hallam v. Tillinghast	122	Hampshire v. Bradley	900
Hallenback v. Rogers	145	Hampson v. Bramwood	901, 903 a
Hallett v. Collins	228, 230	v. Fall	126
v. Hallett	576	Hampstead v. Johnson	592
v. Parker	127	Hampton v. Moorhead	511 <i>b</i>
v. Thompson	386 a, 555, 682	v. Spencer	82, 84, 85
Hallett & Co., <i>In re</i>	828	Hanbury v. Kirkland	261, 417, 418, 419,
Halliburton v. Leslie	52		466, 509
Halliday v. Hudson	151, 152	v. Spooner	272
v. Overton	357	Hanby v. Roberts	573
v. Summerville	571	Hanchett v. Briscoe	669, 850
Hallows v. Lloyd	284	Hancock v. Minott	562, 571

[References are to sections.]

Hancock v. Smith	345	Harford v. Baker	680
v. Titus	127	v. Lloyd	835
Hancom v. Allen	444, 455	v. Purrier	122
Handick v. Wilkes	361	Hargreaves v. Mitchell	601, 863
Handlan v. Handlan	145	Hangthorpe v. Milforth	421
Handley v. Davies	903 a	Harineckell v. Orndorff	602 n
v. Lyons	232	Harker v. Reilly	160
v. Palmer	43, 448, 700	Harkin v. Darby	432
v. Snodgrass	462, 468	Harkkader v. Leily	580
v. Stutz	242	Harkness and Allsopp's Contract, <i>In re</i>	277
Handlin v. Davis	197	Harlan v. Brown	788
Hands v. Hands	250, 258	Harland v. Binks	593
Hane v. Vandusen	237	v. Trigg	112, 113, 116
Hanley v. Downing	660, 662	Harland's Appeal	918
Hannah v. Carnahan	466	Harley v. Harley	626
v. Carrington 602 h, 602 i, 602 m, 602 ad		v. Platts	311
v. Hodgson	201	Harlow v. Mister	873
Hannan's Co., <i>In re</i>	248	Harmon v. Carver	602 r
Hanne v. Stevens	881	v. Siler	658
Hannig v. Mueller	83, 520	v. Smith	223
Hannum v. Spear	598, 795	Harmood v. Oglander 13, 347, 563, 866, 872	
Hanscom v. Marston	457	Harnard v. Webster	847
Hansen v. Bethelsen	76	Harnett v. Maitland	477, 552
Hanson v. Beverly	799, 808	v. McDougall	670
v. Chapman	618	Harpending v. Dutch Church	45
v. Edgerly	179	Harpar v. Archer	127
v. First Pres. Church	137	v. Harper	75
v. Jacks	891	v. Hayes	770, 780
v. Keating	633	v. Munday	901
v. Little Sisters of the Poor	720	v. Phelps	113, 116, 251, 253
v. Miller	639, 643	v. Straws	275
v. Worthington	261, 262, 869, 877	v. Williams	239
Hapgood v. Perkins	441, 444	Harrauld, <i>In re</i>	903 a
v. Rout	499	Harrigan v. Smith	863
Happy v. Morton	733	Harrington v. Brown	195, 205, 428
Harbin v. Bell	433	v. Duchattel	214
v. Darby	904	v. Erie County Savings Bank	195
Harbison v. Lemon	191	Harris v. American Bible Society	715, 748
Harbster's Estate	520	v. Barnett	76, 77, 83
Harcourt v. Harcourt	601	v. Carter	171
v. Knowle	218	v. Collins	228
v. White	869	v. Daugherty	142, 169
Hardage v. Stroope	358	v. Dole	680
Hardcastle v. Fisher	590, 600	v. Du Pasquier	711
Harden v. Darwin & Pulley	48, 126	v. Elliott	133, 330
Harden v. Parsons	416, 421, 441, 453, 850	v. Fly	569, 570, 576
Hardenburgh v. Blair	386	v. Haines	109
Harder v. Harder	126, 137, 138	v. Harlan	237
Hardin v. Baird	82, 98	v. Harris 58, 275, 279, 451, 460, 602 aa,	
Harding v. Glyn	112, 248, 249, 250, 251, 256, 258, 699, 714		660, 931
v. Handy	189, 190	v. Ingledew	539, 595
v. Hardrett	220, 828	v. Martin	918
v. Larned	453, 610	v. McBane	873
v. Randall	171	v. McIntyre	126, 141
Hardingham v. Nichols	219	v. Mott	654, 656
Hardman v. Ellamer	219	v. Newton	257
Hardwick v. Mynd 402, 495, 503, 779, 795, 804, 806, 867		v. Norton	221
v. Vernon	821, 863	v. Pepperell	186
Hardy v. Boaz	677	v. Pounds	890 a
v. Caley	246, 907	v. Poyner	451, 552
v. Call	891	v. Pugh	304
v. Metropolitan Land Co.	444	v. Roop	214
v. Reeves	837, 862	v. Sewell	865
v. Sanborn	540	v. Slaght	715, 716
v. Simpson	590	v. Sumner	591
v. Skinner	590, 591	v. Taylor	642
Hare v. Sherewood	226	v. Tremenneere	202, 206
		v. Tyson	180
		v. Union Bank	126

[References are to sections.]

Harris v. Williamson	171	Harvey v. Harvey	451, 532, 614, 616, 647,
Harrisburgh Bank v. Tyler	127, 133, 137,		885
	138	v. Ledbetter	126
Harrison, <i>In re</i>	549, 551	v. Mix	589
v. Andrews	640	v. Mount	187, 189, 192
v. Asher	929	v. Pennybacker	133, 137
v. Battle	602 j, 602 l, 602 ff	Harwood v. Fisher	640
v. Boswell	862	v. West	112
v. Brolaskey	652, 653, 864	Hascall v. King	472
v. Brophy	715	Hasell, <i>Ex parte</i>	865
v. Forth	222	v. House	765
v. Foster	451	Hasher v. Hasher	863
v. Graham	261, 402, 416, 419, 421	Haskell v. Hervey	763
v. Guest	187, 195	Haskill v. Freeman	95
v. Gurney	72	Haslen v. Kean	254
v. Harrison	94, 114, 248, 251, 255,	Hassam v. Hazen	511 r
	379, 380	Hassanclever v. Tucker	570, 571
v. Hill	658	Hassard v. Rowe	606
v. Hollins	855	Hassel v. Hassel	570
v. Howard	226	Hastie & Silver v. Aiken	863
v. McMenomy	77	Hastings v. Baldwin	602
v. Manson	195	v. Belknap	592
v. Mock	209, 596, 890	v. Drew	242
v. Naylor	366, 372	v. Ord	104
v. Prise	877, 929	Hatch v. Hatch	195, 200
v. Randall	476	v. St. Joseph	104
v. Rowan	475	v. Smith	585
v. Rowley	272	Hatchell v. Eggeso	633
v. Smith	828	Hatcher v. Hatcher	232
v. Stewardson	873, 885	v. Massey	815 a
v. Thexton	440	v. McNamara	769
v. Union Trust Co.	275	Hatfield v. Montgomery	228
v. Warner	891	Hathaway v. Hathaway	121
Harrison's Trusts, <i>Re</i>	275	Hathorn v. Maynard	815 c
Harrod v. Fountleroy	229	Hathorne v. Root	920
Harrold v. Lade	126, 129, 206	Hathornthwaite v. Russell	816, 819
Harrop v. Howard	670	Hattersley v. Bissett	560
Harshman v. Lowe	586	Hatton v. Weems	910
Harston v. Tenison	863	Haughton v. Haughton	515
Hart v. Bayliss	305	Hault v. Townshend	768
Hart v. East Union Railway	752	Hauser v. Lehman	420, 421
v. McFarland	590	v. Shore	597, 794, 795, 797,
v. Middlehurst	361		798
v. Seymour	83, 225, 382, 520	Havelock v. Havelock	615
v. Stephens	640	Havers v. Havers	818, 819
v. Ten Eyck	847	Haviland v. Bloom	627
v. Tribe	112, 117, 620, 623	v. Myers	631, 632
Hart's Appeal	863	Hawes v. Chaille	239
Hartga v. Bank of England	242	v. Oakland	242
Hartley v. Hurle	310, 649	v. Wyatt	192
Hartman v. Dowdell	640, 641	Hawken v. Bourne	486
Hartman's Appeal	282	Hawker v. Hawker	308, 315
Hartopp v. Hartopp	201	Hawkesworth v. Hawkesworth	603
Hartshorne v. Nichols	714	Hawkin's Appeal	200
v. Nicholson	700, 729	Trust, <i>In re</i>	272
Hartson v. Elden	382	Hawkins v. Barney	855
Hartwell v. Hartwell	214	v. Chapman	314, 866, 869
Hartzell v. Brown	900	v. Chappell	427, 771
Harvard College v. Amory	456	v. Gordon	86
v. Balch	253	v. Hawkins	843
v. Soc. for Promoting Theol. Ed-		v. Kemp	273, 290, 502, 511 b, 602 p,
ucation	724, 735, 739		800
Harvey, <i>In re</i>	348, 555	v. Luscombe	309, 310
v. Alexander	109	v. May	602 f, 602 m, 602 p
v. Ashley	34	v. Oben	336
v. Aston	512, 514, 515, 517, 518	v. Obin	641
v. Cook	185	Hawks v. Sailors	124
v. Cubbedge	815 b, 820 a	Hawksley v. Barrow	668
v. Gardner	75, 260	Hawley v. Cramer	195, 197, 202, 205, 228, 480

INDEX TO CASES CITED.

lxxix

[References are to sections.]

Hawley v. James	72, 117, 160, 240, 312, 324, 380, 896, 397, 398, 404, 409, 511, 562, 583, 779, 900	Heap v. Tongue	185
v. Ross	282, 341	Heard v. Eldredge	545, 918
Hawtayne v. Bourne	486	v. Pilley	206
Hawthorne v. Browne	128	v. Read	490, 498, 511 b
Haxall v. Shippen	553	Heardson v. Williamson	312, 317
Haxton v. Corse	396, 398	Hearle v. Botelers	239
v. McClaren	104	v. Greenback	33, 48, 52, 324, 489,
Hay v. Master	112		615
v. Palmer	556	Hearn v. Crutcher	602
Haydel v. Hurck	511 a, 910	v. Hearn	843
Hayden v. Bucklin	855	Hearns v. Savage	918
v. Conn. Hospital	727	v. Waterbury Hospital	699
v. Stone	658	Heartley v. Nicholson	96
v. Stuart	238	Heath v. Bishop	386 a, 555
Haydon v. Stone	863, 865	v. Carter	145
Haye v. Brewer	562	v. Erie R. R. Co.	875, 876, 877
Hayes, <i>Ex parte</i>	617, 618, 623	v. Heath	628, 632
v. Applegate	466	v. Henly	863
v. Bayley	584	v. Knapp	336, 337
v. Carroll	127	v. Lears	555
v. Doane	590	v. Lewis	516
v. Goode	229, 863	v. Page	129
v. Hayes	380	v. Percival	878
v. Heidelberg	596	v. Slocum	127
v. Hollis	139	v. Withington	288
v. Horine	232	Heathcote v. Hulme	468, 470
v. Jackson	94, 562	v. Paignon	187
v. Kershaw	97, 98, 109	Heathman v. Hall	647, 648
v. Kindersley	146, 147	Heath's Appeal	181
v. Kingdome	136, 146, 151, 161	Heatley v. Finster	221
v. Otelly	921	v. Thomas	511 b, 657, 662
v. Pratt	248, 720, 729	Heaton, <i>Ex parte</i>	454
v. Tabor	299	Matter of	610
v. Ward	72, 210	v. Hassell	635
Hayne v. Hayne	183	v. Marriott	416
v. McIntire	865	Hebblethwait v. Cartwright	578
Haynes v. Forshaw	809, 811	Hebron v. Kelly	76
v. Redington	455	Hecht v. Slaney	865
Haynesworth v. Cox	511 a	Heck v. Clippenger	647, 648, 651
Hays v. Jackson	94, 562	Heckert's Appeal	918
v. Quay	82, 139	Hedges v. Ricker	528, 769
v. Reger	79	Hefferman v. Addams	511 c
Hayter v. Trego	722, 729, 731	Heighe v. Littig	546
Hayton v. Wolfe	264	Heidenheimer v. Bauman	83, 729
Hayward v. Cope	179	Heighington v. Grant	471, 902
v. Hayward	637, 642, 644	Heighton v. Grant	903 a
v. Ovey	878	Heilner v. Imbrie	218
Haywood v. Craven	748	Heinz v. White	212
v. Ensley	75	Heiskell v. Powell	126
Hazard v. Irwin	171	v. Trout	127
Hazel v. Hogan	505	Heist v. Baker	232
v. Woods	505	Helan v. Russell	701
Hazeltine v. Fournay	828	Helfensteine v. Garrard	209
Hazelton v. Valentine	440	Hellegas v. Hellegas	602 t
Heacock v. Coatesworth	135	Hellman v. McWilliams	86, 104
v. Fly	184	Hellman's Will	927
Head v. Egerton	219	Helm's Ex'r. v. Rogers	863
v. Gould	343, 454, 467	Helmey v. Heitcamp	602 ff
v. Head	672, 673	Helms v. Francisus	627, 631, 636, 645
v. Providence Ins. Co.	44	Hem v. Rushowski	602 bb
v. Teynham	878	Hemenway v. Hemenway	547
Head's Trustees, <i>In re</i>	308, 567	Hemmer v. Cooper	173
Headen v. Quillian	765	Hemmings v. Muncckly	514, 515, 517
Heager's Ex'rs	538	Hemmingway v. Mathews	640
Healey, <i>In re</i>	636	Hempfield R. R. Co. v. Thornbury	222
Healy v. Alston	347	Hemphill's Appeal	440, 456, 459, 460, 465,
v. Rowan	34		918
		Estate	918
		Hempstead v. Hempstead	126

[References are to sections.]

Hemstreet <i>v.</i> Wheeler	76	Herr's Appeal	647
Henchey <i>v.</i> Henchey	82, 843	Herr's Estate	195, 428
Henchman <i>v.</i> Att.-Gen.	329	Herrick's Estate	453
Henderson <i>v.</i> Adams	299	Herriott <i>v.</i> Prime	248
<i>v.</i> Atkins	576	Hertell <i>v.</i> Bogert	225, 814
<i>v.</i> Burton	232	Hertzfeld <i>v.</i> Bailey	239
<i>v.</i> Cross	152	Hervey <i>v.</i> Audland	111
<i>v.</i> Downing	590, 591	Hesing <i>v.</i> Att.-Gen.	732
<i>v.</i> Henderson	100	Hesketh <i>v.</i> Murphy	699
<i>v.</i> Hill	300, 312, 815 <i>a</i>	Hess <i>v.</i> Dean	779
<i>v.</i> Hoke	126, 133	Hess's Estate	468
<i>v.</i> Hunter	312, 744, 748	Hester <i>v.</i> Hester	500 <i>v.</i> , 602, 894
<i>v.</i> Kennicott	580	<i>v.</i> Wilkinson	438, 439, 618
<i>v.</i> Melver	912	Hetfield <i>v.</i> Debaud	462
<i>v.</i> Vault	541	Heth <i>v.</i> Richmond	458, 836, 847
<i>v.</i> Virden Coal Co.	386	Hetzel <i>v.</i> Hetzel	254, 498, 511 <i>a</i>
<i>v.</i> Warmack	127	Heugh <i>v.</i> Jones	680
<i>v.</i> Williams	765	Heuser <i>v.</i> Harris	699, 748
Henderson's Appeal	589	Hewes <i>v.</i> Dehon	562, 566
Handley <i>v.</i> Westmeath	672	Hewett, <i>In re</i>	658
Hendrick <i>v.</i> Hopkins	191	<i>v.</i> Foster	419, 424, 902
Hendricks <i>v.</i> Nunn	166	<i>v.</i> Hewett	249, 255, 492
<i>v.</i> Robinson	428	<i>v.</i> Wotton	693
Hendrickson <i>v.</i> Decow	730, 733	Hewit <i>v.</i> Hewit	508, 510
<i>v.</i> Hendrickson	863, 865	Hewitt <i>v.</i> Crane	201
Heneke <i>v.</i> Florin	137	<i>v.</i> Loosemore	236
Hengst's Appeal	416, 417	<i>v.</i> Morris	550, 551
Henkle <i>v.</i> Royal Ins. Co.	226	Hews <i>v.</i> Kenney	145
Henley <i>v.</i> Axe	188	Heyer <i>v.</i> Burger	674
<i>v.</i> Cook	185	Heysham <i>v.</i> Heysham	614
<i>v.</i> Phillips	900	Heywood <i>v.</i> Buffalo	660
<i>v.</i> Stone	873	Hibbard <i>v.</i> Lamb	19, 275, 497, 503, 504, 721
Hennershotz's Estate	154	Hibbert <i>v.</i> Cook	477, 552, 913
Hennessey <i>v.</i> Bray	265, 846	<i>v.</i> Hibbert	123, 907
<i>v.</i> Western	591, 592, 599	Hichens <i>v.</i> Kelly	873
Henry <i>v.</i> Dilley	676	Hickens <i>v.</i> Congreve	885
<i>v.</i> Doctor	282	Hickey <i>v.</i> Burt	330
<i>v.</i> Morgan	222, 330	<i>v.</i> Young	137
<i>v.</i> Raiman	202	Hickley <i>v.</i> Farmers', &c. Bank	585
<i>v.</i> Smith	660	Hicklins <i>v.</i> Boyer	552
Henry County <i>v.</i> Winnebago	230, 728	Hickman <i>v.</i> Stewart	195
Henschel <i>v.</i> Mamero	171	<i>v.</i> Upsall	929
<i>v.</i> Maurer	163	Hickox <i>v.</i> Elliott	873
Henshaw <i>v.</i> Morpeth	694	Hicks <i>v.</i> Hicks	851
<i>v.</i> Sumner	586	<i>v.</i> Sallitt	871, 872
Hensman <i>v.</i> Hackney	724	<i>v.</i> Wrench	899
Henson <i>v.</i> Kinard	98	Hickson <i>v.</i> Fitzgerald	271, 898
<i>v.</i> Wright	520	Hidden <i>v.</i> Hidden	448
Henvell <i>v.</i> Whittaker	570	<i>v.</i> Jordan	75, 134
Hepburn <i>v.</i> Dunlop	173	Hide <i>v.</i> Haywood	909, 910
<i>v.</i> Snyder	232	Hieronymous <i>v.</i> Mayhall	861
Hepburn's Appeal	652, 899	Higbee <i>v.</i> Higbee	143, 145
Herbergham <i>v.</i> Vincent	92	<i>v.</i> Rice	302
Herbert <i>v.</i> Blunden	359	Higginbottom <i>v.</i> Hulme	555
<i>v.</i> Hanrick	782	<i>v.</i> Peyton	86
<i>v.</i> Herbert	477	Higgins <i>v.</i> Joyce	178
<i>v.</i> Lownes	182	Higginson <i>v.</i> Barneby	275
<i>v.</i> Scofield	232	<i>v.</i> Turner	43
<i>v.</i> Smith	195	High <i>v.</i> Batte	218, 221, 239
<i>v.</i> Webster	671	Highway <i>v.</i> Banner	362
Hercy <i>v.</i> Dinwoody	867, 869	Hildreth <i>v.</i> Eliot	104
Hereford <i>v.</i> Adams	698, 699, 725	Hileman <i>v.</i> Bouslaugh	358
<i>v.</i> Ravenhill	461	Hill, <i>Ex parte</i>	207, 555
Heriots's Hospital <i>v.</i> Ross	744, 907, 910, 914	<i>v.</i> Anderson	53
Hermstead's Appeal	918	<i>v.</i> Atkinson	480
Herndon <i>v.</i> Pratt	858	<i>v.</i> Bean	568
Herne <i>v.</i> Meeres	187, 195, 428	<i>v.</i> Brown	431
Heron <i>v.</i> Heron	137, 210	<i>v.</i> Buckley	770
Herr <i>v.</i> Payson	202	<i>v.</i> Burns	705, 724

INDEX TO CASES CITED.

lxxxi

[References are to sections.]

Hill v. Chapman	614	Hitch v. Stonebraker	277
v. Conrad	253	Hitchcock v. Bank of United States	263
v. Cook	152	Hitchens v. Hitchens	317
v. Cornwall	104	Hite v. Hite	229, 453, 545, 575, 918
v. Davis	426	Hitner's Appeal	672
v. Durand	873	Hitt v. Applewhite	60
v. Edmunds	633	Hitz v. National Met. Bank	145
v. Fogg	242	Hoag v. Kenney	250
v. Gomme	846	Hoare v. Hoare	672, 727
v. Gray	173	v. Osborne	706, 714
v. Hill 87, 94, 114, 375, 627, 645, 767		v. Parker	542
v. Josselyn	411	v. Peck	862
v. London	116, 151, 152, 158	Hoare's Case	486
v. Magan	891, 907	Hobart v. Andrews	595
v. Manchester W. Works	752	v. Suffolk	152, 153
v. Meinhard	145	Hobbs v. Hull	672
v. Morgan	747, 891	v. McLean	894
v. Page	114, 540	v. Parker	175
v. Paul	69	v. Wavet	485
v. Pine River Bank	143	Hobday v. Peters	203, 440, 845, 848, 849
v. Reardon	70	Hoblyn v. Hoblyn	201
v. Simpson	225, 810, 811, 814, 815	Hobson v. Bell	602 o, 786
v. Tierney	845	v. Blackburn	573
v. Walker	481	v. Staneer	873
Hill, Fontaine & Co. v. Coolidge	828	v. Thelluson	596
Hillary v. Waller	349, 351, 352, 354, 866, 867	v. Trevor	68, 872
Hilleglass v. Hilleglass	782	v. Whitlow	828
Hillen v. Iselin	511 b	Hockenbury v. Carlisle	202
Hilliard, <i>Ex parte</i>	463, 464	Hocking, <i>In re</i>	66
v. Beattie	248	Hockley v. Bantock	469
Hillier v. Jones	578	v. Mawley	250, 251
Hillman v. Westwood	286	Hodgdon v. Shannon	275
Hillyard v. Miller	393, 399, 738, 748, 765	Hodge v. Att.-Gen.	40
Hillyer v. Bennett	53	v. Hawkins	471, 472, 918
Hilton v. Girard	86	v. Wyatt	590
v. Kenworthy	308	Hodgens v. Hodgens	636
Hinchel v. Daley	905	Hodges, <i>In re</i>	511, 828
Hinchenbroke v. Seymour	511 a	v. Blaggrave	786
Hinchmal v. Emans	184	v. Bullock	828
Hinckley v. Hinckley	335	v. Cobb	678
v. Maclaerns	257	v. Hodges	671
Hinckley's Estate	737	v. New England Screw Co.	207
Hind v. Poole	414, 495	Hodges' Estate	281, 466
v. Selly	451	Hodgkinson, <i>In re</i>	902
Hinde v. Blake	585, 593, 826, 827	Hodgson v. Bibby	850
Hindman v. Dill	590, 591	v. Bussey	363
Hindmarsh v. Southgate	53	v. Hodgson	613
Hind's Estate	639	Hodgson's Settlement	297
Hinds v. Hinds	261 a	Hodkinson v. Quinn	802, 803
v. Mooers	602 n	Hodle v. Healey	862
Hindson v. Weatherill	199, 202	Hodnett's Estate	171
Hines v. Spruill	559	Hodson v. Ball	385
Hinkle v. Landis	122	Hodson's Settlement, <i>In re</i>	658
v. Wanzer	68	Hoeffer v. Clogan	715
Hinney v. Phillips	679	Hoes v. Van Hoesen	569, 571
Hinnings v. Hinnings	930	Hoffen's Estate	699
Hinson v. Williamson	248, 415	Hoffman v. Anthony	602 q
Hinton, <i>Ex parte</i>	388	v. Canow	128
v. Hinton	192, 322	Hogan v. Jaques	162
v. Kennedy	456	v. Lepretre	602 k
v. Pritchard	169	v. Staghorn	150
Hintze v. Stingel	781	v. Wyman	58
Hinves v. Hinves	450, 451, 554	Hoge v. Hoge	181, 185, 206
Hinxman v. Poynder	112	Hoghton v. Hoghton	185, 194, 201
Hipkins v. Bernard	918	Hoile v. Bailey	843
Hipp v. Hutchell	602 e	Holbrook v. Allen	585
Hirsh v. Auer	79	v. Comstock	672
Hiserodt v. Hamlett	104	v. Waters	629, 642
Hitch v. Leworthy	408, 508	Holcomb v. Coryell	275

[References are to sections.]

Holcomb v. Holcomb	411, 419, 510, 910	Homer v. Shelton	547
Holden, <i>In re</i>	277	Hon v. Hon	86
v. Crawford	187	Hone v. Van Schaick	380
v. New York & Erie Bank	242	Honner v. Morton	626, 639
v. Strickland	60	Honor v. Honor	361, 362
Holder, <i>In re</i>	448	Honore v. Bakewell	237, 238, 239
v. Durbin	277, 287	v. Bridport	606
v. Nunnelley	137	v. Hutchins	133
Holdom v. Ancient Order of United Workmen	181	Hooberry v. Harding	300
Holdridge v. Gillespie	538	Hood v. Bramlett	511 a
Holdship v. Patterson	386 a	v. Clapham	451, 467, 931
Holdsworth v. Goose	784	v. Fahnestock	217, 222
v. Shannon	770	v. Haden	408
Holford v. Phipps	901, 921	v. Oglander	113, 115, 386
v. Wood	571	v. Phillips	348
Holgate v. Eaton	127	Hood-Barrs v. Heriot	671
Holgate v. Hayworth	900	Hook v. Dyer	341, 464
v. Jennings	451, 551	v. Dundas	512, 555
Holladay's Estate	462	v. Kinnear	874
Holland v. Alcock	99, 260, 701, 710, 713, 715, 723	v. Lowry	471
v. Baker	873, 874, 885	Hooper v. Eyles	137
v. Citizens' Bank	223	v. Felgner	299
v. Holland	260	v. Holmes	86
v. Hughes	467	v. Hooper	393, 737
v. Peck	713, 724, 748	v. Rossiter	544, 545
Holland's Case	17	v. Savage	462
Hollenbeck v. Pixley	672	v. Scheimer	328
Holliday v. Coleman	541	v. Tuckerman	590
Hollins v. Brierfield Coal Co.	242	Hoot v. Sorrell	664
Hollinshead's Appeal	76	Hoover v. Hoover	571, 796
Hollinshed v. Allen	82	v. Samaritan Society	667
v. Simms	166	Hope v. Brewer	72
Hollis v. Hollis	126	v. Carnegie	71
Hollis's Case	863	v. Clifden	580
Hollis-street Meeting-house v. Pierpont	734	v. D'Hedouville	450
Holloway, <i>In re</i>	511 b	v. Fox	889
— v. Headington	108, 170, 367	v. Gloucester	869
Holman, <i>Ex parte</i>	352	v. Harman	103
v. Loynes	202	v. Hayley	68
Holman's Appeal	562	v. Hope	603
Holme v. Williams	768	v. Johnson	308
Holmes, <i>Re</i>	72, 671	v. Liddell	245, 337, 806, 846
v. Bell	883	v. Stone	246 a
v. Campbell	129	Hopkins v. Burr	828
v. Coates	705	v. Glunt	112
v. Coghill	108, 511 b	v. Grimshaw	315, 384, 706
v. Dring	453, 621	v. Hopkins 151, 299, 301, 304, 385, 863	460, 467, 655
v. Fresh	187	v. Myall	590
v. Gilman	828	v. Ray	31
v. Holmes	920	v. Turnpike Co.	748
v. Joslin	618	v. Upshur	17, 323
v. Lysight	514	Hopkinson v. Burghly	821
v. Mead	748	v. Dumas	126, 322, 347
v. Mitchell	546	v. Ellis	903 a
v. Penney	386 b	v. Roe	912
v. Pickett	299	Hopper v. Adee	414
v. Reynolds	658	v. Conyers	837, 839, 842
v. Stone	218	v. Hopper	195
v. Trustees	384	Hoppes v. Check	770
v. Turner's Falls Co.	199	Hora v. Hora	118
Holroyd v. Marshall	68	Hord v. Hord	632
Holt v. Agnew	204	Horde v. Suffolk	705, 712
v. Hogan	254	Hore v. Beecher	184, 633
v. Holt	129, 196, 538	v. Wouffe	639
Homan v. Hague	886	Horn v. Barton	767
Home v. Patrick	654	v. Horn	796
Homer v. Homer	82, 127	v. Lockhart	456
		Hornbeck v. Am. Bible Soc.	730

INDEX TO CASES CITED.

lxxxiii

[References are to sections.]

Horne v. Askham	511 a	Howard v. Gilbert	282, 881
v. Barton	361, 371, 375	v. Hatch	602 r
v. Lyeth	359, 370	v. Henderson	300
Horner v. Swann	765	v. Hooker	213, 653
Hornsby v. Lee	639	v. Howard	147
Horrey v. Glover	540, 546, 547	v. Jemmet	837
Horrock v. Ledsam	878, 892	v. Manning	468
Horseley v. Chaloner	171, 443	v. Moffatt	545
v. Fawcett	884	v. Morton	627
Horsey v. Hough	187, 602 z	v. Papera	816, 818, 819
Horsfall, <i>In re</i>	337	v. Quattlebaum	453, 863
Horton v. Brocklehurst	440, 821	v. Rhodes	276, 280, 282, 283, 901
v. Horner	238	v. Savings Bank	98
v. Horton	309, 310	v. Thornton	402
v. Riley	212	v. Waters	275
v. Sledge	299	v. Whitfield	495
v. Smith	347, 348	Howard Ins. Co. v. Halsey	222
Hortopp v. Hortopp	172	Howarth v. Mills	66
Horwitz v. Norris	254	Howden v. Haight	212
Horwood v. West	112	v. Rogers	72
Hosack v. Rogers	593, 826, 894, 918	Howe, <i>In matter of</i>	43, 44
Hosea v. Jacobs	381, 748	v. Dartmouth	440, 444, 450, 455, 467, 541, 547, 548, 549, 848
Hosford, <i>In re</i>	448	v. Freeman	759
v. Merwin	98	v. Howe	126, 450, 451, 547
Hoskins v. Nichols	468, 887	v. Medcraft	572
Hospes v. Northwestern Manuf. Co.	242	v. North	658
Hotchkiss v. Gallatin Turnpike	588	v. School District	734
Hotchkiss v. Fortson	191	v. Waldron	920
Hotchkys, <i>In re</i>	477	Howell v. Ashmore	218
Hotel Co. v. Wade	206	v. Baker	135
Hotz's Estate	514	v. Barnes	493, 765
Houck v. Houck	501	v. Edgar	592
Hough, <i>In re</i>	309	v. Hanforth	556
v. Blythe	685	v. Howell	126, 362, 541, 633, 865, 872
v. Harvey	918 n	v. Price	564
v. Richardson	171, 173, 174, 175, 228	v. Ransom	202
Hougham v. Sandys	511 c, 785	v. Tyler	511 c
Houghton, <i>Ex parte</i>	126, 130, 131	v. Whitchurch	182
v. Davenport	815 b, 828	Howell's Estate	472
v. Davis	595	Hower v. Geesaman	330
v. Haggood	324	Howgrave v. Cartier	580
House v. Kountze	87	Howland v. Blake	137
v. Way	449	Howman v. Currie	640
Household S. M. Co. v. Vaughan	449	Howorth v. Dewell	116
Houston v. Embry	649, 651	Howse v. Chapman	704, 903 a
v. Nowland	593	Howth v. Owens	875
v. Thornton	177	Hoxie v. Carr	126, 137, 814
Hovenden v. Annesley	40, 228, 229, 325, 855, 857, 858, 861, 862, 865	v. Finney	252
Hovey v. Blakeman	417, 421, 422, 423, 670	v. Hoxie	121
v. Blanchard	222	Hoy v. Master	113, 115
v. Bradbury	863	Hoyle v. Jones	861
v. Dary	451	v. Stowe	530
How v. Bishop	142	Hoysradt, <i>In re</i>	275
v. Camp	216, 585	Hoyt, <i>In re</i>	453, 541, 545
v. Godfrey	904, 910	v. Hilton	624
v. Hutch	299	v. Latham	195
v. Sherewood	226	Hubbard v. Elmer	769
v. Weldon	171, 187, 188	v. Fisher	918
v. Winterton	863	v. German Cath. Cong.	730, 768
Howard v. Aiken	863	v. Goodwin	64, 131
v. American Peace Society	262, 699	v. Lloyd	263, 574
v. Ames	724, 748	v. Manhattan Trust Co.	855
v. Chaffers	602 o	v. U. S. Mortgage Co.	863
v. Digby	576, 805	v. Young	451
v. Duncom	665	Hubbell v. Hubbell	876
v. Edgell	787	v. Medbury	864
v. Fay	187	Hubble v. Osborne	147
	828, 838	Huckabee v. Billingsly	498, 602 k, 921

[References are to sections.]

Huddleston, <i>In re</i>	253	Hunt v. Crawford	328
Hudson v. Carmichael	667	<i>v. Elliott</i>	86
<i>v. Hudson</i>	205, 414, 425, 863	<i>v. Evans</i>	92
<i>v. Kimbrough</i>	861	<i>v. Fisher</i>	786 a
<i>v. Maze</i>	590, 600	<i>v. Friedman</i>	134
<i>v. Morris</i>	171	<i>v. Hamilton</i>	182
<i>v. Wadsworth</i>	541	<i>v. Holden</i>	500
<i>v. White</i>	79, 124	<i>v. Hunt</i>	299, 347, 456, 672
Hudson B. C. Co. v. Glencoe Co.	347	<i>v. Maldonado</i>	607
Huff, <i>Ex parte</i>	461	<i>v. Mathews</i>	183, 208, 213
<i>v. Earle</i>	602 v	<i>v. Moore</i>	140, 171, 189
<i>v. Wright</i>	684	<i>v. Peacock</i>	882
Huger v. Huger	610, 780	<i>v. Rousmaniere</i>	184, 226, 499
Hugh v. Smith	471	<i>v. Scott</i>	451
Hughes, <i>Ex parte</i>	209, 285	<i>v. Smith</i>	828
<i>v. Caldwell</i>	336	<i>v. Townshend</i>	783
<i>v. Edwards</i>	55, 226, 228	<i>v. Watkins</i>	546
<i>v. Empson</i>	439, 462	<i>v. Wheeler</i>	568
<i>v. Evans</i>	150, 158, 159	Hunt, Appellant	453
<i>v. Garner</i>	220	Hunter, <i>In re</i>	701
<i>v. Garth</i>	219	<i>v. Anderson</i>	324, 411
<i>v. Hall</i>	71	<i>v. Atkins</i>	190, 195, 202, 210
<i>v. Hughes</i>	612, 613	<i>v. Baxter</i>	481
<i>v. Kearney</i>	232, 235, 236	<i>v. Gibson</i>	282
<i>v. Key</i>	884, 888	<i>v. Hallett</i>	639
<i>v. Mills</i>	669	<i>v. Hubbard</i>	864
<i>v. Nicklas</i>	358	<i>v. Hunter</i>	98
<i>v. People</i>	471	<i>v. Lawrence</i>	225
<i>v. Peters</i>	681	<i>v. Marlboro'</i>	137
<i>v. Tabb</i>	790, 794	<i>v. Smrall</i>	219, 221
<i>v. Turner</i>	511 c	<i>v. Stembridge</i>	112, 117
<i>v. Wells</i>	40, 240, 325, 667	Hunter's Will	182
<i>v. Williams</i>	243	Huntington v. Huntington	621
<i>v. Wilson</i>	206	<i>v. Jones</i>	827 a
<i>v. Wynne</i>	600, 601	Huntley v. Buckner	602 aa
Hughlett v. Hughlett	418, 426	<i>v. Denny</i>	166
Hughson v. Cookson	882	Huntly v. Huntly	38, 95, 240, 674, 863
<i>v. Mandeville</i>	218	Hunton v. Davies	869
Huguenin v. Baseley	104, 171, 181, 184,	Hurd v. Silsbee	592
187, 189, 192, 204, 206, 210, 211, 511 a		Hurlburt v. Durant	918
Hulkes v. Barrow	532, 533	Hurley, <i>Ex parte</i>	780
Hull v. Hull	397, 398	Hurst, <i>In re</i>	440, 465, 568
<i>v. Pearson</i>	712	<i>v. McNeil</i>	77, 299, 301
Hullman v. Honcomp	707, 748	<i>v. Wilson</i>	358
Hulls v. Jeffrey	586	Hurt v. Long	52
Hulme v. Hulme	285, 286, 402	Husband v. Davis	412
<i>v. Tenant</i>	654, 655, 657, 662, 670	Pollard	111
Hulse v. Wright	594	Huskisson v. Bridge	112, 115
Humberstone v. Chase	242, 875	Hussey, <i>Ex parte</i>	282
<i>v. Humberstone</i>	376, 383, 390	<i>v. Castle</i>	122
Humbert v. Trinity Church	45, 855	<i>v. Markham</i>	271, 503
Humble v. Bill	796, 809, 815	Husted v. Thomson	928
Hume v. Lopes	453	Huston v. Cassidy	205
<i>v. Richardson</i>	551	Hutcheson v. Hammond	160, 476, 480, 574,
Hummer v. Schott	232		915
Humph v. Morse	892	Hutchings v. Smith	641
Humphrey v. Richards	664, 668	Hutchins v. Baldwin	499
Humphrey v. Hollis	874	<i>v. Colby</i>	678
<i>v. Morse</i>	269	<i>v. Heywood</i>	142, 165, 298, 299, 301,
Humphreys, <i>In re</i>	622		305
Hun v. Cary	401, 459	<i>v. Lee</i>	82, 86, 151, 162, 226
Hungate v. Hungate	126	<i>v. State Bank</i>	814
Hungerford v. Earle	590	<i>v. Van Vechten</i>	82
Hunnewell v. Lane	86	Hutchinson v. Brown	175, 191
Hunt v. Ball	602 o	<i>v. Hutchinson</i>	127, 162, 256, 258
<i>v. Bass</i>	205, 602 v, 602 ee, 771	<i>v. Lord</i>	590
<i>v. Bateman</i>	558	<i>v. Morritt</i>	427
<i>v. Booth</i>	647	<i>v. Patrick</i>	239
<i>v. Bullock</i>	759	<i>v. Reid</i>	877

INDEX TO CASES CITED.

[References are to sections.]

lxxxv

Hutchinson v. Tindall	76, 79, 82, 85, 162, 189, 191	<i>In re</i> Jackson	918
v. Tottenham	389	" " Jones	552
v. Townsend	882	" " Martyn	275
Underwood	680	" " Mason	918
Hutt v. Fletcher	869	" " Nash	275
Hutton v. Annan	457	" " Watson	275
v. Ducey	672, 673	Inlow v. Christy	865
v. Simpson	871	Insurance Co. v. Smith	350
v. Weems	476, 915	Inwood v. Twyne	476, 605, 915
Huxley v. Rice	169	Iorr v. Hodges	311
Huyler v. Kingsland	766	Ips. Manuf. Co. v. Story	266, 440
Hyde v. Price	672, 674	Irbv v. Irbv	47
v. Warren	602 c, 602 g, 602 h	Iredell v. Langston	915
v. Watson	920	Ireland v. Geraghty	99, 732
v. Woods	386 a	Irick v. Clement	147
Hyden v. Hyden	137, 498	Irish v. Antioch College	861
Hylton v. Hylton	195, 200, 851	Irnham v. Child	76, 226
Hyman v. Devereux	602 g, 602 ee	Irvine v. Angus	554
Hyndman v. Hyndman	602 r	v. Campbell	292
Hyndshaw v. Morpeth	700	v. Dunham	275
Hyslop v. Clarke	592	v. Irvine	33
		v. Kirkpatrick	173, 180
		v. Robertson	228
		v. Sullivan	112, 152
		Irving v. De Kay	894, 903 a
Iasigi v. Chicago, &c. R. Co.	900	v. Irving	476 a, 920
Iddings v. Bruen	199, 428, 853	Irwin v. Keen	590, 600
Ide v. Pierce	82	v. Patchen	451
Idle v. Cook	312	v. Reeves Pulley Co.	44
Iglehart v. Armiger	234, 238	v. Rogers	900
Ihmsen's Appeal	459, 460, 469	Irwin's Appeal	416
Iles v. Martin	770	Isaac v. Defriez	256, 699
Ilminster School, <i>In re</i>	733	v. Gompertz	718
Imboden v. Atkinson	199	v. Worstencroft	554
Imlay v. Huntington	359, 365, 655, 660	Isaacs, <i>In re</i>	448
Imperial Mer. Cred. Ass'n v. Coleman	207	v. Weatherstone	824
Inches v. Hill	920	Isabella Denby, <i>In re</i>	272
Inchiquin v. French	86, 93, 566	Isbell's Estate	705
Incedon v. Northcote	616, 633	Isham v. Delaware, &c. R. R. Co.	771
Incorporated Society v. Price	724, 729	v. Post	225
v. Richards	694, 733, 745	Isherwood v. Oldknow	529
Independence Church v. Reorganized Church	709	Ithell v. Beane	367, 795, 796
Indiana, &c. R. Co. v. Swannell	166, 790	Iverson v. Saulsbury	815 c, 820 a, 850
Indianapolis v. Grand Master	705, 710, 748	Ives v. Allyn	93
Ingalls v. Ferguson	656	v. Davenport	786 a
Inge, <i>Ex parte</i>	743	Ivory v. Burns	77, 312
v. Forrester	651	Ivy v. Gilbert	581, 597
Ingersoll v. Cooper	330	Izod v. Izod	249, 255
Ingersoll's Estate	448		
Ingham v. Burnell	75		
Ingle v. Partridge	402, 443, 445, 827	J.	
Ingleby, &c. Ins. Co., <i>In re</i>	339	Jackman v. Delafield	500
Inghelf v. Coghlan	648	v. Hallock	238
Inglis v. Sailors' Snug Harbor	46, 47, 709, 722, 730, 731, 736, 748	v. Ringland	126, 134, 135
Ingraham v. Baldwin	33	Jacks v. The State	813 a
Ingraham	472, 709	Jackson v. Bateman	132
v. Meade	251	v. Billinger	380
v. Wheeler	592	v. Blount	602 d
Ingham v. Kirkpatrick	900, 918	v. Bowen	602 bb
Inioes v. American Exchange Bank	592	v. Brown	754
<i>In re</i> Allen	918	v. Burr	765
" " Baker	918	v. Burtis	499
" " Brewer	476 a	v. Cadwell	162, 221, 299
" " Cavin v. Gleason	828	v. Calden	602 r
" " Gerry	546	v. Cary	209
" " Hawley	121	v. Cator	226
" " Holland	275	v. Clark	602 t, 602 u, 602 aa
		v. Cleveland	162
		v. Cornell	50

[References are to sections.]

Jackson v. Delancy	336	James v. Gibbs	602 <i>ee</i> , 627, 642
v. Dunsbagh	299	v. Greaves	171
v. Dutton	165	v. Holmes	127, 210
v. Feller	139, 144	v. James	141, 195
v. Ferris	499	v. Johnson	347
v. Fish	298, 299, 312	v. Kerr	188, 189, 203
v. Forrest	142	v. Mayrant	661
v. Garnsey	162	v. Morey	347
v. Given	499	v. Morgan	187
v. Hampton	602 <i>f</i>	v. Smith	206
v. Hartwell	42, 43, 44	James's Appeal	262
v. Haworth	654	Jameson v. Shelly	463, 468
v. Hobhouse	670	v. Smith	308
v. Hurlack	152	Jamison v. Brady	51, 277, 647, 648
v. Hyde	166	v. Lindsay	891
v. Jackson	136, 371, 606, 612, 861, 918	Jane v. Kennedy	768
v. Jansen	783, 785	Janes v. Falk	163
v. Leek	222	v. Throckmorton	863
v. Lignon	783	Janey v. Latane	748
v. Matsdorf	126, 143	Jansen v. Ostrander	43
v. Mills	126	January v. Poyntz	468
v. Moore	82, 83, 130, 133, 349, 351	Jaqes v. Methodist Church	667
v. Morse	126	Jaquith v. Mass. Bap. Convention	145
v. Myers	299	Jarmon v. Wilkinson	660
v. Parker	591	Jarnagan v. Conway	254
v. Phillips	690, 694, 697, 700, 701, 705, 709, 710, 715, 719, 724, 728, 748	Jarvis v. Duke	171
v. Pierce	349	v. Prentice	648
v. Pool	815 <i>b</i>	Jasper v. Howard	651
v. Potters	500	Jaudon v. National City Bank	814
v. Robins	315	Jay v. Long Island R. R.	684
v. Root	299	Jaycox v. Smith	223
v. Rowe	219	Jeaffreson's Trusts, <i>In re</i>	256
v. Sackett	866	Jeans, <i>In re</i>	371
v. Schaubert	308, 765	v. Cooke	147
v. Sharp	222	Jecko v. Lansing	251
v. Sternberg	126	Jee v. Audley	385
v. Sublett	633	v. Thurlow	372
v. Von Zedlitz	827 <i>a</i>	Jefferies v. Harrison	892
v. Welch	196, 869	Jefferson v. Tyrer	498
v. West	660	Jeffersonville Assoc. v. Fisher	602 <i>v</i>
v. Williams	780	Jefferys v. Jefferys	97, 107, 108, 111, 162, 367
v. Winslow	222	v. Marshall	900
v. Wood	139	Jeffreys v. Small	136
v. Woods	126	Jeffries v. Lawson	426
v. Woolly	474	Jemmit v. Verrel	705, 712
Jackson's Case	828	Jencks v. Alexander	142, 144, 149, 602 <i>l</i> , 602 <i>o</i> , 602 <i>q</i> , 602 <i>s</i> , 602 <i>x</i>
Jacksonville Nat. Bank v. Beesley	137	Jenckes v. Cook	215
Jacob v. Lucas	414, 438, 505, 848, 884	Jenison v. Groves	126, 137
Jacobs v. Amyatt	634, 636, 649	Jenkins, <i>Ex parte</i>	17
v. Lake	231	Jenkins, <i>In re</i>	639, 642
v. Pou	863	v. Doolittle	468
v. Ryland	263	v. Eldredge	81, 173, 181, 206, 226, 918
Jacomb v. Harwood	225	v. Fickling	432
Jacot v. Corbett	592	v. Frink	126, 127, 129
v. Emmett	463, 468	v. Hammerschlag	274, 860
Jacques v. Hall	81	v. Hiles	597, 802
v. Swasey	145	v. Jenkins	314
Jagger v. Jagger	394	v. Jenkins Uni.	159
Jago v. Jago	264	v. Jones	782, 816
Jail v. Mills	248	v. Lester	70
James, <i>Ex parte</i>	197, 907	v. Milford	329
James, <i>In re</i>	528	v. Pye	188, 201
v. Allen	159, 711, 712	v. Robertson	260, 847, 876
v. Bird	235	v. Row	761
v. Cowing	215	v. Walter	463
v. Dean	195, 538	v. Whyte	918
v. Everly	685	Jenks v. Backhouse	343
v. Frearson	261, 262, 267, 419	Jenner v. Hooper	739

INDEX TO CASES CITED.

lxxxvii

[References are to sections.]

Jenness v. Howard	191	Johnson v. Eason	602 o, 602 q, 602 u, 602 x, 602 ee
Jenney v. Mackintosh	72	v. Fesemeyer	202
Jennings v. Broughton	230	v. Freeth	671
v. Davis	262, 639, 678	v. Gallagher	658, 659, 663
v. Moore	217	v. Giles	166
v. Selleck	144, 151	v. Glasscock	182
v. Shacklett	138, 141	v. Goss	451
v. Sturdevant	568	v. Harvey	591
Jennison v. Hapgood	195, 205	v. Henry	602 ee
Jenny v. Gray	676, 678, 681	v. Humphrey	863
Jenour v. Jenour	903 a	v. Johnson	131, 144, 160, 200, 225, 299, 421, 449, 511 a, 540, 541, 544, 545, 639, 641, 729, 851, 921
Jernegan v. Baxter	630	v. Kelly	160
Jerome v. Bohm	171	v. Kennett	597, 795, 796, 801, 802
Jerrard v. Saunders	218	v. Krassin	126, 226
Jervis v. Wolferstan	485, 910, 932	v. Lawrence	918
Jervoise v. Duke	511, 515	v. Leman	907
v. Northumberland	357, 359, 360, 366, 372, 390	v. Lewis	847
v. Silk	614, 615	v. Longmire	748
Jesse v. Barnett	884	v. Malcomb	585
Jessup v. Hulse	590	v. Matsdorf	146, 147
Jesus' College v. Bloom	871	v. Mayne	748
Jesus' College Case	700	v. Medicott	191
Jevon v. Bush	17, 54, 482	v. Milksopp	564
Jewell v. Clay	147	v. Miller	471
Jewett, <i>Ex parte</i>	610	v. Moore	551
v. Davis	685	v. Newton	443, 446, 462, 463
v. Iowa Land Co.	223	v. Prairie	860
v. Miller	195, 205	v. Prendergast	462
v. Palmer	221	v. Quarles	126, 139
v. Tucker	873	v. Richardson	137
v. Woodward	596, 894, 918	v. Richey	847
v. Yardley	44	v. Roland	259
Jewson v. Moulson	239, 629, 632, 633, 636, 641	v. Ronald	79
Jobson, <i>In re</i>	622	v. Rowlands	112
v. Palmer	441	v. Runyan	677
Jochumsen v. Suff. Sav. Bank	929	v. Simpson	275
Jodrell v. Jodrell	32, 118, 185, 620, 672	v. Sirmans	815 c
Joel v. Mills	248, 388, 555	v. Smith	34, 855, 863
John v. Battle	127	v. Stanton	511 c
v. Bennett	197	v. Swire	845
v. Smith	700, 720	v. Telford	910
John V. Farwell Co. v. Sweetzer	242	v. Thweatt	590
Johnes v. Lockhart	648, 649	v. Turner	602 s, 602 bb
Johns v. Herbert	465	v. Vail	678
v. Johns	511 a, 764, 820 a	v. Van Wyck	202
v. Sergeant	779	v. Ward	122
John's Will, <i>In re</i>	700, 720	v. Webster	347, 348
Johnson, <i>Ex parte</i> ,	457	v. Williams	602 y, 602 ee
Johnson, <i>In re</i>	511 c	Johnson's Appeal	262, 459, 817
v. Aston	826	Johnston, <i>In re</i>	373
v. Ball	93	v. Eason	771, 787
v. Barber	427	v. Johnston	679
v. Beattie	603	v. Knight	511 c
v. Bennett	195, 205	v. McCain	863
v. Billups	117	v. Spicer	122
v. Blackman	195	v. Swan	704, 705, 712
v. Bridgewater Co.	545, 556	v. Todd	903 a
v. Calnan	225	Johnstone v. Baker	773
v. Cary	301	v. Browne	658
v. Cawthorn	239	v. Lumb	668
v. Chisson	686	Joice v. Taylor	171
v. Clark	602 d	Joliffe, <i>Ex parte</i>	929
v. Clarkson	93, 160, 715	v. East	903 a
v. Currin	380	v. Jolland	432
v. Deloney	82	Jollands v. Burdett	670, 671
v. Dorsey	602 s, 782	Jones, <i>In re</i>	280, 401, 466, 929
v. Dougherty	126, 137		

[References are to sections.]

Jones v. Atchison, &c. R. Co.	466	Jones v. Torin	248, 250, 251
v. Bradley	157	v. Tripp	209
v. Bush	301	v. Tucker	511 c
v. Clifton	104	v. Turberville	866
v. Cole	330	v. Ward	463
v. Dawson	552, 554, 602 v, 910, 913	v. Waste	672
v. Dexter	430	v. Whitebread	591
v. Dougherty	275, 818	v. Williams	697, 704, 724, 814
v. Elkins	127	v. Wilson	82, 83
v. Foote	257	v. Winwood	784
v. Foxall	468, 470, 471	v. Zollicoffer	218
v. Fulghum	276 a	Jones's Appeal	404, 415, 416, 417, 418, 420, 421, 501
v. Geddes	72	Jones's Case	918
v. Gibbons	438, 633	Joor v. Hodges	303
v. Goodchild	157, 434	v. Williams	610, 828
v. Graham	129	Joralemon v. Van Riper	920
v. Greatwood	117	Jordan, <i>Ex parte</i>	449
v. Green	730	v. Cheney	243, 828
v. Habersham	741	v. Holkam	516
v. Harris	659, 662	v. Hudson	238
v. Henderson	863	v. Jordan	843
v. Higgins	365, 849	v. Money	208
v. Holladay	790	v. Roach	380, 392
v. Home S. Bank	865	Jorden v. Morey	870
v. Hughey	133	Jordon v. Hunt	468
v. Jones	218, 248, 275, 281, 330, 460, 580, 766, 876	Jortin, <i>Ex parte</i>	725
v. Julian	457	Josling v. Karr	881
v. Kearney	170, 196	Josselyn v. Josselyn	615
v. Langton	361	Jouffret v. Loppin	568
v. Lewis	407, 441, 443, 457, 520, 900, 901, 914	Jourolmon v. Massengill	312, 815 a
v. Lock	97, 99	Jowitt v. Lewis	754
v. Lloyd	82, 195, 851	Joy, <i>Re</i>	705
v. Lord Saye and Seale	301, 305, 308, 310	v. Campbell	404, 419, 421, 828, 837
v. Maggs	397, 584	v. J. & M. Plank R. Co.	754
v. McKee	181	Joyce v. Gunnels	282, 540
v. McPhillips	275	v. Hutton	108
v. Miller	380	v. Joyce	277, 287
v. Mitchell	160	Joyner v. Conyers	810
v. Moore	82	Jubber v. Jubber	112, 117, 620
v. Morgan	347, 358, 359	Judah v. Judd	438
v. Morley	108	Judd v. Dike	468
v. Morrall	468	v. Haseley	187
v. Nabbe	86	v. Moseley	226
v. Neale	602 z	Judge v. Booze	780
v. Newell	171	v. Jackson	918
v. Obincham	95, 100, 103, 109	v. Mathes	453
v. Parsons	863	v. Pfaff	226, 764
v. Powell	474, 538, 913	v. Wilkins	187
v. Powles	218, 219	Judice v. Prevost	264
v. Price	492, 505, 597, 795	Judkin's Trusts, <i>In re</i>	615
v. Reeder	212	Judson v. Corcoran	438
v. Ricketts	188	v. Gibbons	259, 261, 262, 270
v. Roberts	203	v. National City Bank	225
v. Salter	652, 653, 671	Juler v. Juler	94
v. Scott	558, 559, 601	Julian v. Reynolds	195, 205
v. Selby	569	Jull v. Jacobs	511 a
a. Seligman	762	Junction Railw. v. Ruggles	754, 758
v. Shaddock	217, 334, 828	Justices v. Haygood	891
v. Sherrard	554	Justin v. Wynne	829
v. Slaughter	133	Juvenal v. Jackson	221
v. Slubey	82, 85	Juzan v. Toulmin	175, 187, 230
v. Smith	428, 814		
v. Stanley	421		
v. Stockett	268, 274, 280, 901, 918		
v. Strong	330		
v. Suffolk	518		

K.

Kahn v. Chapin	195, 869
v. Gunherts	212
Kampf v. Jones	380, 390

INDEX TO CASES CITED.

lxxxix

[References are to sections.]

Kane, <i>In re</i>	612	Kellett v. Kellett	151
v. Bloodgood	228, 855, 863, 864	v. Rathbun	463, 468
v. Kane	471	Kelley v. Babcock	82, 594
Kane's Appeal	277	v. Boettcher	166, 855
Kane County v. Herrington	227, 246 a	v. Jenness	126, 130, 132, 246 a
Kantrowitz v. Prater	680	Kellogg v. Carrico	774
Karr v. Karr	471, 472	v. Hale	300
v. Washburn	76	v. Slauson	590
Kates v. Burton	507	v. Western El. Co.	865
Kator v. Pembroke	828	v. Wood	126
Katzenberger v. Aberdeen	749	Kellogg's Case	918
Kauffelt v. Bower	232	Kellum v. Smith	215
Kaufman v. Crawford	458, 607, 836, 842	Kelly v. Browning	166
Kavanagh, <i>In re</i>	460	v. Drew	678
Kay, <i>In re</i>	848	v. Johnson	126, 133
v. Crook	208	v. Karsner	76, 143
v. Scates	299, 920	v. Lank	591
v. Smith	851	v. McNeill	133
Kaye, <i>In re</i>	51, 275	v. Nichols	83, 706, 727
v. Powell	549	v. Richardson	560
Kayser v. Maughan	166, 226	v. Scott	336
Keady v. White	122	Kelsal v. Bennett	219
Kean v. Kean	248	Kelsey v. Snyder	139
Keane v. Robarts	246, 403, 789, 809, 810, 811, 907	v. Western	562
	260	Kelso v. Kelso	142
Kearnan v. Fitzsimon	476 a	v. Tabor	660
Kearney v. Kearney	386 b, 388, 555	Kemmis v. Kemmis	615
Kearsley v. Woodcock	508, 510	Kemp v. Burn	900
Keates v. Burton	173, 179	v. Burr	821
v. Cadogan	769	v. Kemp	8, 251, 507, 511, 570
Keating v. Keating	437 a	v. McPherson	576, 796
v. Stevenson	132, 144	Kempf v. James	888
Keaton v. Cobb	863	Kempton v. Packman	190
v. Greenwood	864	Kenaday v. Edwards	277, 770
v. McGwier	680	Kenan v. Hall	471
v. Scott	616, 619	v. Paul	918
Kehble, <i>Ex parte</i>	419, 453	Kendall v. Gleason	920
Keble v. Thompson	437 a	v. Granger	159, 711
Kedian v. Hoyt	918	v. Mann	126, 133
Kee v. Kee	664	v. Micfeild	13
v. Vasser	196, 538	v. New England, &c.	918
Keech v. Sanford	511 c	Kenge v. Delavall	662
Keefer v. Schwartz	894	Keniston v. Mayhew	82
Keeler v. Keeler	315	Kennedy v. Baker	127, 828, 865
Keen v. Walbank	305, 307, 309, 315, 349, 353, 354	v. Daley	122, 216, 433, 828, 830, 863
Keene v. Deardon	282	v. Fury	17, 328
Keene's Appeal	590	v. Gramling	315
Keep v. Sanderson	126	v. Hammond	602 ff
Kegerreis v. Lutz	511 a	v. Hoy	99
Keiley v. Keily	379	v. Keating	129, 135
Keily v. Fowler	515	v. Kennedy	189, 226, 865
v. Monck	408	v. Kingston	251, 255
Keim v. Lindley	226	v. McCloskey	127
Keisselbrock v. Livingston	794	v. Strong	463
Keister v. Scott	238	v. Turnley	293
Keith v. Horner	91, 133	v. Ware	109, 111
v. Miller	347	v. Winn	259, 261, 865
v. Wheeler	730	Kennedy's Appeal	912
Keith & P. Coal Co. v. Bingham	68, 98, 101	Kennell v. Abbott	182
Kekewich v. Manning	102, 104, 105, 111, 438	Kenney v. Udall	631, 632, 636
Kellaway v. Johnson	460, 467, 509	Kenrick v. Beauchlerk	305, 308
	847, 849	Kensington v. Bouverie	554
Keller v. Ashford	206	v. Dolland	647, 649, 651
v. Auble	211	Kenson's Case	739
v. Nutz	241	Kent, <i>Ex parte</i>	617
v. Ruiz	680	v. Chalfant	197
v. Strong	79	v. Dunham	710
		v. Gerhard	232
		v. Hutchins	900

[References are to sections.]

Kent <i>v.</i> Jackson	870	Kincaid <i>v.</i> Thompson	245
<i>v.</i> Mehafeey	227	Kincaird's Trusts, <i>In re</i>	633, 636
<i>v.</i> Morrison	252, 511 <i>b</i>	Kincell <i>v.</i> Feldman	226
<i>v.</i> Plumb	467, 670	Kinch <i>v.</i> Ward	297
Kentish <i>v.</i> Kentish	569	Kinchant <i>v.</i> Kinchant	201
<i>v.</i> Newman	364	Kinder <i>v.</i> Miller	137
Kenyon <i>v.</i> Farris	658	<i>v.</i> Shaw	243
<i>v.</i> Kenyon	324	King, <i>Re</i>	901, 902
Keogh <i>v.</i> Cathcart	654	<i>v.</i> Akerman	312
Keon <i>v.</i> Magawley	787, 874	<i>v.</i> Bellord	19, 52
Kep <i>v.</i> Bank of New York	58	<i>v.</i> Boston	135
Ker <i>v.</i> Buxton	624, 672	<i>v.</i> Bushnel	322
<i>v.</i> Snead	471	<i>v.</i> Carmichael	866
Kerlin <i>v.</i> Campbell	151, 158	<i>v.</i> Coggan	434 <i>a</i>
Kern <i>v.</i> Hazlerigg	238	<i>v.</i> Cotton	213
Kerr <i>v.</i> Day	38, 231	<i>v.</i> Cushman	129, 428, 915
<i>v.</i> Dunganon	195, 206, 380	<i>v.</i> Denison	54, 151, 152, 153
<i>v.</i> Kirkpatrick	421	<i>v.</i> Donnelly	138, 240, 259, 280
<i>v.</i> Laird	463	<i>v.</i> Duntz	602 <i>x</i> , 602 <i>aa</i>
<i>v.</i> Verner	243, 473	<i>v.</i> Eggington	837
<i>v.</i> Water	421	<i>v.</i> Hake	580
Kerrigan <i>v.</i> Tabb	715	<i>v.</i> Hamlet	188
Kerrison <i>v.</i> Stewart	873	<i>v.</i> Holland	64
Kershaw <i>v.</i> Snowden	122	<i>v.</i> Jenkins	17
Ketchum <i>v.</i> Ketchum	891	<i>v.</i> King	441, 827 <i>a</i> , 898, 914
<i>v.</i> Mobile & Ohio R. Co.	275	<i>v.</i> Lawrence	264, 343
<i>v.</i> Packer	875	<i>v.</i> Leach	343
Ketrick <i>v.</i> Barnsly	182	<i>v.</i> Lucas	658
Kettle <i>v.</i> Hammond	587	<i>v.</i> Merchants' Exchange Co.	299,
Kettleby <i>v.</i> Atwood	367		602 <i>i</i>
Kevan <i>v.</i> Branch	591, 592	<i>v.</i> Mildmay	325
Key <i>v.</i> Hughes	443	<i>v.</i> Mitchell	153
Keyes <i>v.</i> Carleton	104	<i>v.</i> Morrison	927
<i>v.</i> Wood	602 <i>n</i>	<i>v.</i> Mullins	922
Keyser's Appeal	304	<i>v.</i> Pardee	141
Kiah <i>v.</i> Greiner	371, 391	<i>v.</i> Parker	312, 320, 705, 737
Kibbee <i>v.</i> Hamilton Ins. Co.	172	<i>v.</i> Phillips	269
Kibbett <i>v.</i> Lee	511 <i>b</i>	<i>v.</i> Remington	195
Kiddill <i>v.</i> Farnell	100, 929	<i>v.</i> Roe	474
Kidney <i>v.</i> Coussmaker	556, 570, 867, 872	<i>v.</i> Rundle	748
Kightley <i>v.</i> Kightley	569	<i>v.</i> Savery	201, 202
Kilbee <i>v.</i> Sneyd	402, 403, 422, 424,	<i>v.</i> Stone	411
	445, 851, 914	<i>v.</i> Strong	903 <i>a</i>
Kilbourn <i>v.</i> Sunderland	861	<i>v.</i> St. Catharine's Hall	743
Kildare <i>v.</i> Eustace	40, 71	<i>v.</i> Talbott	441, 454, 455, 459, 460,
Kilford <i>v.</i> Blaney	571		468
Kilgore, <i>Ex parte</i>	264	<i>v.</i> Taylor	905 <i>a</i>
Killam <i>v.</i> Allen	313, 393, 398	<i>v.</i> Townshend	299, 351
Killar <i>v.</i> Beclor	639	<i>v.</i> Whitely	367
Killeran <i>v.</i> Brown	226	<i>v.</i> Whiton	769
Killett <i>v.</i> Killett	151, 152, 154	<i>v.</i> Wilson	434, 606
Killick, <i>Ex parte</i>	648	<i>v.</i> Wise	209
<i>v.</i> Flexney	196, 538	<i>v.</i> Woodhull	160, 272, 748
Kilpatrick <i>v.</i> Johnson	396, 398, 738	King's Mortgage	338
<i>v.</i> Kilpatrick	239	Kingdom <i>v.</i> Bridges	144, 146
Kilpin <i>v.</i> Kilpin	75, 77, 86, 144, 146, 147	Kingdon, <i>In re</i>	511 <i>b</i>
Kilroy <i>v.</i> Wood	815 <i>a</i>	Kingham <i>v.</i> Lee	49, 121
Kilvert's Trusts, <i>In re</i>	714	Kingland <i>v.</i> Rapelye	359
Kilvington <i>v.</i> Gray	550	Kingman <i>v.</i> Winchell	827 <i>a</i>
Kimball <i>v.</i> Ives	863	Kingsbury <i>v.</i> Burnside	82
<i>v.</i> Johnson	396, 398, 738	<i>v.</i> Powers	200, 607
<i>v.</i> Morton	86	Kingston <i>v.</i> Lorton	112, 855
<i>v.</i> Reading	440, 459, 465	Kinmouth <i>v.</i> Brigham	545, 547
<i>v.</i> Universalist Society in Sweden	748	Kinnard <i>v.</i> Kinnard	541
Kime <i>v.</i> Welpitt	616	<i>v.</i> Thompson	593
Kimm <i>v.</i> Weippert	680	Kinne <i>v.</i> Webb	122
Kimmel <i>v.</i> McRight	144, 149	Kinner <i>v.</i> Walsh	686
<i>v.</i> Smith	171	Kinney <i>v.</i> Ensminger	237
Kinard <i>v.</i> Hiers	25, 215	<i>v.</i> Harvey	238

[References are to sections.]

Kinney v. Heatley	918	Knight v. Packer	590
Kinsey v. State	612	v. Plymouth	406, 457, 465, 914
Kinsler v. Clark	299	v. Robinson	338
Kinslev v. Ames	602 <i>bb</i>	v. Selby	357
v. Boyd	136	v. Whitehead	667
Kintner v. Jones	127	Knight's Trust	927
Kintzinger Estate	639	Kniskern v. Lutheran Churches	733, 748
Kinzie v. Penrose	84	Knoch v. Van Bernuth	790
Kip v. Bank of New York	463	Knorr v. Raymond	858
v. Deniston	416, 420	Knott, <i>Ex parte</i>	218, 618
Kirby v. Masly	900	v. Cottee	115, 116, 461, 468, 471, 472
v. Schoonmaker	599		898, 902, 907
v. Taylor	851	v. Hill	188
Kiricke v. Bransbey	152	Knottman v. Peyton	213
Kirk v. Clark	874, 878	Knouff v. Thompson	143, 149
v. Paulin	310, 648	Knowies, <i>In re</i>	589
v. Webb	137, 841	v. Knowles	891
Kirkbank v. Hudson	700	v. McCamley	660
Kirkey v. Lacy	678	v. Spence	855
Kirkham v. Smith	348	Knowlton v. Atkins	83
Kirkland v. Cox	312, 315, 320, 328, 520	v. Brady	453, 468
v. Narramore	272	Knox v. Bigelow	891
Kirkman v. Booth	433, 454, 877, 904	v. Hotham	119
Kirkpatrick v. Beauford	678	v. Jenks	302
v. Davidson	86, 126	v. Jones	382, 391
v. McDonald	77, 98, 127, 133, 330	v. Knox	112
v. Rogers	570	v. McFarran	75, 77, 82, 133, 137
Kirsch v. Tozier	790	v. Pickett	421, 891
Kirwan v. Daniels	593	Knox's Trusts, <i>In re</i>	900
Kirwan's Trusts, <i>In re</i>	248	Knuckolls v. Lea	175
Kirwin v. Weippert	655	Knust, <i>Ex parte</i>	240, 282
Kirwood v. Thompson	199	Knye v. Moore	438, 877, 878
Kisler v. Kisler	126, 127, 134, 215	Kobarg v. Greeder	145
Kissam v. Anderson	122	Koch v. Roth	239
v. Dierkes	602 <i>g</i> , 784	Koerber v. Sturgis	634
v. Edmundson	591	Koenig's Appeal	304, 312
Kitchen v. Bradford	828	Kofoed v. Gordon	202
Kittel's Estate	860	Kopp v. Gunther	91
Kittleby v. Lamb	928	Korns v. Shaffer	195
Kittredge v. Fulsome	93	Kountze v. Kennedy	177
Klamp v. Klamp	145	Kraemer v. Dustermann	206
Klapp v. Shurk	591, 593	Kraft v. Lohman	275
Kleberg v. Bond	456	Kraken v. Shields	456
Kleiser v. Scott	238	Kramer v. Arthur	218
Klepner v. Laverty	371	Krankel v. Krankel	104
Kline's Appeal	127, 144	Krauth v. Thiele	82
Kline's Estate	213	Kreb's Estate	305, 502
Klock v. Cronkhite	602 <i>s</i>	Kreider v. Boyer	640
Klotz's Estate	908	Kreitz v. Frost	892
Kuapp v. Noyes	513	Krumbaar v. Burt	639, 641
v. Smith	678, 686	Krupp v. Scholl	213, 641
Knatchbull v. Fearnhead	846, 848, 877, 924	Kruse v. Stephens	205
v. Hallett	837	Kuhn v. Newman	299
Kneeling v. Brown	569	Kuntzleman's Trust Estate	920
Knefler v. Shreve	815 <i>a</i>	Kupferman v. McGehee	815 <i>a</i> , 815 <i>bb</i>
Knight v. Boughton	112, 114, 116	Kuster v. Howe	344
v. Bowyer	745, 850, 863	Kutz's Appeal	863
v. Brawneer	639	Kyle v. Barnett	454, 464, 470, 471
v. Cameron	514	v. Tait	221, 236, 237
v. Fisher	122	v. Wills	79
v. Garborough	254		
v. Haynie	415		
v. Hunt	212		
v. Knight	114, 116, 237, 653, 654, 828,		
v. Leak	633		
v. Leary	126		
v. Loomis	262, 264, 500		
v. Majoribanks	199		
v. Martin	476 <i>a</i> , 901, 922, 928		

L.

Lacey, <i>Ex parte</i>	195, 197, 209, 285, 428
Lachlan v. Reynolds	380
Lackey's Estate	451
Lacoe v. Lacoe	862
Lacoste v. Splivalo	453

[References are to sections.]

Lacy v. Wilson	218, 222	Lane's Appeal	468
Ladbroke, <i>Ex parte</i>	780	Lanesborough v. Fox	380
Ladbrook v. Bleden	271	v. Kilmaine	219
Ladd v. Chase	252, 511 a	Lang v. Ropke	398
v. Ladd	511 b	Langdale's Settlement Trust, <i>In re</i>	460
Laddington v. Kine	379	Langdon v. Astor	93
Lade v. Holford	349, 350, 355, 395	v. Simson	381, 395
Lade v. Lade	126	Langford v. Auger	336
Lady Mico's Charity	724	v. Gascoyne	402, 404, 419, 444, 467, 849
Lady Wellesley v. Earl of Mornington		v. Mahoney	908, 910
Lafferty v. Farley	863	Langham v. Sandford	94, 150, 157
Lagow v. Badollet	232, 237, 238	Langley v. Brown	226
Lahey v. Kortright	277, 499	v. Fisher	433, 863
Laidlaw v. Organ	171, 180	v. Hawk	818
Laing's Settlement, <i>In re</i>	453	v. Sneyd	351, 354
Lajoie v. Primm	929	Langmead's Trusts	795
Lake v. Currie	511 c	Langsdale v. Woollen	76
v. De Lambert	48, 51, 54, 275, 282	Langstaff v. Taylor	203
v. Freer	82	Langston v. Olivant	329, 417, 453, 460, 539
v. Gibson	132, 136	Langton v. Astrey	828, 829
v. Lake	150	v. Brackenburgh	614
Lakin v. S. B. M. Co.	231	v. Horton	68
Lallance v. Fisher	786	Langworthy v. Chadwick	541
Lamar v. Pearre	856	Lanier v. Brunson	918
v. Simpson	62	Lanning v. Lanning	585
v. Walton	264	Lanoy v. Athol	577, 613, 614, 635
Lamas v. Bayley	135	Lansdowne v. Lansdowne	134, 871
Lamb v. Davenport	231	Lansing v. Lansing	262
v. Goodwin	602 dd	Lantherman v. Abernathy	97
v. Lamb	162, 551	Lantry v. Lantry	134
v. Lynch	386	Lantsbury v. Collier	498
Lamb's Appeal	464, 466	Lape v. Taylor	901
Lambe v. Orton	101, 102, 105	Laprimaudaye v. Teissier	644
Lambert v. Parker	616, 619	Larco v. Casaneuava	198
v. Stees	124	Large's Case	388, 555
v. Thwaites	250, 258	Larkin v. Mason	576
Lambeth Charities, <i>In re</i>	699	Larkins v. Biddle	184
Lamerson v. Morvin	602 y	v. Rhoades	132, 137
L'Amoureux v. Crosby	35	Larmon v. Knight	162, 171, 245
v. Van Rensselaer	526, 660	Larod v. Douglass	418
Lampet's Case	68	Larrabee v. Hascall	82
Lamphear v. Buckingham	762	Larrow v. Beam	218
Lamplcy v. Watson	647, 666, 677, 684	Lashmar, <i>In re</i>	816 a
Lamplugh v. Lamplugh	54, 143, 144, 146	Laskey v. Perrysburg Board, &c.	511 b
Lanahan v. Latrobe	596	Lasley v. Lasley	275
Lancashire v. Lancashire	273, 493	Lassence v. Tierney	360, 511 a
Lancaster Charities	278	Lassiter v. Dawson	627
Lancaster v. Evors	431	La Terriere v. Bulmer	551
v. Dolan	310 a, 652, 655, 661, 768	Latham v. Henderson	129
v. Elce	593, 600	Lathrop v. Bampton	828, 835, 843
v. Thornton	308	v. Baubie	276, 917
Land Credit Co. v. Fermoy	207, 875	v. Gilbert	127
Landen v. Green	894	v. Hoyt	134, 135
Lander v. Weston	808	v. Pollard	195
Landers v. Dell	382	v. Smalley	276, 459, 472, 900, 903, 918
Landis v. Saxton	128, 863	v. Tracy	770
Landon v. Hutton	143, 163	Lattimer v. Hanson	262, 264, 268, 492
Lands Allotment Co., <i>In re</i>	863	Latouch v. Lacom	593
Lane, <i>In re</i>	618	Latouche v. Dunsany	876
v. Colman	918	Latourette v. Williams	640
v. Debenham	294, 340, 414, 493, 494, 505	Latrobe v. Baltimore	331
v. Dighton	139, 835, 837, 839, 842	v. Tiernan	411, 415
v. Eaton	705, 730	Lau's Estate	145
v. Ewing	79, 98, 100, 163	Laughlin v. Fairbanks	438
v. Lane	112, 147, 861	Laurel County Court v. Trustees	343
v. Page	511 a	Laurens v. Jenney	299, 306, 309
v. Tidhall	602 o, 602 x, 602 ee	v. Lucas	795
		Lauriat v. Stratton	873

INDEX TO CASES CITED.

xciii

[References are to sections.]

Lavender v. Stanton	582, 610, 793	Lee v. Egremont	632
Laver v. Fielder	208	v. Enos	346
Law v. Barchard	183	v. Fernie	511 a
v. Butler	238	v. Ferris	77, 83, 93
v. Mills	586	v. Fox	127
v. Skinner	590	v. Huntoon	77, 83
Lawes v. Bennett	448	v. Kennedy	82
Lawless v. Shaw	120	v. Lee	464
Lawley v. Hooper	169	v. Patten	206
Lawrence v. Bowle	848, 876, 903	v. Pennington	918
v. Cooke	121	v. Prideaux	647, 648
v. Davis	593	v. Randolph	240, 280
v. Farmer's Loan & Trust Co.	602 c,	v. Sankey	806
	602 g	v. Simpson	253, 511 c
v. Lawrence	75, 134	v. Stuart	34
v. Maggs	533	v. Tinken	142
v. Smith	451	v. Young	276, 508, 509, 510, 511
v. Stratton	222	Leech v. Leech	107, 584
v. Trustees, &c.	855	Leed v. Beene	863
Lawrence's Estate	382	Leedham v. Chawmer	907, 909, 910
Lawrie v. Banks	311	Leedom v. Plymouth Railway	757
Lawry v. McGee	97	Leeds v. Amherst	446, 540, 869, 870
Laws v. Law	126	v. Munday	336, 337
Lawson v. Campion	185	v. Wakefield	493, 784
v. Copeland	900	Leeds Banking Co.	654, 659
v. Lawson	76, 511 c	Leeke v. Bennett	541
v. Morton	324	Leeper v. Taylor	83
Lawton v. Ford	863	Lees v. Nuttall	206
Lay v. Brown	627	v. Sanderson	422
v. Duckett	812	Lees' Settlement Trusts, <i>In re</i>	295
Laytin v. Davidson	171, 918	Leferve v. Leferve	748
Layton v. Layton	631, 636	Leffler v. Armstrong	260, 602 r
Lazarus v. Bryson	205	Le Fort v. Delafield	245
Lea v. Grundy	665	Lefroy v. Flood	112, 116
Lea's Appeal	586	Legard v. Hodges	82, 122
Leach v. Asher	859 a	v. Johnson	673
Leach v. Ausbacher	814	Legare v. Ashe	183
v. Farr	104	Legatt v. Sewell	366
v. Leach	112, 117, 118, 119, 195, 620	Le Gendre v. Byrnes	863
Leader v. Tierney	124	Legg v. Goldwire	361
Leadman v. Harris	591	v. Legg	639
Leahy v. Leahy	678	v. Mackrell	271
Leake v. Leake	15, 321	Legge v. Asgill	699, 705, 712
v. Robinson	160, 383, 616, 622	Leggett v. Dubois	64, 131, 140
v. Watson	329, 358, 828	v. Grimmett	296, 297
Leakey v. Gunter	75	v. Hunter	273, 281, 404, 414, 610
Leaphart v. Commercial Bank	206	v. Leggett	133
Lear v. Leggett	388, 555	v. Perkins	305
v. Tritch	137, 795	Legh v. Legh	330
Learned v. Welton	412	L'Herminier, <i>In re</i>	541
Learoyd v. Whiteley	457	Lehman v. Lewis	133
Leavitt v. Beirne	508, 511, 655, 660	v. Rothbarth	128, 246, 468, 471, 917
v. Peel	680, 768	Leicester v. Foxcroft	182
v. Wooster	562, 571, 795	v. Rose	212
Leaycraft v. Hedden	655	Leichrist's Appeal	135
Leazure v. Hillegas	45	Leigh v. Ashburton	769
Lechmere v. Brotheridge	656	v. Barry	411, 415, 416, 417, 421
v. Carlisle	98, 367, 858	v. Evans	863
v. Charlton	577	v. Leigh	117
v. Lavie	112, 113, 116	v. Lloyd	768
Le Coif v. Armstrong L. H. Co.	656	Leighton v. Leighton	245, 552
Ledge v. Morse	139	Leiper v. Hoffman	65, 126, 131
Leddie v. Vrooman	680	Leisenring v. Black	202
Ledyard v. Chapin	602 x	Leitch v. Wells	223, 814
Lee v. Alston	871	Leith v. Irwin	905
v. Balcarras	530	Leith Banking Co. v. Bell	179
v. Brown	476, 615, 618, 619, 624,	Le Jeune v. Budd	517
	915	Leland v. Hayden	545
v. Delane	476 a, 928	Le Lievre v. Gould	177

[References are to sections.]

Le Maitre v. Bannister	113, 116	Lewis v. Lindley	166
Le Marchant v. Le Marchant	113	v. Lewis	76
Leman v. McComas	920	v. Madocks	122, 837, 841, 842
v. Sherman	296	v. McLemore	171
v. Whitley	76, 83, 162, 226, 232	v. Mathews	272, 337, 648, 649, 651
Lemmond v. People	160, 900	v. Merritt	189
Lemoine v. Dunklin County	863	v. Nelson	21, 71
Lenaghan v. Smith	882	v. Nobbs	422
Lench v. Lench	127, 128, 137, 138, 836, 839	v. Pead	190
Le Neve v. Le Neve	217, 222, 223	v. Phillips	221
Lengenfitter v. Ritching	210	v. Price	639
Lennard v. Curzon	876	v. Reed	404, 409
Lent v. Howard	452, 920	v. Rees	319
Leon, <i>In re</i>	56	v. Robinson	141
Leonard, <i>Re</i>	547	v. Scaperton	236
v. Bell	391, 748	v. Stanley	145
v. Diamond	309	v. Starke	347
v. Ford	602 <i>b</i>	v. Taylor	133
v. Green	133, 149	v. Thornton	562
v. Haworth	281	v. Wells	124
v. Leonard	185	v. Yale	660
v. Sussex	389	Library Company of Philadelphia v. Williams	511 <i>a</i>
v. Powell	915	Liddard v. Liddard	112
Le Page v. McNamara	724, 748	Lidderdale v. Montrose	69
Le Prince v. Guillemont	592, 594	Lide v. Law	186
Lerow v. Wilmarth	487, 553	Life Assoc. v. Siddall	265, 337, 476, 846, 849, 850, 853, 860, 863, 869
Leslie v. Bailie	927	Liffler v. Armstrong	602 <i>e</i>
v. Devonshire	159	Liggett v. Wall	217
v. Guthrie	68, 345	Light v. Scott	104
v. Leslie	83, 91	v. Zeller	145
Lesser v. Lesser	248, 511 <i>b</i>	Lignon v. Alexander	234
Lester v. Frazer	34	Like v. Bearsford	636
v. Garland	395	Liles v. Terry	202
L'Estrange v. L'Estrange	69	Liley v. Hey	113, 255, 710, 732
Letch v. Hollister	159	Lill v. Neafie	275
Letcher v. Letcher	126, 132, 137	Lillard v. Turner	660
Letterstedt v. Broers	275	Lillia v. Ayre	655, 657
Leuppie v. Osborn	658	Linch v. Cappey	464
Le Vasseux v. Scratton	641	v. Thomas	874
Lever v. Andrews	126	Lincoln v. Aldrich	876 <i>a</i>
Levering v. Heighe	34	v. Allen	468
v. Levering	34	v. Newcastle	359, 360, 373, 389, 390
Levet v. Needham	150, 152	v. Winsor	432, 895, 904
Levi v. Evans	133	v. Wright	226, 418, 419, 424, 848
v. Gardner	845	Lindenberger v. Metlock	765
Levin v. Ritz	52	Lindley v. Cross	680
Levis v. Kengla	79	Lindo v. Lindo	186
Levy v. Commonwealth	748	Lindow v. Fleetwood	288, 375
v. Horne	750	Lindsay v. Harrison	646, 653
v. Levy	41, 45, 384, 716, 738, 741, 748	v. Lindsay	863
Lewellin v. Cobbald	213, 826	Lindsell v. Thacker	336, 337, 648
Lewes, <i>Re</i>	929	Lindsley v. Dodd	861
v. Lewes	119, 388, 555	Lines v. Darden	116, 253
Lewin's Trusts, <i>In re</i>	633	v. Lines	104
Lewis, <i>Ex parte</i>	774	Lingan v. Henderson	84, 234
v. Adams	647	Lingard v. Bromley	848, 876, 879
v. Baird	259, 261	Lingenfelter v. Richey	226
v. Bacon	559	Lining v. Peyton	598, 794
v. Beall	299	Link v. Link	75
v. Bradford	221	Linker v. Smith	213
v. Building & Loan Ass'n	126	Linley v. Taylor	908
v. Castleman	864	Linn v. Davis	827 <i>a</i>
v. Covillaud	238	Linsley v. Sinclair	142
v. Darling	570, 571	Linton v. Boley	598, 602 <i>g</i>
v. Duane	60	v. Shaw	277
v. Hill	475	Linville v. Golding	299
v. Hillman	202, 206	Lippincott v. Barber	592
v. James	324		
v. Johns	678		

[References are to sections.]

Lippincott v. Davis	358	Lloyd v. Williams	600, 645
v. Evens	815 b	v. Woods	145
v. Lippincott	501	Lobdell v. Hayes	324
v. Ridgway	254	Lock v. Lock	532, 533
v. Warder	541	Lockart v. Forsythe	245
v. Wikoff	411	Locke v. Farmers' L. & T. Co.	83, 541
Lipscomb v. Nichols	126	v. Lomas	475, 597, 794, 799, 806
Liptrot v. Holmes	320	Lockey v. Lockey	871
Liquidation Estates P. Co. v. Wil-		Lockhart v. Canfield	328
loughby	347	v. Hardy	119
Lister v. Hodgson	97, 98, 102	v. Northington	499, 501
v. Lister	195, 198, 635	v. Reilly	260, 457, 467, 848, 876
v. Peckford	864	v. Wyatt	590, 591
v. Stubbs	206, 345	Lockridge v. Foster	171
Litchfield v. Baker	449, 451, 547	Lockwood v. Abdy	246, 907
v. Pickering	547	v. Canfield	75
v. White	417, 590, 914	v. Fenton	623
Litt v. Randall	385	v. Riley	418
Littell v. Grady	171, 848	v. Stockholm	576
Little v. Bennett	284	Lockyer v. Savage	388, 555
v. Brown	237	Locton v. Locton	121
v. Chadwick	122, 828	Loddington v. Kline	597
v. Little	477	Loder v. Allen	330
v. Thorne	476 a	Lodge v. Hamilton	639
v. Wilcox	24	Loften v. Witboard	127
v. Willford	701	Lofthouse, <i>In re</i>	612
Little, <i>Re</i> , Harrison v. Harrison	671	Loftis v. Loftis	60, 145
Littlefield v. Cole	511	Loftus v. Heriot	671
v. Smith	438	Logan v. Birkett	672
Littlehales v. Gascoigne	468, 903	v. Deshay	569
Little Rock & F. S. Ry. Co. v. Page	129	v. Fairlee	623
Litton v. Baldwin	655, 661, 900	v. Fontaine	918
Litzenberger's Estate	415	v. Johnson	137
Livermore v. Aldrich	126, 137, 138	v. Logan	918
v. Jenckes	592	v. Simmons	213
Livesay v. Livesay	931	Lomax v. Lomax	616, 619
Livesey v. Jones	712, 720	v. Pendleton	462, 468
Livingston, <i>In re</i>	282	v. Ripley	77, 83, 84, 93, 159, 511 a
Livingston Pet'r	282	Lombard v. Morse	200
v. Ball	592	Londenschlager v. Benton	759
v. Hammond	613	Londesborough v. Somerville	544
v. Livingston	38, 48, 51, 95, 277, 562, 564, 565, 566	London v. Garway	157
v. Newkirk	562, 566	v. Richmond	885
v. Stickles	537	London Ass'n v. London & India Docks Joint Committee	732
v. Wells	468, 471	London Bridge, <i>In re</i>	787
Livingston's Case	918	London Gas Light Co. v. Spottiswood	877
Llewellyn v. Mackworth	858, 863	London & County Banking Co. v. Bray	646
Llewellyn's Trusts	451, 551	London R. Co. v. Winter	226
Lloyd v. Attwood	851	Long v. Blackall	379
v. Baldwin	597, 795, 796, 800	v. Cason	621, 863
v. Banks	438	v. Clapton	431
v. Branton	512, 513, 514	v. Dennis	512, 515
v. Brooks	97	v. Fox	171, 843
v. Carew	379	v. Israel	891
v. Carter	126, 137	v. King	145, 206, 865
v. Currin	215	v. Long	286, 520, 615, 796
v. Goold	112, 487	v. Mathieson	752
v. Griffiths	787	v. Norcom	618
v. Hart	605, 611	v. Rankin	784
v. Inglis	76	v. Ricketts	514, 517
v. Lloyd	388, 555, 706	v. Serger	126
v. Loaring	885	v. Vallean	863
v. Lynch	137	v. White	647, 660, 855
v. Read	130, 144, 145, 146, 147	Longbotham's Estate	869
v. Rowe	918	Longford v. Eyre	511 b
v. Spillett	88, 125, 126, 138, 151, 152, 162, 900	Longley v. Hall	918
v. Taylor	501	v. Longley	157

[References are to sections.]

Longman v. Brown	714	Low v. Carter	846, 924
Longmate v. Ledger	189	v. Gemley	246
Longmore v. Broom	251, 255, 258, 468,	v. Manners	514
v. Elcum	507	Lowden v. Lowden	341
112, 116, 117, 118, 620		Lowe v. Convention	460
Longwith v. Butler	602 c, 602 x	v. Fox	646
Longworth v. Goforth	215	v. Morgan	873
Longworth's Estate	556	v. Morris	918
Lonsdale v. Beckett	291	v. Peers	516
v. Berchtoldt	119	v. Suggs	277
Lonsdale's Estate	100	v. Swift	764
Loomis v. Lift	212	Lowell v. North	602 o
v. Loomis	134, 438	Lowell's Appeal	700
v. McClintock	783	Lowenstein v. Evans	21
v. Spencer	56	Lowery v. Erskine	206
Loomis's Appeal	573	Lowman, <i>In re</i>	382
Lord v. Bishop	127	Lowndes v. Garnett & Mosely Co.	752
v. Brooks	545, 547	v. Lane	173, 176
v. Bunn	386 b, 555, 807	v. Lowndes	616
v. Fisher	589	Lowrie's Appeal	891, 918
v. Godfrey	451, 508, 509, 547	Lowry v. Commercial Bank	242
Lord and Fullerton's Contract, <i>In re</i>	264	v. Commercial & Farmers' Bank	814
Lord Paget's Case	585	v. Farmers' Bank	225
Lord Sandwich's Case	511 a	v. Fulton	259, 261, 401, 463
Lorillard v. Coster	380	v. Houston	641
Loring, <i>Ex parte</i>	236	v. Tiernan	768
v. Blake	381, 490, 507, 508	Lowson v. Copeland	438, 440, 465
v. Brodie	511 b	Lowther v. Charlton	222
v. Elliott	152	v. Lowther	206
v. Hildreth	103, 158	Lucas v. Atwood	594
v. Hunter	359, 370	v. Braudreth	357
v. Loring	117, 386 a, 620	v. Coe	910
v. Mass. Horticultural Society	288	v. Doe	500
v. Palmer	82	v. Harris	602 n
v. Salisbury Mills	242, 670	v. Lockhart	112, 117, 248
v. Steinman	476 a, 928	v. Oliver	602 v
v. United States Co.	588	v. Putney	754
Lorings v. Marsh	499, 721, 724, 731	v. Sanbury & Erie R. R. Co.	589
Lorman v. Clarke	855	Luckett v. White	570
Loscombe v. Wintringham	705, 725, 729	Luckin v. Rushworth	196
Losey v. Stanley	476 a, 511 b, 920	Lucknow v. Brown	613
Losley v. Losley	817	Luco v. De Toro	863
Loss v. Obyr	186	Luddy's Trustee v. Peard	203
Lothrop v. King	212, 591	Ludlam v. High	733
Lott v. Kaiser	171	Ludlow v. Flournoy	171
Louch, <i>Ex parte</i>	587	v. Greenhouse	693, 724, 732, 896
Louisville Trust Co. v. Stockton	828	v. Hurd	159
Loud v. Barnes	137	Ludwig v. Highley	58, 334
Lounsberry v. Purdy	58, 126, 133, 142	Luke v. Kelmorey	119
Lovat v. Leeds	627	Luken's Appeal	463, 468, 851, 918, 919
Lovatt v. Knipe	194	Lulham, <i>In re</i>	196
Love v. Gaze	94, 150	Lumb v. Milnes	634, 649
v. Love	855, 858	Lumley, <i>In re</i>	671
v. Morris	910	Lummis v. Big Sandy Land Co.	845
v. Robertson	676	Land v. Blanshard	877
Lovegrove, <i>Ex parte</i>	910	v. Lund	463, 468
Loveland v. Clark	770	Lundy v. Lundy	181
Lovell v. Minot	456	Lunham v. Blundell	443
Loveman v. Taylor	281, 918	Lapton v. Lupton	562, 569, 570, 796
Loveridge v. Cooper	438, 926	v. White	447
Loving v. Minot	551	Lurton v. Rodgers	770
v. Worthington	382	Luscomb v. Ballard	262, 812
Lovesy v. Smith	213	Luscombe v. Grigsby	206
Lovett v. Farnham	104, 248	Luse v. Reed	245
v. Lovett	288	Lush v. Wilkinson	149
v. Taylor	76, 162	Lush's Trusts	634
Low v. Barchard	187	Lusk v. Lewis	715
v. Bouverie	177, 554	Lusk's Appeal	195
v. Brinnan	764	Luther v. Bianconi	8, 440, 532, 845

[References are to sections.]

Lutheran Cong. v. St. Michael's Church		McCahan's Appeal	459, 918
Luttrell v. Olmius	181, 211	McCahill v. McCahill	79
Lycan v. Miller	901	McCain v. Peart	863
Lyddon v. Ellison	376	McCall v. Coover	231
v. Moss	869	v. Harrison	244
Lyell v. Kennedy	863, 865	v. Hinkley	592
Lyford v. Thurston	137, 217, 828	v. Parker	33
Lygon v. Lord	615	v. Peachy	460, 918
Lyles v. Hattan	468	v. Rogers	828
Lyman v. Parsons	508	McCallam v. Carswell	863
Lyn v. Ashton	679	McCall's Estate	471
Lynch v. Cox	126	McCalmont v. Rankin	226
v. Dearth	237	McCammon v. Pettitt	138
v. Swayne	520	McCampbell v. McCampbell	562
Lyne, <i>Ex parte</i>	414	McCandless v. Warner	82
v. —	648, 652	McCandless's Estate	843
v. Crouse	661	McCandlish v. Keen	235
v. Guardian	182	McCann v. Randall	277, 820 a
Lyne's Ex'rs v. Crouse	652	McCants v. Bee	199
Lynn v. Beaver	94	McCarogher v. Whieldon	773, 806
v. Bradley	639	McCartee v. Orph. Asy. Soc.	38, 748
v. Lynn	134	v. Teller	34
Lynn's Appeal	540	McCartee v. Cornel	855
Lyon v. Baker	432, 904	McCarthy v. Decaix	184, 851
v. Foscue	918	v. Gould	69
v. Lyon	195, 205, 428	v. McCarthy	511 a, 863
v. Marclay	863	v. McCartie	562
v. Richmond	184, 226	v. Tyle	861
v. Saunders	184	McCartin v. Traphagen	848
v. Swayne	680	McCartney v. Bostwick	17, 126, 142, 149, 240
Lyons v. Beard	918	v. Calhoun	195
v. Bodenhamer	217	v. Ridgway	163
v. Chamberlin	468	McCarty v. Ball	855
v. Jones	602 v	v. Blevins	67
Lypet v. Carter	569, 570	v. Pruet	232
Lysaght v. Royse	511 a	McCaskey v. Graff	215
Lyse v. Kingdom	457, 462, 520, 818, 876, 877, 900	McCaskill v. Lathrop & Co.	815 c
Lyster v. Burroughs	122	McCauly v. Givens	757
Lytle's Appeal	680	McCauseland's Appeal	918
		McCaw v. Blunt	918
		v. Galbraith	64, 131, 305, 327, 436
		McClain v. McClain	226
		McClanahan v. Henderson	538
		McClane v. Shepherd	865
		McClean, <i>Re</i>	52
		McClellan v. McClellan	52
		McClelland v. Norfolk So. R. Co.	225
		McClintie v. Ochiltree	655
		McClintock v. Irvine	357
		McClug v. Lecky	591
		McClure v. Miller	98, 213
		v. Purcell	165
		v. Raben	183
		McClurg v. Wilson	520
		McCluse v. Doak	132
		McColghan v. Hopkins	585
		McCollough v. Sommerville	585
		McComas v. Long	128
		McComb v. Frink	225
		McCombie v. Davis	243
		McCord v. O'Chiltree	701, 724, 748
		McCormick v. Garnett	632
		v. Grogan	181
		v. Malin	187
		McCosker v. Brady	230, 305, 341
		v. Golden	668
		McCown v. Jones	237
		McCoy v. Horwitz	456

M.

M., *In re*

Maberly v. Turton	249, 255, 615
Mabie v. Bailey	82
McAdam v. Logan	294
McAfee v. Ferguson	213
McAlister v. Burgess	705
McAllister v. Barry	171
v. Commonwealth	463
v. Marshall	591
v. Montgomery	136
McAlpin v. Burnett	232, 238, 239
McAlpine v. Potter	917
McArte v. Engart	187
McArthur v. Gordon	142
v. Robinson	790
v. Scott	873
Macartney v. Blackwood	872
Macaulay v. Phillips	630, 632, 633, 639, 645
McAuley v. Wilson	724, 726
McAuley's Estate	83, 163
McBee v. Loftes	221
McBride v. McIntyre	260, 281, 877, 910
v. Porter	733
v. Smyth	310 a, 652
McBurney v. Carson	456

[References are to sections.]

McCoy v. Poor	860, 861	v. Doe	328
v. Scott	245	McGillivray, <i>Re</i>	275
McCrahen v. McCrahen	918	McGinity v. McGinity	137
McCrary v. Clements	864	McGinn v. Schaeffer	890
McCraw v. Davis	189	McGinnis v. Jacobs	137
McCrea v. Purmont	843, 855	McGinness v. Barton	75
McCreary v. Bomberger	253	McGirr v. Aaron	731, 748
v. Gewinner	82, 163	McGivney v. McGivney	141, 870
McCreary v. Hamlin	780	McGlaughlin v. McGlaughlin	568, 570
McCrocklin v. McCrocklin	672	McGlinsey's Appeal	665, 666
McCroory v. Foster	127, 640	McGovern v. Knox	82, 126, 144
MacCubbin v. Cromwell	79, 82, 84, 85, 259, 261, 262, 404, 416, 420, 890	McGowan v. Gowan	126, 132, 133, 181
McCue v. Gallagher	139	McGrath, <i>In re</i>	603
McCulloch v. Cowher	172	McGraw v. Daly	124
v. Hutchinson	591	McGregor v. Gardner	206
McCullough v. McCullough	453	v. Hall	602 d, 602 j, 602 l
McCullough's Appeal	514	v. McGregor	884
McCullum v. Coxie	330	McGuire v. Devlin	863
McCurdy's Appeal	926	v. McGowan	126, 139
McDearmon v. Burnham	79	v. Ramsey	126
McDermith v. Voorhees	76, 81	McHan v. Ordway	248
McDermott v. Kealy	616	McHardy v. Hitchcock	826, 827
v. Lorillard	782	Machemer's Estate	448
v. Strong	594	McHugh v. McCole	448, 715, 729
McDevitt v. Frantz	169	McIlvaine v. Smith	386 a, 555
McDonald v. Black	118	McIlvaine v. Gether	512
v. Bryce	160, 397	McIlwraith v. Hollander	223
v. Donaldson	82	McIntire v. Agricultural Bank	602 l
v. Hanson	774	v. Hughes	109, 111
v. King	500	v. Janesville	38
v. May	230	v. Knowlton	678
v. McDonald	132, 863	v. Lanesville	724
v. Neilson	187	v. Prior	861
v. Richardson	430	v. Skinner	75
v. Sins	863	McIntire Poor School v. Zanesville Canal Co.	38, 43, 121, 240, 460, 698, 700, 742
v. Walgrove	546	McIntosh's Estate	520
v. Walker	339, 340, 494	McIntyre, <i>In re</i>	568
McDonnell v. Eaton	627	v. Farmers' Bank	87
v. Harding	417, 443, 463	Mack's Appeal	701
v. Hesilrigde	213	McKamey v. Thorp	127, 815 c
McDonough v. McDonough	736	Mackason's Appeal	555
v. Murdoch	41, 42, 43, 126, 142	Mackay v. Coates	328
McDougald v. Cary	341	v. Douglass	108
v. Dougherty	594	v. Green	562
McDowell v. Brantley	817	v. Langley	602 ff
v. Caldwell	618, 911, 918	v. Martin	215
v. Goldsmith	229, 230, 863	McKay, <i>In re</i>	336
v. Lawless	562	v. Carrington	38, 231
v. Peyton	182	McKee v. Griggs	79
v. Potter	639, 863	v. Judd	69
Macduff, <i>In re</i>	712	v. Lamon	206
McElhenny's Appeal	469, 471, 891, 910	v. Vail	171
McElvoy v. McElvoy	152, 312, 359	Macken v. Hogan	438
Macey v. Shurmer	112	McKenna, <i>In re</i>	122, 850
McFadden v. Hefley	449	McKenna v. Phillips	240, 668, 672
v. Jenkins	86, 96, 102, 105	McKenney v. Burns	162
McFadin v. Catron	189, 295	Mackenzie v. Mackenzie	585
Macfarland v. Heim	658	v. Taylor	900
McFarland's Appeal	511 a	McKenzie v. Sumner	299
McFerrin v. White	680	McKeown v. Collins	233
McGachen v. Dew	438, 467, 878, 885	v. McKeown	137
McGar v. Nixon	456	McKern v. Handy	891, 894
McGarger v. Nogles	320, 652	Mackey v. Maturin	665
McGaughey v. Brown	195	McKey, <i>Ex parte</i>	618
McGee v. Wells	126	Mackie v. Cairnes	591
McGeorge v. Bigstones Gap Imp. Co.	411	v. Mackie	439, 450, 551
McGibbon v. Abbott	253, 254	McKillip v. McKillip	235
McGill, <i>In re</i>	238		

[References are to sections.]

McKim v. Aulbach	426	McNeill v. McNeill	248
v. Blake	845	McNeille v. Acton	50, 225, 454, 800, 810
v. Doane	277, 284	McNeilledge v. Galbrath	251, 255
v. Duncan	918	McNish v. Guenard	209, 303, 310
v. Glover	467	Macomb v. Kearney	766
v. Handy	294	Macon, &c. Railway v. Parker	575
v. Hibbard	468	Macpherson v. Macpherson	550
v. Voorhies	72	McPherson v. Cox	276
McKinley v. Irvine	195, 881	v. Rollins	104
McKinney v. Pinkard	187	v. Snowden	357, 366, 371, 374
v. Rhoades	593	McQueen v. Farquhar	511 a, 769, 830
Mackintosh v. Ogilvie	72	v. Lilly	568
v. Townsend	741	v. Meade	350
McKissick v. Pickle	227	McRaeny v. Johnson	330
McKinney v. Brady	232, 239	McRae v. Huff	215
v. Taylor	228, 869	McRee v. Means	112, 380
v. Walsh	468, 471, 472, 612, 613, 614, 615, 918	McKemmon v. Martin	239
McKonkey's Appeal	113, 119	McRoberts v. Carneal	246, 869
Mackrell v. Walker	920	v. Moudy	733
Makreth v. Symmons	38, 217, 232, 233, 235, 236, 239	McTighe v. Dean	827
v. Walnesley	178	McVey v. Boggs	636
Mackworth v. Hinxman	380	McWhorter v. Agnew	498
McLain v. School Directors	732, 748	v. Benson	919
McLanahan v. McLanahan	75	v. Wright	586
v. Wyant	570	McWilliams v. Nisby	68
McLane v. Johnson	166	Macy v. Williams	225
v. McDonald	546	Maddeford v. Austwick	178, 210
Maclaren v. Stainton	72	Maddison v. Andrew	139, 144, 251, 507, 510
McLaren v. Stainton	545, 556 a	Maddocks v. Wren	243
McLarren v. Brewer	127, 128	Maddox v. Allen	858
Maclary v. Reznor	178	v. Maddox	512, 515, 555
McLaughlin v. Detroit	545	v. Staine	379
v. Fulton	133, 828	Mades v. Miller	910
McLaurie v. Parthlow	82, 84	Madox v. Jackson	250, 878
McLaurin v. Fairly	75, 832, 840	Maennel v. Murdock	590, 591
McLay v. Love	662, 676, 685	Maffit v. Rynd	86
McLean v. Wade	715, 748	Magdalen College v. Att.-Gen.	737, 866
McLearn v. McLellan	232	Magdalena Steam Nav. Co., <i>In re</i>	754
McLemore v. Good	541, 556	Magee v. Carpenter	602 d
McLennan v. Sullivan	126	v. Cowperthwaite	918
Macloed v. Annesley	457	Magees, <i>In re</i>	603
McLeod v. Bullard	171	Magill v. Brown	46, 696, 699, 700, 701, 704, 715, 721, 730, 748
v. Drummond	225, 809, 810, 811, 814, 815	Maginn v. Green	917
v. Evans	122, 828	Magruder v. Peter	232, 238, 501
v. First National Bank	828, 836	Maguiac v. Thompson	184
McLoud v. Burchall	562	Maguire v. Scully	360, 361
v. Roberts	632	Magwood v. Johnston	661
McLouth v. Hunt	465, 545	Mahan v. Mahan	109, 111
McMahill v. McMahill	613	Mahar v. O'Hara	576
McMahon v. Featherstonhaugh	828	Mahlor v. Lees	226
v. Harrison	292	Mahon v. Savage	255, 256, 699
McMeekin v. Edmonds	594	v. Stanhope	539, 777
McMillan v. Deering	253	Mahony v. Hunler	262
McMonagle v. McGlinn	861	Mahorner v. Harrison	126
McMullen v. Beatty	304	Mais, <i>In re</i>	275
v. O'Reilly	810	Maitland v. Backhouse	201
v. Scott	918	v. Bateman	440
McMurray v. Montgomery	416, 418, 421	v. Irving	201
McMurry v. Mobley	206	v. Wilson	219
Macnab v. Whitbread	112	Major v. Herndon	93
McNair v. Pope	171	v. Lansley	647, 656
McNair's Appeal	225, 421	v. Sommes	680, 685
McNamara v. Garrity	126	Makepeace v. Rogers	863
v. Jones	910	Malcolm v. O'Callaghan	513, 514, 517, 910
McNeil v. McDonald	539	Malins, <i>In re</i>	774
McNeilage v. Holloway	640	v. Barker	112
		v. Keighley	112, 116

[References are to sections.]

Malins v. Malin	38, 82, 137, 189, 227	March v. Head	633, 636
Mallabar v. Mallabar	150, 151, 900	v. Russell	467, 846, 851, 867
Mallalieu v. Hodgson	212	Marcy v. Amazeen	82
Mallet v. Smith	499	Mare v. Sandford	591
Mallory v. Mallory	127	Mareck v. Minneapolis Trust Co.	787
Malone v. Geraghty	845, 878	Marfield v. Ross	602 z
v. O'Connor	112	Margetts v. Barringer	648
Maloney v. Kennedy	664, 668	v. Perks	418
v. Kernan	217	Marigny v. Remy	593
v. L'Estrange	229, 230	Marine Fire Ins. Co. v. Early	232
v. Tilton	163	Marker v. Marker	540, 851
Maltby's Case	179	Markle's Estate	195
Malzy v. Edge	261, 267	Markley v. Singletary	648
Man v. Warner	559	Marks v. Morris	602 ee
Manahan v. Gibbons	416	v. Semple	910, 917
Manby v. Bewicke	863	Markwell v. Markwell	104
Manchester v. Bonham	903 a	Marlborough, Duke of, <i>In re</i>	162
v. Manchester	328	Marlborough v. Godolphin	93, 252, 383, 507, 508, 714
v. Mathewson	855	v. St. John	477, 552
v. Sahler	680	Marles v. Cooper	218
Manchester Royal Infirmary, <i>In re</i>	453	Marlow v. Johnson	602 ff
Manchester School Case	725	Maroney v. Maroney	133
Manderson's Appeal	815 b	Marples v. Brainbridge	512, 516
Mandeville v. Solomon	211	Marr v. Gilman	351
Manes v. Durant	213	v. Peay	270
Mangles v. Dixon	438, 831	Marrett v. Paske	428
Manhattan Bank v. Walker	122	Marrick v. Grice	667
Manice v. Manice	305	Marriott v. Kinnersley	402, 845
Manion v. Titsworth	641, 863, 865	v. Marriott	182
Manly v. Slason	232, 233, 236, 237, 239	Marryatt v. Marryatt	280, 826
Mann v. Ballott	733	v. Townley	359, 361, 364, 366, 371, 374
v. Betterly	187, 189	Marsden's Estate	275
v. Darlington	212	Marsden's Trusts, <i>In re</i>	511 a
v. Ricketts	863	Marsh, <i>In re</i>	511 c
Mannen v. Bradberry	843	v. Alford	680
Manners v. Furze	818	v. Att.-Gen.	724
Manning v. Albee	173	v. Hunter	469
v. Cox	330, 520	v. Marsh	562, 647, 666, 684
v. Manning	429, 462, 464, 468, 900, 916	v. Means	700, 724, 726
v. Pippen	226	v. Oliver	863
v. Spooner	563	v. Putnam	72
v. Thesiger	881, 885	v. Renton	721, 725
v. Wopp	118	v. Turner	232
Mannings v. Randolph	556	v. Wells	536
Mannix v. Purcell	142, 169, 477	v. Wheeler	160, 765
Mansell v. Hedges	208	Marshall, <i>Ex parte</i>	337
v. Mansell	217, 241, 344, 509 b, 784, 828, 844	Marshall, <i>Re</i>	511 c
Mansell v. Vaughn	414, 491, 505	v. Baltimore & Ohio Railway	214
Manser v. Dix	768	v. Blew	542
Mansfield v. Dameron	237	v. Bousley	366
v. Mansfield	602 h, 672	v. Brenner	451
v. McGinness	866	v. Carson	195
v. Shaw	816, 818	v. Christmas	232, 237
Mansfield's Case	189	v. Collett	184
Manson v. Bailie	401, 432	v. Crowther	551
Mant v. Leith	458, 460, 467, 655	v. Fisk	299, 302
Manuf. & Mech. Bank v. Bank of Penn.	589	v. Fleming	137
Manufacturers Nat. Bank v. Swift	44	v. Fowler	633, 636
Mapp v. Elcock	152, 157	v. Frank	219
Mapps v. Sharpe	199, 602 v	v. Gibbings	632
v. Tyler	766	v. Holloway	169, 393, 395, 619, 906, 913
Mara v. Browne	846	v. Lovell	55
v. Manning	969	v. Miller	680
Marbury v. Ehlen	225, 814	v. Sladden	282, 297, 329, 539, 769, 777
March v. Berrier	611	v. Stevens	195, 655, 661, 782
v. Eastern R. R. Co.	554	Marshall's Estate	305, 451, 865

INDEX TO CASES CITED.

ci

[References are to sections.]

Marsteller's Appeal	918	Massey v. Banner	406, 441, 443, 444, 463,
Martelli v. Holloway	381		901, 914
Martidall v. Martin	693	v. Davies	206
Martin, <i>Re</i>	622	v. Fisher	44
v. Aliter	602 d	v. Huntington	98, 99
v. Baird	137	v. McIlwaine	217
v. Baldwin	815 b	v. O'Dell	863
v. Bell	648, 649	v. Parker	646, 647, 648, 652, 653, 671
v. Blight	172	v. Sherman	112
v. Coles	243	Massie v. Watts	70, 71, 72
v. Fort	299, 655	Massy v. Stout	276
v. Frantz	863	Master v. DeCroismar	64, 364
v. Frye	562, 563	v. Fuller	657, 658
v. Funk	97, 99	Masters v. Masters	572, 573
v. Graves	167	Mastin v. Barnard	262
v. Greer	127, 836	Mather v. Bennett	863
v. Jackson	863	v. Norton	796, 801
v. Joliffe	830	v. Thomas	338
v. Margham	388, 396, 399, 709, 725,	Mathers v. Prestman	780
	738	Mathes v. Bennett	463
v. Martin	71, 72, 142, 238, 364, 427,	Mathew v. Hanbury	171
	629, 631, 635, 843	Mathews v. Bliss	178, 180
v. McCord	748	v. Brise	443, 444, 461, 463
v. Mitchell	645	v. Guess	639
v. Morgan	178, 179	v. Heyward	458
v. Parnell	881	v. Keble	393
v. Persse	898	v. Masters	706
v. Ramsey	100	v. Mathews	421
v. Rayborn	454, 468	Mathias v. Mathias	841
v. Read	873	Mathis v. Mathis	918
v. Remington	127	Mathison v. Clarke	431, 432, 904
v. Sedgwick	438	Matson v. Abbey	856
v. Sherman	645	Mattox v. Weand	237
v. Smith	334, 861	Matthew v. Brise	871
v. Swannell	248	v. Holman	610
Martin's Appeal	552, 618	v. Marow	724
Martindale v. Picquot	416	Matthews v. Bagshaw	905
Martzell v. Stauffer	843	v. Dellicker	827 a
Marvel v. Phillips	466	v. Dragand	195, 915
Marvin v. Brooks	133	v. Leaman	85
Marwood v. Darell	301	v. McPherson	328, 329
Maryland Ins. Co. v. Dalrymple	199	v. Ward	6, 17, 299, 301, 321, 327, 328,
Mason, <i>In re</i>	397		349, 436, 520
v. Baker	165	Matthie v. Edwards	602 o, 602 s, 602 ee,
v. Bank of Commerce	766, 794		770, 782
v. Chambers	70	Mattocks v. Moulton	281, 460
v. Crosby	171, 230	Mattoon v. McGrew	145
v. Dry	611	Mattox v. Eberhart	780
v. Jones	508, 620	Maud v. Maud	112
v. Limbury	112	Maul v. Rader	210, 223, 851
v. Martin	428, 785	v. Rider	851
v. Mason	347, 508, 511, 611, 858, 859	Mauldin v. Armstead	264, 343, 602 e, 602 m
v. McNeill	639, 640	Maundrell v. Maundrell	511 c
v. Morgan	640	Maundy v. Maundy	182
v. Morley	446	Maunsell v. Hedges	208
v. Pewabic M. Co.	242	Maupin v. Delany	618
v. Pomeroy	466	Maverick, &c. Soc. v. Lovejoy	243
v. Roosevelt	918	Maw v. Pierson	246
v. Smallwood	299	Maxwell v. Barringer	127, 498, 863
v. Wait	404, 409, 606, 609	v. Finnie	275
v. Wheeler	253	v. Kennedy	229, 230
v. Whitehorn	443, 444	v. Pittinger	191
v. Williams	189	v. Wettenhall	600
Mass. Hosp. v. Amory	275, 286	May v. Armstrong	900
v. Fairbanks	607	v. Frazer	404, 500
Mass. Soc. for Prevention of Cruelty to		v. May	248, 274, 275
Animals v. Boston	712	v. Selby	884
Massenburgh v. Ash	379, 382	v. Steele	126
Massett v. Pocock	894	v. Taylor	328

[References are to sections.]

May's Heirs <i>v.</i> Frazer	779	Meikel <i>v.</i> Greene	39
Mayall <i>v.</i> Mayall	610, 764	Meinertzhagen <i>v.</i> Davis	55, 286, 297
Mayberry <i>v.</i> Neely	649	Meldon <i>v.</i> Devlin	545, 848
Maybury <i>v.</i> Brien	323	Meldrum <i>v.</i> Scorer	873
Mayd <i>v.</i> Field	652	Melery <i>v.</i> Cooper	238
Mayer <i>v.</i> Galluchat	432, 661, 895	Melick <i>v.</i> Voorhees	845
<i>v.</i> Gould	848	Mellick <i>v.</i> Asylum	706
<i>v.</i> Montreton	509, 826, 827, 877, 884	Melling <i>v.</i> Leak	866
<i>v.</i> Pullan	602 <i>e</i>	Mellingen <i>v.</i> Bausmann	642
<i>v.</i> Townsend	360	Mellish <i>v.</i> Robertson	184
Mayfield <i>v.</i> Clifton	639	Mellish's Estate	850
<i>v.</i> Donovan	275	Mellor <i>v.</i> Porter	52
<i>v.</i> Forsyth	79, 84, 166, 865	Meloney, <i>In re</i>	280
<i>v.</i> Kegour	329	Memphis Barrel Co. <i>v.</i> Ward	242
Mayham <i>v.</i> Coombs	232, 236	Mence <i>v.</i> Mence	157
Mayhew <i>v.</i> Crickett	210	Mendenhall <i>v.</i> Leivy	658
Maynard <i>v.</i> Cleveland	437 <i>a</i>	<i>v.</i> Mower	276 <i>a</i>
<i>v.</i> Tyler	189	Mendes <i>v.</i> Guedella	412, 418, 442
<i>v.</i> Williams	676	Mendon <i>v.</i> Merrill	98
Maynel <i>v.</i> Massey	581	Menier <i>v.</i> Hooper's Tel. Works	242
Mayor <i>v.</i> Davenport	260	Mennard <i>v.</i> Welford	275, 284, 292
<i>v.</i> Nixon	732	Mer. Man. Co. <i>v.</i> Smith	586
<i>v.</i> Williams	223	Mercantile Nat. Bank <i>v.</i> Parsons	225
Mayor of Coventry <i>v.</i> Att.-Gen.	42, 275	Mercein <i>v.</i> People	672
Mayor of London's Case	694, 699	Mercer <i>v.</i> Hall	517
Mayor of Lyons <i>v.</i> Advocate-General of Bengal	727	<i>v.</i> Stock	77, 140
Mayor of Lyons <i>v.</i> East India Co.	741	Mercers' Co. <i>v.</i> Att.-Gen.	725
Mayor of South Molton <i>v.</i> Att.-Gen.	745	Merchant Tailor's Co. <i>v.</i> Att.-Gen.	725
Maywood <i>v.</i> Lubcock	218	Merchants' Bank, <i>In re</i>	275, 280
Mazelin <i>v.</i> Rouyer	277	Merchants' Nat. Bank <i>v.</i> Haverhill Iron Works	790
Mazyck <i>v.</i> Vanderhost	380	Merchants' Ins. Co. <i>v.</i> Abbott	790
Meacham <i>v.</i> Sternes	596, 918	Meredith <i>v.</i> Heneage	112, 113, 115, 116, 153
Meachey <i>v.</i> Young	612	Merest <i>v.</i> James	13, 347
Mead <i>v.</i> Langdon	183	Merket <i>v.</i> Smith	127
<i>v.</i> Merritt	72	Merino <i>v.</i> Munoz	127
<i>v.</i> Orrery	217, 225, 809, 810, 811, 815	Merkel's Estate	462
<i>v.</i> Phillips	591	Merlin <i>v.</i> Blagrove	385, 476 <i>a</i> , 922, 928
Meads <i>v.</i> Martin	658	Merriam <i>v.</i> Harsen	667
Meakings <i>v.</i> Cromwell	64, 499, 501	<i>v.</i> Hassam	860, 864
Means <i>v.</i> Rosevear	770	Merrick's Estate	462, 463, 468
Meason <i>v.</i> Kaine	134	Merrill <i>v.</i> Fowle	602 <i>s</i>
Mebane <i>v.</i> Mebane	386 <i>a</i>	<i>v.</i> Moore	918
Mechanics' Bank, <i>In re</i>	411, 413, 760	<i>v.</i> Neill	599
<i>v.</i> Der Bolt	816	<i>v.</i> Peaslee	95
<i>v.</i> Edwards	347	<i>v.</i> Smith	127
<i>v.</i> Gorman	592	<i>v.</i> Swift	593
<i>v.</i> Seton	242	Merriott <i>v.</i> Givens	602 <i>gg</i>
Meconkey's Appeal	511 <i>c</i>	Merritt <i>v.</i> Farmers' Ins. Co.	336, 337
Medbury <i>v.</i> Watson	173	<i>v.</i> Jenkins	918 <i>n</i>
Medecai <i>v.</i> Parker	520	<i>v.</i> Lambert	202
Medland, <i>In re</i>	457	<i>v.</i> Lyon	664
Medley <i>v.</i> Davis	232	<i>v.</i> Merritt	448, 455
<i>v.</i> Horton	347, 670	<i>v.</i> Wells	232, 239
Medlicott <i>v.</i> O'Donnell	228, 861	<i>v.</i> Wilson	599
Medworth <i>v.</i> Pope	66	Merriweather <i>v.</i> Booker	633
Meecham <i>v.</i> Steetle	305	Merry <i>v.</i> Abney	277
Meek <i>v.</i> Briggs	827 <i>a</i>	<i>v.</i> Rvves	517, 519
<i>v.</i> Kettlewell	98, 100, 101, 102, 105, 111	Mersey Docks, &c. <i>v.</i> Gibbs	744, 914
Meeker <i>v.</i> Puvallup	705, 720	Mershon <i>v.</i> Duer	324
Meeting St. Bapt. Soc. <i>v.</i> Hail	312, 734, 748	Mervin, <i>In re</i>	382
Megargal <i>v.</i> Saul	232	Meserole <i>v.</i> Meserole	398
Megargel <i>v.</i> Naghie	310 <i>a</i> , 652	Mesgrett <i>v.</i> Mesgrett	511, 517, 518, 519
Meggison <i>v.</i> Moore	112, 114, 116	Messena <i>v.</i> Carr	547
Meggott <i>v.</i> Meggott	871	Messenger <i>v.</i> Clark	664
Megod's Case	17	<i>v.</i> Gloucester	694
Mehrtens <i>v.</i> Andrews	467, 869	Messingbred, <i>Re</i>	457
Meigs <i>v.</i> Dimock	232	Mestaer <i>v.</i> Gillespie	181
<i>v.</i> Meigs	103	Metcalf <i>v.</i> Cook	655, 661

INDEX TO CASES CITED.

ciii

[References are to sections.]

Metcalf v. Framingham Parish	451	Miller v. Bingham	646, 652, 653
Metcalf v. Hutchinson	581	v. Blöse	133, 141, 143
Metford School	156	v. Brown	680
Methan v. Devon	86, 93	v. Chittenden	384, 748
Methodist Church v. Jaques	655, 660, 665	v. Clark	82
v. Remington	46, 715, 724, 728, 731, 748	v. Congdon	263, 574
v. Stewart	413	v. Conklin	592
v. Warren	748	v. Cotton	226
Methodist Soc. of Georgetown v. Bennett	518	v. Cramer	920
Method v. Turner	615	v. Davis	165, 612
Metropolitan Nat. Bank v. Campbell C. Co.	828	v. Evans	774, 779
v. Rogers	147	v. Fenton	879
Meure v. Meure	366, 371, 372	v. Franciscus	230
Meux v. Bell	105	v. Gable	733, 734, 748
v. Howell	590	v. Harwell	562, 573
v. Maltby	71, 72, 885	v. Hine	685
Mews v. Mews	664	v. Hull	602 t, 602 u, 602 aa
Meyer v. Holle	131	v. Knight	282
v. Simonson	457, 458, 551	v. Lerch	42, 45
Meyer's Appeal	918	v. Macomb	380
Michael v. Baker	32	v. McIntire	228, 855
v. Jones	437 a	v. Meetch	248, 262, 308, 499
Michael's Trusts, <i>In re</i>	671	v. Miller	547, 672
Michell v. Michell	671	v. Morrison	863
Michigan State Bank v. Gardner	243	v. Pearce	181
Michoud v. Girod	195, 197, 205, 207, 229, 230, 745, 855	v. Porter	697, 715, 731, 748
Middaugh v. Fox	865	v. Priddon	284, 806, 808
Middlebrook v. Merchants' Bank	331	v. Proctor	441, 458, 927
Middleton v. Clithrow	701	v. Race	837
v. Dodswell	484, 818, 819	v. Rosenberger	351
v. Middleton	169, 181, 183	v. Rowan	705, 712
v. Reay	293	v. Rutland, &c. Railway	757
v. Spicer	61, 327, 427, 437, 701	v. Scammon	167
Midland Counties Railw. Co. v. Westcombe	494	v. Sharp	82
Midland Great Western Railw. v. Johnson	184	v. Stanley	538
Midlcott v. O'Donel	855	v. Stokely	137
Midmer v. Midmer	138	v. Stump	324
Miggett's Appeal	195	v. Texas & Pac. Ry. Co.	610
Mikel v. Mikel	914	v. Thatcher	75
Milbank v. Collier	885	v. Welles	178
Mildmay v. Mildmay	220	v. Wetherby	685
Miles v. Bacon	596, 891, 910	v. Whittier	911
v. Durnford	225, 809, 810, 811	v. Williams	664
v. Ervin	202	v. Williamson	655, 660, 810
v. Fisher	320	v. Wilson	162
v. Knight	765	Miller's Case	17
v. Leigh	569	Estate	606, 609, 639, 918
v. Neave	270	Millet v. Rowse	636
v. Thorne	860	Milligan v. Mitchell	734, 816
v. Wheeler	205, 865	v. Pleasants	457, 472
Miles's Will, <i>In re</i>	455	Milliken v. Ham	126
Milhous v. Dunham	458, 814	Milling v. Leak	860
Millar v. Craig	923	Millinger v. Bausman	676
Millard v. Eyre	275, 282, 283, 293	Mills v. Argall	599
v. Hathaway	126, 137, 863	v. Banks	578, 581, 597, 768
Millard's Case	219, 521, 828	v. Britton	545
Milledge v. Lamar	546	v. Davison	384
Millen v. Guernard	547	v. Dugmore	773
Miller v. Atkison	700, 720, 748	v. Farmer	156, 693, 705, 708, 714, 719, 724, 725, 729, 739
v. Antle	215	v. Hoffman	452
v. Argyle	602 ee	v. Hurd	166
v. Baker	145, 863	v. Mills	428, 440, 451, 455, 467, 547, 848
v. Beverleys	324, 464, 468, 910, 912, 918	v. Newbury	732
		v. Osborne	438, 453
		v. Post	828
		v. Roberts	616
		v. Swearingen	828
		v. Taylor	783

[References are to sections.]

Millspaugh v. Putnam	98	Moddewell v. Keever	599
Milno's Succession	443	Modrell v. Riddle	137
Milner v. Colmer	633	Moffatt v. Bingham	864
v. Freeman	126, 147	v. McDonald	127, 836
v. Hyland	828	v. McDowall	585
v. Rucker	206	v. Tuttle	815 b
v. Stanford	147	Mogg v. Hodges	57
v. Turner	35	Mogg v. Mogg	385, 390
Milner's Settlement, <i>Re</i>	671	Moggeridge v. Grey	275
Milnes v. Slater	563	v. Thackwell	156, 690, 693, 705, 714, 719, 722, 724, 729, 739
Milroy v. Lord	96, 100, 102	Mohn v. Mohn	86
Milington v. Mulgrave	508, 532, 534	Mohun v. Mohun	747
Mimms v. Delk	490	Moir v. Brown	273
Mims v. Chandler	133	Moke v. Norrie	59, 297
v. Macklin	299	Mole v. Mole	616
Minchin v. Minchin	76	v. Smith	347
v. Nance	122	Mollan v. Griffith	562, 573
Mines v. Lockett	232, 237	Molony, <i>In re</i>	901
v. Mason, &c. R. R.	232, 237	v. Kennedy	626
Minet v. Hyde	630	v. Kernan	206, 219
v. Vulliamy	741	Molton v. Camroux	189
Minneapolis Trust Co. v. Menage	453	v. Morton	684
Minor v. Wicksteed	569	Molum v. Molum	891, 894, 896
Minot v. Amory	551	Molyneux v. Fletcher	145
v. Boston Asylum	730	Monahan v. Gibbons	421
v. Mitchell	135, 172, 215	Monday v. Vance	104
v. Paine	545	Monell v. Monell	416, 419, 421
v. Prescott	783, 785	Money v. Herrick	75, 132, 133, 137, 181
v. Thompson	547	Money Penny v. Bristow	871
Minton v. Pickens	828	v. Dering	376, 385, 390
Minturn v. Seymour	97, 98, 367	Monk v. Mawdesley	511 c
Minus v. Cox	462, 568, 780, 782, 894	Monks v. Monks	903 a
Mirhouse v. Scaife	569, 570, 573	Monro v. Allaire	195, 199
Missionary Society	730, 748	Monroe v. James	262
Mitchell, <i>Re</i>	875	Monroe Cattle Co. v. Becker	127
v. Adams	264	Montacute v. Maxwell	226
v. Beal	590	Montagu, <i>In re</i>	603
v. Bower	584	v. Pacific Bank	122
v. Bunch	72	Montague v. Dawes	199, 495, 602 w, 602 x, 602 gg
v. Colburn	437 a, 539	v. Garnett	843
v. Colglazier	127	v. Hayes	82
v. Corbett	769	Montefiore, <i>Ex parte</i>	836
v. Gates	647	v. Behrens	630
v. Gazzam	586	v. Browne	784
v. Holmes	918	Montesquieu v. Sandys	188, 202
v. Kingman	35	Montford v. Cadogan	260, 261, 467, 532, 534, 847, 848, 849, 877
v. Mitchell	578, 584, 684	Montgomery v. Agricultural Bank	661
v. Murphy	920	v. Bath	873, 882
v. Nixon	291	v. Beavan	929
v. O'Neil	137	v. Commercial Bank	588
v. Otey	677	v. Dorion	55
v. Pitner	282	v. Eveleigh	661
v. Rice	262	v. Hobson	230
v. Sevier	628	v. Johnson	261
v. Stiles	590	v. McElroy	569
v. Thomson	869	v. McEwen	602 gg
v. Whitlock	437 a	v. Milliken	500
v. Winslow	68	Montgomery's Appeal	918 n
Mitchell's Estate	560	Montpelier v. E. Montpelier	275
Mitchelson v. Piper	474	Montpelier Seminary v. Smith's Estate	729
Mitchum v. Mitchum	205	Moody, <i>In re</i>	618
Mitford v. Mitford	239, 633, 635, 641	v. Farr	328
v. Reynolds	41, 47, 61, 697, 704, 706, 712, 720, 741	v. Fulmer	500, 518
Mittenberger v. Schlegel	576	v. Gay	72
Mix v. King	181	v. Vandyke	195, 205, 500
Mobile, &c. Railway v. Tolman	754, 757		
Mobile Life Ins. Co. v. Randall	828		
Mocatta v. Murgatroyd	347		

INDEX TO CASES CITED.

CV

[References are to sections.]

Moody & M. Co. v. Trustees	467	Morehead v. Brown	918
Moons v. De Bernales	464, 847	Morsland v. Brown	122
Moor's Appeal	924	Moreton v. Harrison	232, 234, 238
Moorecroft v. Dowding	82, 400	Morey v. Herrick	133, 181, 215
Moore, <i>In re</i>	512	Morley v. San Francisco, &c. R. Co.	254, 312
v. Black	871	Morgan, <i>Ex parte</i>	209, 336, 337, 870
v. Blake	877	Morgan, <i>In re</i>	378
v. Brackin	203	v. Flann	661
v. Burnet	17, 328, 520	v. Halford	227
v. Burrows	231	v. Hannas	918
v. Campbell	171	v. Higgins	20
v. Clay	219	v. Homans	432
v. Cleghorn	357	v. Mallson	96, 97, 101
v. Crawford	147, 169	v. Morgan	324, 397, 450, 451, 547, 551, 584, 871
v. Crofton	107, 108, 109	v. Otey	456
v. Darton	87	v. Rogers	299
v. Dimond	254, 511 b	v. Stephens	907
v. Ellis	673	v. Thomas	358
v. Eare	443	Moriarty v. Martin	112, 254
v. Frowd	432, 894, 895, 904	Morice v. Durham	116, 150, 157, 159, 507, 697, 703, 711, 712
v. Green	135	Morison v. Morison	907, 910
v. Halcombe	233, 239	Morley, <i>In re</i>	348
v. Hamerstag	127, 171	v. Bird	136
v. Hamilton	453	v. Hawke	840
v. Harris	653	v. Loughman	189
v. Henderson	880	v. Morley	347, 441, 914
v. Hilton	205	v. Rennoldson	515
v. Horsley	79, 131, 212	Morley's Trusts	337
v. Hussey	48	Mornington v. Keane	122
v. Jackson	349	v. Selby	183
v. Jones	649	Morony v. Vincent	892
v. Lampkin	815 b	Morrell v. Dickey	891
v. Lockett	766	Morret v. Paske	206, 430, 431
v. McGlynn	466	Morrill v. Lawson	878, 881
v. Moore	97, 133, 137, 145, 381, 606, 627, 629, 632, 665, 670, 671, 721, 724, 728, 731, 748, 931	Morrison's Trusts	633
v. Morris	647, 668	Morris v. Burroughs	201
v. Prance	900	v. Clare	131
v. Raymond	238	v. Hanson	143
v. Read	191	v. Joseph	206
v. Robbins	448	v. Kent	272
v. Scarborough	665	v. McCulloch	214
v. Sheppard	863	v. Morris	162, 540, 610, 771
v. Shultz	298, 310, 498	v. Mowatt	562
v. Simonson	477	v. Nixon	206, 226
v. Smith	929	v. Preston	290
v. Stinson	310	v. Remington	72
v. Tandy	421	v. Thompson	748
v. Thornton	633	v. Wallace	456, 459
v. Vinten	878	v. Way	44, 602 a
v. Waco	358	Morris's Appeal	600
v. Zabriskie	918	Morris Canal v. Emmet	174
Moorhead's Estate	520	Morrissey v. Mulhern	658
Moorhouse v. Calvin	208	Morrison, <i>In re</i>	623
Moorman v. Arthur	147	v. Bean	602 gg
v. Crockett	279	v. Beirer	731, 748
Moors v. Wyman	918 n	v. Kelly	296
Mora v. Manning	849	v. Kenstra	447, 463
Moran v. Moran	171, 715	v. McLeod	189, 191
v. Somes	79	v. Moat	67
Moravian Soc., <i>In re</i>	284	v. Morrison	432
Mordecai v. Parker	17, 328	v. Thomas	202
v. Schirmer	499	Morrow v. Peyton	426
Morden v. Chase	299	Morse v. Crofoot	600
More v. Bennett	21	v. Hill	195, 229
v. Calkins	260, 767, 910	v. Mason	680
v. Freeman	672	v. Morse	82
v. Mayhow	219, 220, 221		

[References are to sections.]

Morse v. Royal	195, 197, 209, 228, 428, 861, 869	Muller, <i>In re</i>	468
Mortimer v. Ireland	294, 340, 494, 495	Mulligan v. Mitchell	745
v. Moffatt	541	Mullins v. Mullins	79
v. Picton	455	Mulrein v. Smillie	477
v. Shortall	226	Mulry v. Mulry	277
v. Watts	508, 532	Mulvaney v. Dillon	196
Mortimore v. Mortimore	460	Mumford v. Murray	418, 419, 463, 468, 594, 626, 632, 645
Mortlock v. Buller	169, 176, 498, 507, 539, 770, 775, 777, 779, 781, 784, 787	Mumma v. Mumma	54, 143, 146
Morton, <i>In re</i>	494	v. Potomac Co.	242
v. Adams	458, 910	Mumper's Appeal	891
v. Barrett	305, 891, 894, 910	Munch v. Cockerell	404, 417, 454, 463, 467, 847, 851, 875, 878, 881, 923
v. Naylor	68	Munden v. Bailey	815 a
v. Southgate	511	Mundine v. Pitts	218
v. Tewart	82, 83	Mundy v. Howe	612
Morton and Hallett, <i>In re</i>	339	v. Mundy	871
Morville v. Fowler	412, 701	v. Vattier	598, 602 g
Mory v. Michael	32, 511 c	Munnerlyn v. Augusta S. Bank	122, 443
Mosby v. Steele	37	Munro v. Collins	123
Moseley v. Eastern R. R. Co.	556	Munson v. S. G. & C. R. R. Co.	129
v. Marshal	329, 539, 540, 547	Muntorff v. Muntorff	891
v. Moseley	249, 257	Murdoch v. Finney	438
Mosely v. Garrett	232	v. Hughes	863, 865
Mosely & Eley v. Norman	815 b	Murdoch's Case	199
Moser v. Lebenguth	184	Murdock v. Bridges	712
Moses v. Levi	419, 422, 423	v. Johnson	783
v. Murgatroyd	98, 343, 414, 593, 594, 602 f, 891	Murless v. Franklin	126, 143, 145, 146, 147
Moshier v. Knox College	246 a	Murphey v. Cook	351
Mosley v. Ward	900	Murphy, <i>In re</i>	555
Moss v. Bainbridge	202	v. Abraham	555
v. McCall	647	v. Bell	590
Moss's Appeal	547	v. Bright	685
Moth v. Atwood	183, 187, 188	v. Carlin	114
Mott v. Buxton	305	v. Dallam	748
v. Clark	218, 222	v. Doyle	460
v. Harrington	202	v. Grice	626
Moulton v. De M'Carty	614	v. Hubert	75
v. Haley	143, 676	v. Moore	330
Mounce v. Byars	232, 239	v. Nathans	144
Mountford, <i>Ex parte</i>	613, 617	v. Peabody	126, 139
v. Scott	222	v. Whitney	282
Mousley v. Carr	468, 901	Murphy's Estate	720
Movan v. Hays	76, 79, 165, 226	Murray v. Able	238
Mower v. Hanford	590	v. Addenbrook	380, 381
Moyle v. Moyle	259, 417, 443, 462, 563	v. Ballou	217, 221
Moyse v. Gyles	136	v. Barlee	657, 658, 662, 663
Mozingo v. Ross	863	v. Blatchford	425
Mucholland v. Belfast	770	v. Coster	228
Muckenfoss v. Heath	918	v. Dehon	503
Muckleston v. Brown	84, 90, 93, 151, 160, 165, 216	v. De Rottenham	915
v. Tuller	262, 416, 419, 438, 440	v. Elibank	626, 627, 630, 645
Mudge v. Brown	672	v. Feinour	459, 465, 466, 467
Muffett, <i>In re</i>	548	v. Glass	82, 454, 544, 545, 551
Muggeridge's Trusts	388, 555	v. Green	671
Muir v. Cross	232	v. Lylburn	836, 842
v. Schenck	438	v. Murphy	182
v. Trustees	182	v. Murray	122
Mulcahy v. Kennedy	861	v. Palmer	171, 187, 230
Muldrow v. Fox	499	v. Pinkett	835
Mulford v. Shurk	591	v. Sell	126
v. Winch	205	v. Vanderbilt	199, 207
Mulhallen v. Marum	200, 229, 230	Murrell v. Cox	416, 421, 423, 809
Mulholland v. York	171	Murthwaite v. Jenkinson	305, 308
Mullen v. Bowman	152	Muscogee Lumber Co. v. Hyer	918 a
v. Doyle	428	Muse v. Sawyer	263
v. McKim	137	Musham v. Musham	127
		Muskerry v. Chinnery	530

cvi

Musselman v. Eshelman	205	Naylor v. Godman	378
Mussey v. Mussey	863	v. Wynch	185, 199
v. Noyes	590	Nazareth, &c. v. Lowe	239
Mussoorie Bank v. Raynor	114	Neal v. Black	104
Musters v. Wright	626	v. Bleckley	612, 860
Mut. Acc. Ass'n v. Jacobs	828	v. Maxwell	932
Mutual Life Ins. Co. v. Armstrong	181	Neale, <i>In re</i>	613
v. Everett	248	v. Davies	433
v. Woods	264	v. Haythrop	126
Myatt v. St. Helen's, &c. Railw.	750	v. Neale	185
Myercough, <i>Ex parte</i>	617	Neally v. Ambrose	500
Myers, <i>Re</i>	454, 468	Nearpass v. Newman	104
v. Board of Education	828	Nebraska Nat. Bank v. Johnson	181, 837
v. Jackson	137, 162, 299	Neddy v. Nedby	667
v. McBride	511 c	Needham, <i>In re</i>	259
v. Myers	76, 84, 89, 139, 471, 612,	Needler's Case	849
	627, 910	Needles v. Martin	748
v. Perigal	86	v. Needles	188, 639
v. Trustees of Schools	275	v. Winchester	48
v. Wade	618	Neel v. McElhenry	864
v. Zetelle	456	Noeley v. Anderson	206
Myers's Appeal	206, 918	Neely v. Steele	783
Myetsky v. Goery	685	Neeson v. Clarkson	231
Myler v. Fitzpatrick	246, 907	Neeses v. Burrage	474
		Neff's Appeal	438, 441, 914, 927
N.		Negroes v. Palmer	114
		Neil v. Kinney	232, 239
		Neill v. Keese	81, 127, 138
Nab v. Nab	82, 84, 85, 86, 90	Neilson v. Blight	98, 593
Nace v. Boyer	194	v. Cook	914
Nagle v. Bayler	191	v. Lagow	62, 64, 312, 320
Nagle's Estate	297, 506, 769	Neimawicz v. Gahn	554, 667
Naglee v. Ingersoll	665	Nelson v. Bridport	72, 74
Nail v. Punter	467, 849	v. Callow	506
Nairn v. Majoribanks	477, 552, 913	v. Cornwall	863
v. Prowse	236	v. Davis	299, 305, 312, 357
Naldred v. Gilham	103	v. Duncombe	915
Nance v. Coxse	541	v. Hagerstown Bank	468, 869
v. Nance	122, 457, 460	v. Lee	610
Nanney v. Martin	639	v. McDonald	658
v. Williams	181, 182	v. Oldfield	182
Nantes v. Corrock	189, 662, 663	v. Ratliff	104
Nantz v. McPherson	219	v. Seaman	878
Napier v. Howard	627, 632, 636, 645	v. Stocker	930
v. Napier	626, 632, 636	v. Worrall	137
Narron v. Wilmington & W. R. Co.	765	Nesbitt v. Berridge	188
Nash v. Allen	310	v. Tredennick	129, 196, 538
v. Coates	312	v. Turner	658
v. Minnesota Title Co.	177	Nesmith, <i>In re</i>	910
v. Morely	699, 711, 712	Ness v. Davidson	448
v. Nash	640	Nestal v. Schmidt	135
v. Ober	560	Nester v. Gross	207
v. Preston	322	Nettle's Charity, <i>In re</i>	735
v. Spofford	246 n	Nettleship v. Nettleship	665
Nashville Trust Co. v. Lannon	145, 162	Nettleson v. Stephenson	395, 397
v. Smythe	238	Neustadt v. Joel	596
Nathans v. Morris	918	Nevarre v. Rutton	863
National Bank, &c. v. Lake Shore, &c.		Neves v. Scott	359, 361, 367,
R. R. Co.	242		370
v. Ellicott	122	Nevil v. Saunders	305, 310
v. Smith	790	Nevill v. Nevill	119
National, &c. Building Society, <i>In re</i>	453	Neville v. Fortescue	451, 466
National Exch. Co. v. Drew	172	v. Thacker	358
National Revere Bank v. Morse	790	v. Wilkinson	171
National Webster B'k v. Eldridge	284	Nevin, <i>In re</i>	603
Nauman v. Weidman	706	Nevitt v. Gibson	171
Naundorf v. Schumann	511 c	New v. Bonaker	47, 741
Naylor v. Arnitt	305, 307, 329, 484,	v. Hunting	593
	528	v. Jones	904

[References are to sections.]

New v. Nichol	526	New York Life Ins. Co. v. Sands	453
New England Tr. Co. v. Eaton	547	New York Security Co. v. Saratoga Gas Co.	279
Newark Meth. Episc. Ch. v. Clark	386, 748	Neyland v. Bendy	137, 816 a
Newberg, &c. Co. v. Miller	761	Niblack v. Park Nat. Bank	87
Newberry v. Blatchford	732	Nice's Appeal	652
Newbery, <i>In re</i>	603	Nicholls, <i>In the Goods of</i>	929
Newburgh v. Bickerstaffe	871	v. Nicholls	192
Newcastle v. Lincoln	364, 373	v. Peak	598, 794
Newcombe v. Keteltas	528	Nichols v. Allen	711
v. St. Peter's Church	748	v. Baxter	602 v
v. Williams	263, 272, 426, 574	v. Campbell	264, 343
Newcomen v. Hassard	658	v. Eaton	386 a, 388
Newdigate v. Newdigate	540	v. Emery	79, 104
Newels v. Morgan	126, 149	v. Hodges	918
Newen, <i>In re</i>	289, 329	v. Levy	386 a
New England Bank v. Lewis	593, 594	v. McEwen	590, 918
New England M. S. Co. v. Buice	253	v. Nichols	122
New England Theosophical Corp. v. Boston	712	v. Palmer	672
Newhall, <i>Ex parte</i>	37	v. Postlethwaite	570
v. Wheeler	299, 312, 843	v. Rogers	276
Newill v. Newill	380	Nichols, Appellant	467, 863
Newland v. Att'y-Gen.	704	Nicholson v. Faulkner	888
v. Champion	225	v. Field	290
Newlands v. Paynter	647, 648, 653	v. Halsey	347
Newlin v. Freeman	655, 660	v. Leavitt	586, 590, 591
Newman v. Barton	244	v. Tutin	593
v. Early	143, 229	Nickell v. Handley	305, 386 a, 652
v. Jackson	602 i, 602 q, 602 r, 602 aa, 762, 782	Nickels v. Philips	276
v. James	648	Nickerson v. Buck	891
v. Johnson	569	Nickolls v. Gould	188
v. Jones	849	Nickols v. Thornton	126
v. Meek	188	Nickols v. Knowles	246
v. Montgomery	330	Nicoll v. Miller	259
v. Payne	202, 203	v. Mumford	593, 594
v. Warner	273, 503	v. Ogden	259
v. Williams	574	v. Walworth	17, 312, 318, 328
New Market v. Smart	748	Nicolson v. Wordsworth	270, 271, 273, 503
Newmeyer's Appeal	733	Niell v. Morley	35
New Orleans v. McDonough	748	Nightingale v. Burrell	380
Newport v. Bryan	260	v. Goulbourn	41, 47, 61, 704, 720
v. Cook	615, 616	v. Harris	592
Newsome v. Flowers	433, 863	v. Hidden	299, 324, 647
Newson v. Buffalo	226	v. Lawson	533
v. Thornton	243	v. Lockman	639
New South B. Co. v. Gann	103	v. Nightingale	104
New Statehouse, <i>In re</i>	41	Niles, <i>Re</i>	848
Newstead v. Searles	222, 367	v. Stevens	402, 499
Newton, <i>In re</i>	603	Nimmo v. Davis	188
v. Askew	104, 111, 821	Nims v. Bigelow	684
v. Bennett	464, 468, 501, 901, 902	Niolon v. Douglas	585, 592
v. Bronson	71, 402, 409, 779	v. McDonald	910
v. Egmont	885	Nisbett v. Murray	903 a
v. Hunt	188	Niver v. Crane	126, 133
v. Marsden	514	Nix v. Bradley	646, 650, 655
v. Metropolitan R. Co.	812	Nixon v. Rose	647, 660
v. Pelham	84	Nixon's Appeal	126, 133, 137
v. Porter	128, 135, 211	Noad v. Backhouse	818
v. Preston	137	Noble v. Andrews	317, 357, 358, 841
v. Reid	652	v. Brett	932
v. Swazey	84, 231	v. Edwards	780
New York, &c. v. Stillman	334	v. McFarland	676
New York Ins. Co. v. Ely	44	v. Meymott	267, 291, 884
v. Roulet	843	v. Morris	82
New York Life Ins. Co., <i>In re</i>	545	Noble's Estate	462
v. Baker	453	Nobles v. Hogg	453
v. Kane	453, 467	Noe v. Roll	143, 145
		Noel v. Bewley	349, 351, 355

INDEX TO CASES CITED.

cix

[References are to sections.]

Noel v. Henley	559, 571	Nostrand v. Atwood	592
v. Jevon	322	Nottage, <i>In re</i>	384, 705
v. Jones	119	Nottige v. Prince	189, 192
v. Robinson	244	Nottingham v. Jennings	389
Noke v. Seppings	826, 827	Nougues v. Newlands	865
Nolen's Appeal	639, 642	Nourse v. Finch	159
Nonotuck Silk Co. v. Flanders	122, 827	v. Merriam	738, 748
Norbury v. Calbeck	900	Newland v. Nelligan	112
v. Norbury	457, 604	Noyes v. Blakeman	660, 680
Norcum v. D'Oench	511, 784	v. Newburyport S. Inst'n	82
Norfolk's Case	737	v. Turnbull	343
Norling v. Albee	246, 437 a	Nugent v. Gifford	809, 810, 811, 815
Norman v. Cunningham	843, 844, 847	v. Vetzera	603
v. Hill	602 p, 602 m	Nunnen v. Lyon	299
Norris v. Chambers	71	Nunn v. Graham	690
v. Clymer	610	v. Harvey	618
v. Frazer	181	v. O'Brien	114, 540
v. Haggin	862	v. Wilsmore	600
v. Harrison	544, 545	Nurse v. Yerwarth	347
v. Hassler	875	Nurton v. Nurton	809
v. He	223	Nutt v. Morse	82, 171
v. Johnston	555	Nyce's Appeal	418, 453, 456, 467
v. Le Neve	206, 228, 869	Estate	459, 514
v. Norris	894, 897	Nyssen v. Gretton	570
v. Thompson	694, 711, 720, 765, 920		
v. Woods	511 b		
v. Wright	457, 460, 889		
Norris's Appeal	229, 464, 470, 471, 901, 918	O.	
North v. Barnum	863	Oakes v. Strachay	117, 449
v. Crompton	150, 151	Oakland Bank of Savings v. Wilcox	209
v. Curtis	609	Oakley, <i>In re</i>	428
v. Pardon	154	Oates v. Cooke	312, 313, 314
v. Philbrook	320	Oatman v. Barney	346
v. Turner	593	O'Bannon v. Musselman	511
North Adams Univ. Soc. v. Fitch	705, 748	O'Bear Jewelry Co. v. Volfer	242
Northage, <i>In re</i>	545	Obce v. Bishop	850
North Amer. Coal Co. v. Dyett	554	Obermiller v. Wylie	126
North Australian Territory Co., <i>In re</i>	207	Obert v. Bordine	17, 328
North Baltimore, &c. Ass. v. Caldwell	195	Oberthier v. Strand	126
North British Ins. Co. v. Lloyd	179	O'Brien v. Grierson	928
North Carolina R. R. Co. v. Wilson	853	v. Lewis	202
No. Car. School v. No. Car. Inst'n	700	v. McMeel	729
Northampton Bank v. Ballitt	438	v. Petitioner	99
v. Crafts	873	O'Cain v. O'Cain	401
v. Whiting	299	O'Callaghan v. Cooper	517, 518, 901
North Hempstead v. Hempstead	43	Ocean Nat. Bank v. Alcott	142
Northcroft v. Martin	172	Ochiltree v. Wright	415, 417, 421
Northen v. Carnegie	152	Ockeston v. Heap	340, 494, 495
Northern Central R. R. Co. v. Keighton	918	O'Connell v. O'Callaghan	800
Northrop v. Hale	82	O'Connor v. Decker	443
North Shore Ferry Co.	331	v. Haslam	601
Norton v. Dyersburg	749	v. Spaight	871
v. Frecker	871	Odd Fellows Hall Ass'n v. McAllister	437 a
v. Gillison	918	Oddie v. Brown	386, 397
v. Ladd	863	Odell v. Odell	384, 399, 687, 724, 737, 758, 748
v. Leonard	299, 302, 305	Odell's Estate	477, 490
v. McDevit	863, 865	Oden v. Windley	918
v. Norton	312	O'Donnell v. White	126
v. Ray	843	Oeslager v. Fischer	408
v. Turvill	657, 663, 668, 893	O'Farrall, <i>Ex parte</i>	632
Norton's Estate	471	O'Ferrall v. O'Ferrall	533
Norvell v. Johnson	232	Olley v. Olley	581
Norway v. Norway	270, 271, 898	Ogden v. Astor	178
Norway S. Bank v. Merriam	82, 163	v. Kip	819
Norwich Yarn Co.	907	v. Larabee	82
		v. McHugh	122
		v. Murray	207, 918

[References are to sections.]

Ogden <i>v.</i> Ogden	856	Ormsby <i>v.</i> Tarascon	602 <i>g</i> , 602 <i>p</i> , 602 <i>q</i> ,
Ogden's Appeal	305, 310 <i>a</i> , 652	<i>v.</i> Webb	783
Oglander <i>v.</i> Oglander	277, 287	O'Rorke <i>v.</i> Bolingbroke	189
O'Hara, <i>In re</i>	276	O'Rourke <i>v.</i> Beard	79, 260, 315
<i>v.</i> Dudley	171	Orr <i>v.</i> Hodgson	55
<i>v.</i> O'Neill	82, 135, 137	<i>v.</i> Newton	261, 440
O'Herlihy <i>v.</i> Hedges	427	<i>v.</i> Rode	790
O'Herron <i>v.</i> Gray	845	Orrett <i>v.</i> Corser	440
Oke <i>v.</i> Heath	160	Orrock <i>v.</i> Binney	812
Okeden <i>v.</i> Okeden	581	Orth <i>v.</i> Orth	114, 245
O'Keefe <i>v.</i> Calthorpe	277, 283, 284	Orthwein <i>v.</i> Thomas	66
O'Kelly <i>v.</i> Glenny	862	Osborn, <i>In re</i>	422
O'Kinson <i>v.</i> Patterson	299	<i>v.</i> Brown	513
Olcott <i>v.</i> Gabert	315	<i>v.</i> Glasscock	223
<i>v.</i> Tioga R. R. Co.	199	<i>v.</i> Morgan	627, 633
<i>v.</i> Bynum	132	Osborne <i>v.</i> Fuller	591
Oldham <i>v.</i> Hand	202	<i>v.</i> Gordon	277
<i>v.</i> Jones	206	<i>— v.</i>	280, 282
<i>v.</i> Litchfield	181, 226	to Rowlett	339, 494
Old's Estate	917	Osburn <i>v.</i> Tallows	873
Olipphant <i>v.</i> Burns	223	<i>v.</i> Throckmorton	647
<i>v.</i> Hendrie	741	Osgood <i>v.</i> Bliss	288
<i>v.</i> Liversidge	145	<i>v.</i> Eaton	133
Olive <i>v.</i> Dougherty	137	<i>v.</i> Franklin	187, 308, 770
<i>v.</i> Westerman	458	<i>v.</i> Lovering	371
Oliver, <i>Re</i>	308	<i>v.</i> Strode	367
<i>v.</i> Courts	210, 419, 770	Osmond <i>v.</i> Fitzroy	189, 851
<i>v.</i> Ins. Co.	186	Osterman <i>v.</i> Baldwin	65, 75, 131
<i>v.</i> Oliver	226, 451	Oswald's Appeal	468
<i>v.</i> Piatt	127, 217, 836, 842, 843, 844,	Oswell <i>v.</i> Probert	626, 632, 633
	863	Otis <i>v.</i> Beckwith	105
Olliffe <i>v.</i> Wells	687	<i>v.</i> McLellan	381
Olmstead, <i>In re</i>	280	<i>v.</i> Sill	86
<i>v.</i> Herrick	590	Ottley <i>v.</i> Gibbs	821
<i>v.</i> Webb	189	<i>v.</i> Grav	792
Olney <i>v.</i> Balch	288	Otto <i>v.</i> Schlapkahl	863
O'Loughlin <i>v.</i> Fitzgerald	347	Ottway <i>v.</i> Wing	654
Olson <i>v.</i> Lamb	202	Ould <i>v.</i> Washington Hospital	694
Ommanny <i>v.</i> Butcher	253, 712, 748	Ouseley <i>v.</i> Anstruther	458, 469
Oneal <i>v.</i> Mead	564	Outcalt <i>v.</i> Van Winkle	641
O'Neall <i>v.</i> Herbert	425	Outwater <i>v.</i> Berry	602 <i>v</i>
O'Neil <i>v.</i> Greenwood	103	Overbagh <i>v.</i> Petrie	537
<i>v.</i> Hamilton	215	Overseers <i>v.</i> Tayloe	699
<i>v.</i> Vanderburg	782	Overseers of Ecclesalt Bierlow, <i>Ex</i>	
O'Neill <i>v.</i> Donnell	918	<i>parte</i>	737
<i>v.</i> Henderson	216	Overseers of Poor <i>v.</i> Bank of Virginia	128
<i>v.</i> Lucas	381, 397	Overstreet <i>v.</i> Bates	863
Onslow <i>v.</i> Corrie	536	Overton <i>v.</i> Bannister	53, 624, 923, 930
<i>v.</i> Londresborough	786	Ovey, <i>Re</i>	727
<i>v.</i> Wallis	157, 327, 734	Oviatt <i>v.</i> Hopkins	920
Ontario Bank <i>v.</i> Mumford	58	Owen <i>v.</i> Aprice	871
Opinion of Justices	757	<i>v.</i> Arvis	592
Oppenheimer <i>v.</i> First Nat. Bank	82	<i>v.</i> Bryant	66
Orange <i>v.</i> Pickford	511 <i>c</i>	<i>v.</i> Delamere	454
Orb <i>v.</i> Coapstick	166	<i>v.</i> Dickenson	658
Orbey <i>v.</i> Mohun	530	<i>v.</i> Homan	178, 179, 657
Orcutt <i>v.</i> Gould	828	<i>v.</i> Owen	284
Ord <i>v.</i> Noel	409, 602 <i>ee</i> , 770, 774, 779,	<i>v.</i> Peebles	462, 468
	781, 787	<i>v.</i> Reed	831
<i>v.</i> White	831	<i>v.</i> Switzer	511 <i>c</i>
O'Reilly <i>v.</i> Alderson	275, 284, 292, 297	<i>v.</i> Williams	196
Orford <i>v.</i> Churchill	903 <i>a</i>	Owens <i>v.</i> Cowan's heirs	500
Orleans <i>v.</i> Chatham	82	<i>v.</i> Crow	520
Orlebar <i>v.</i> Fletcher	231	<i>v.</i> Mission Society	748
Ormiston <i>v.</i> Olcott	452	<i>v.</i> Owens	181
Ormond <i>v.</i> Hutchinson	173, 185, 863	<i>v.</i> Walker	614
Ormod's Settled Estate, <i>In re</i>	903 <i>a</i>	Owing <i>v.</i> Mason	218
Ormsby, <i>In re</i>	904, 910	Owing's Case	35, 570, 576
<i>v.</i> Dumesnil	251		

INDEX TO CASES CITED.

cxii

[References are to sections.]

Ownes v. Ownes	33, 66, 82, 95, 96, 98, 162, 165, 214	Palmer v. Carlisle	873
Owson v. Cown	172	v. Davis	683
Owthwaite, <i>In re</i>	453	v. Forbes	759
Oxenden v. Compton	605, 611	v. Holford	380, 395
v. Oxenden	634, 637	v. Jones	847
Oxford v. Reid	671	v. Mitchell	464
v. Richardson	871	v. Scott	846
Oxley, <i>Ex parte</i>	388, 555	v. Simmons	112, 113
		v. Union Bank	705
		v. Wakeford	880
		v. Wilkins	334
		v. Williams	221, 788
		v. Yarborough	602 ff
		v. Young	196, 538
Pace v. Pace	386 a	Palmer v. Danby	611
v. Payne	863	Palmetto Co. v. Risley	127, 207
v. Pierce	330	Pannell v. Hurley	246, 813, 907
Pacific Nat'l B'k v. Windram	585, 815 a, 827 a	Pannill v. Coles	321
Pack v. Shanklin	705	Papillon v. Voice	359, 369
Packard v. Kingman	437 a	Paramore v. Greenslade	122
v. Marshall	315, 160	Parcher v. Daniel	511 c
v. O. C. R. Co.	82	Pardoe v. Price	751
v. Putnam	82	Parfitt v. Hember	376, 383, 390
v. Roberts	633	Paris v. Paris	543, 545
Packer v. Packer	630	Parish's Appeal	678
v. Wyndham	633	Parish of St. Dunstan v. Beauchamp	695
Packwood v. Maddison	899	Parkam v. McCrary	230
Paddock v. Adams	145	Parke v. Kleeber	680
v. Strobridge	179	Parke's Charity, <i>In re</i>	737
Paddon v. Richardson	267, 417, 440, 454	Parker, <i>Ex parte</i>	236
Padfield v. Padfield	98	v. Barlow	437 a
Paff v. Kinney	855, 863	v. Bloxam	429
Page, <i>In re</i>	861	v. Bodley	75
v. Adam	597, 795, 801, 802	v. Bolton	112
v. Bennett	455	v. Brast	127
v. Booth	229, 230	v. Brooke	538, 647, 648, 665, 833, 834
v. Boynton	915		
v. Broom	585, 593, 786	v. Brown	724
v. Cooper	768	v. Calcroft	242
v. Estes	627, 632	v. Carter	324
v. Holeman	471	v. Converse	284, 320, 653, 671, 921
v. Leapingwell	160, 574	v. Coop	127, 133
v. Lever	219	v. Crittenden	219, 221, 222
v. Olcott	590	v. Fearnley	570, 571
v. Page	126, 133, 137, 139, 143	v. Gillian	225
v. Stevens	330	v. Hall	858
v. Trufant	672	v. Johnson	547, 912
v. Way	386 b, 555	v. Jones Adm'r	828
Paget, <i>In re</i>	503	v. Kane	680
Pahlman v. Shumway	602 bb, 602 ff	v. Kelly	330
Paice v. Canterbury	150, 699, 719, 722	v. Logan	137
Paige v. Paige	127	v. May	723, 748
v. Smith	762	v. Nichols	299
Paillon v. Martin	195	v. Parker	145
Paine v. Barnes	768	v. Sears	499
v. Forsaith	315	v. Seeley	490, 549
v. Hall	216	v. Sewell	237
v. Irwin	199	v. Snyder	137
v. Miller	122	v. White	199, 521
v. Wilcox	137	Parker's Trusts, <i>In re</i>	290
Painter, <i>Ex parte</i>	58	Parker's Will, <i>In re</i>	818
v. Henderson	195	Parkes v. White	646, 665, 667, 669, 670, 849, 869
Pairo v. Vickery	195		
Paisley v. Holzshu	448	Parkhurst v. Van Cortlandt	226
Paisley's Appeal	117, 119	Parkinson v. Hanbury	199
Paker v. Simonds	680	Parkinson's Trust	113
Palairot v. Carew	770	Parkist v. Alexander	206
Palk, <i>Re</i>	343, 848	Parkman v. Suffolk S. Bank	225
Palmer v. Bate	69	Parks v. Hall	226

[References are to sections.]

Parks v. Parks	298, 306	Paulus v. Dilley	275
v. Satterthwaite	865	Paulet v. Delavel	679
Parmenter v. Walker	602 r, 602 w	Paulus v. Latta	828
Parnlee v. Sloan	137	Pauly v. State Loan & T. Co.	910
Parnell v. Hingston	100, 101, 162	Paup v. Mingo	94
v. Lyon	513, 517	Pavey v. American Ins. Co.	76
Parnham v. Hurst	345	Pawcey v. Bowen	529
Parrett v. Palmer	658	Pawlett v. Att. Gen.	40, 217, 325
Parris v. Cobb	863	v. Clark	743
Parrish v. Parrish	189	Paxton v. Bond	511 a
v. Rhodes	149	v. Potts	569, 570
Parrott v. Palmer	871	Payne, <i>Ex parte</i>	112, 116
v. Pawlett	694, 724	v. Atterbury	231
v. Sweetland	235, 236	v. Ballard	863
v. Treby	900	v. Collier	460, 884
Parry v. Warrington	462, 508, 550	v. Compton	828
v. Wright	347	v. Little	665, 894
Parshall's Appeal	209, 427	v. Low	613
Parson v. Snook	385	v. Parker	876
Parsons v. Baker	112	v. Rogers	330
v. Boyd	330, 414, 602 m	v. Sale	312, 317
v. Clark	596	Payne's Case	694
v. Dunne	630	Payton v. Almy	93
v. Hayward	430	Peabody v. Eastern Meth. Soc.	730
v. Jones	275	v. Tarbell	126, 137
v. Jury	218	Peachman v. Daw	827
v. Lyman	262, 281	Peacock v. Black	228
v. Parsons	629, 639, 641	v. Evans	187, 188
v. Phelan	127	v. Monk	654, 655, 656, 657, 665
v. Winslow	458, 516, 552, 817	v. Pembroke	640, 642
Partee v. Thomas	875	v. Tompkins	591
Partington v. Reynolds	890	Peacock's Trusts, <i>In re</i>	337
Partridge v. Havens	126, 143	Peak v. Ellicott	122
v. Messer	212, 591	Peake, <i>Ex parte</i>	236, 239
v. Pawlett	136	v. Ledger	884
v. Stocker	660	v. Penlington	375, 767
v. Walker	693	Pearce v. Bryant Coal Co.	482
Paschall v. Acklin	694, 737, 748	v. Crutchfield	636
v. Hinderer	146, 229	v. Gamble	197
Pascoag Bank v. Hunt	128, 135	v. Gardner	499, 771, 783
Pascoe v. Swan	871, 872	v. Loman	515
Passingham v. Sherborne	277, 297	v. McClenaghan	312
Patapsco Guano Co. v. Bryan	206	v. Newlyn	230, 828
Patching v. Barnett	382	v. Olney	72
Patten v. Bond	345, 823	v. Pearce	265, 274, 288, 846
v. Herring	827 a	v. Slocombe	597, 599, 600
Pattenden v. Hobson	771, 890	Peard v. Kekewich	376
Patrick, <i>Re</i>	438	Pearle v. McDowell	35
Patterson v. Devlin	541, 546, 547	Pearly v. Smith	556
v. Flanagan	681	Pearse v. Baron	528
v. High	546	v. Green	821
v. Johnson	260	v. Hewitt	877
v. Linder	232	Pearson v. Amicable Office	101
v. Mills	86, 347	v. Bank of England	242
v. Murphy	82, 86, 96, 104	v. Belchier	869
v. Scott	569, 573	v. Benson	202
v. Wilson	253	v. Crosby	592
Patterson's Appeal	82, 195	v. East	135, 172
Pattison v. Hawksworth	866	v. Jamison	402, 408, 779
Patton v. Chamberlain	82	v. Morgan	171
v. Moore	220, 221	v. Pearson	79, 903 a
v. Randall	501	v. Pullev	855, 862
v. Thompson	428	v. Rockhill	585, 591, 594
Paul v. Chouteau	126	v. Wartman	568
v. Compton	112, 116	Pease v. Pattinson	727
v. Fulton	82, 221	v. Pilot Knob Co.	511 c
v. Heweston	511 b	Peat v. Crane	455
v. Squibb	205	Peatfield v. Benn	293, 297
v. Wilkins	231		

INDEX TO CASES CITED.

cxiii

[References are to sections.]

Peay v. Peay	324	Penstred v. Payer	701
Peckel v. Fowler	539, 770, 782, 816	Pentland v. Stokes	621, 858
Peck v. Brown	521	Pentz v. Simonson	985
v. Hendershott	678	People v. Abbott	437 a
v. Peck	602 ee	v. Bufalo	891
v. Walton	676	v. Chicago Gas Trust Co.	21
v. Whiting	591	v. Clark	732
Peckham v. Newton	452, 453	v. Cogswell	700, 701
v. Taylor	86, 100	v. Donohoe	277
Peebles v. Reading	134, 135, 137, 141, 172, 217, 228	v. Everest	855
People's Appeal	262	v. Fitch	701
Peek v. Henderson	765	v. Houghtaling	245
Peer v. Peer	147, 148	v. Jansen	210
Peerce v. Roberts	386, 555	v. Kendall	170
Peers v. Ceeley	910, 927	v. Merchants' Bank	195
Peiffer v. Lytle	137	v. Morton	341
Peilow v. Brookling	671	v. Moores	33
Peirce v. McKeehan	137	v. North River Sugar Ref. Co.	21
Peirsol v. Roop	252	v. North San Francisco Home- stead Ass	732
Pelham v. Anderson	699	v. Norton	275
Pell v. Ball	900	v. O. B. of S. B. B. Co.	195
v. Cole	681	v. Powers	79, 712, 720, 729
v. De Winton	476, 792, 806	v. Rochester	44
v. Mercer	723	v. Simonson	732
Pelley v. Bascombe	863	v. Steele	734, 748
Pells v. Brown	379	v. Tebbets	351
Pelly v. Maddin	126	v. Utica Ins. Co.	44
Pelton v. Harrison	671	v. Webster	49
Pember v. Knighton	701	Pepper v. Tuckey	277
v. Mathers	226	Peppercorn v. Wayman	270, 273
Pemberton v. McGill	669	Peralta v. Castro	84
v. Marriott	627	Percy v. Milladon	207
v. Johnson	686	Perfect v. Lane	188
Pembroke v. Allentown	126	Perham v. Randolph	172
Pence v. Force	863	Perin v. Cary	45, 697, 724, 737, 748
Pendleton v. Fay	225, 810, 811	Perine v. Swaine	654
Penfield v. Public Adm'r	98	Perkins, <i>In re</i>	511 b
v. Skinner	748	v. Boynton	468
v. Sumner	710	v. Cartwell	855, 863
v. Tower	72, 448, 511 b	v. Cottrell	676
Penfold v. Bouch	157, 520, 900	v. Elliott	660
v. Mould	97	v. Fisher	382
Penn v. Lord Baltimore	40, 71, 172, 325	v. Kershaw	910
Penne v. Peacock	489	v. Lewis	262, 281
Pennell v. Deffell	443, 463, 837	v. McGavock	268, 274
v. Home	869	v. Moore	262, 263
Pennell's Appeal	910, 918	v. Nichols	146, 148
Penney v. Avison	471	v. Perkins	836
Penniman v. Sanderson	785	v. Pritchard	752
Pennington v. Beechey	219	v. Westcoat	612
v. Buckley	701, 903 a	Perkins's Appeal	432, 918
v. Giddington	109	Perkinson v. Hanna	221
v. Smith	878	Perrin v. Lepper	877
Pennock v. Coe	68, 759	v. Lyon	515
Pennock's Appeal	195, 205, 428	v. McMicken	43
Estate	113, 119	Perrine v. Applegate	892
Pennoyer v. Shelden	765	v. Newell	910
Penn. Ins. Co. v. Austin	768, 809	Perrins v. Bellamy	848
v. Bauerle	242	Perry, Goods of	264
Penny v. Allen	8, 869, 871	v. Boileau	647
v. Cook	781, 785	v. Craig	229, 230
v. Davis	259, 261	v. Head	126
v. Penny	877	v. Knott	848, 874, 877, 882
v. Turner	248, 251, 255, 258, 714	v. McEwen	733
Pennypacker's Appeal	471	v. McHenry	132
Penobscot R. R. Co. v. Mayo	843, 923	v. Pearson	226
Penrhyn v. Hughes	554	v. Perry	52
Pensonneau v. Bleakley	218	v. Phelps	841

[References are to sections.]

Perry v. Roberts	286 b	Philippo v. Munnings	263, 574, 827, 863
v. Shipway	413	Phillips, <i>In re</i>	397
Perry's Almshouses, <i>In re</i>	701	v. Brydges	8, 13, 347
Perry Herrick v. Attwood	108	v. Crammond	64, 126, 127, 131, 139
Perryclear v. Jacobs	628, 632	Phillips, <i>Ex parte</i>	412, 605, 611
Persch v. Quiggle	128, 206, 851	v. Bank of Lewiston	438
Person v. Warren	56	v. Belden	229, 230
Personeau v. Personeau	466	v. Buckingham	883
Persons v. Persons	147	v. Bucks	172, 174
Persse v. Persse	185	v. Bury	742, 743
Petch v. Tutin	67	v. Bustard	918
Peter v. Kendall	756	v. Cayley	511 c
Peters v. Bain	828	v. Eastwood	487
v. Beverly	415, 421, 499, 501, 602 m, 765	v. Edwards	778
v. Goodrich	186	v. Everard	786
v. Grote	637	v. Garth	250, 257
v. Tunell	234	v. Gutteridge	576
Petersham v. Tash	243	v. Harrow	700
Peterson v. Boswell	127	v. Hessell	630, 632
v. Grover	226	v. James	361
Peterson's Appeal	499	v. Medbury	514
Peti. of Baptist Church	476 a, 928	v. Moore	191
Petit v. Smith	17, 150	v. Mullings	104
Petit's Appeal	618	v. Paget	624
Peto v. Gardner	605	v. Phillips	114, 151, 226, 244, 444, 538, 930
Petranek, <i>Re</i>	277	v. Rogers	855
Petre, <i>Ex parte</i>	613, 614	v. Ross	284
v. Espinasse	104	v. Sargent	547
v. Petre	614	v. Saunderson	237
Petrie v. Clark	225, 809, 812, 814	v. Sherman	77
Petriken v. Davis	593	v. South Park Com'rs	76, 82
Pettee v. Peppard	440	v. Swank	315
Pettibone v. Perkins	602 v	v. Thompson	918
Pettingill v. Pettingill	262, 559	v. Ward	328
Petteward v. Prescott	872	v. Winslow	759
Pettus v. Atlantic S. Ass'n	277	v. Wood	252
v. Clawson	468	Phillips Academy v. King	42, 44
Petty v. Booth	648	Phillipson v. Gatty	457, 462, 467, 469, 870, 881
v. Petty	213	v. Kerry	104
v. Styward	136	Phillpots v. Phillpots	131
Peynado v. Peynado	242	Philpot v. Penn	137, 139
Peyton v. Alcorn	610	v. St. George Hospital	709
v. Bury	344, 414, 505, 511, 518, 519	Phipps v. Annesley	571
v. Enos	205	v. Kelynge	381, 390, 396
v. McDowell	891	Phoenix v. Livingston	918
v. Rawlins	191	Phoenix Bank v. Sullivan	593
v. Smith	463, 468, 918	Phoenix Life Assurance Co., <i>In re</i>	331
Pfaff v. Prag	593	Phyfe v. Wardwell	538
Phalen v. Clarke	230	Piatt v. Oliver	127, 206, 881, 882
Pharis v. Leachman	841, 877	v. Vattier	38, 228, 230, 855, 869
Phayre v. Perce	217, 828	Pickard v. Anderson	453
Phelps, <i>Ex parte</i>	275	Pickels v. McPherson	846
v. Conover	769	Pickens v. Kniseley	658
v. Harris	324, 748, 890	Pickering v. Coates	387, 652, 670
v. Phelps	396	v. De Rochemont	468
v. Pond	82, 137	v. Pickering	185, 450, 451, 467, 547
v. Seeley	929	v. Shotwell	46, 700, 701, 730, 748
Phené, <i>Re</i>	245, 909	v. Staniford	861, 867, 869
v. Gillon	869	v. Vowles	196, 336, 532, 538
Phifer v. Berry	529	Pickett v. Everett	639
Philadelphia, Matter of	710, 743, 748	v. Jones	672, 673
v. Fox	45, 384, 396, 399, 724, 738, 748	v. Loggan	187, 192, 230, 872
v. Girard	738, 748	Pickslock v. Lyster	590
v. Wills	748	Pickup v. Atkinson	451, 547
Philadelphia Nat. Bank v. Dowd	122	Picquet v. Swan	32, 51, 277
Philanthropic Society v. Kemp	573	Pidcock v. Bishop	171, 178, 179
Philbrooke v. Delano	162, 232, 233	Pidgeley v. Pidgeley	511 c

INDEX TO CASES CITED.

CXV

[References are to sections.]

Piedmont Land Co. v. Piedmont Foundry Co.	124	Pitcher v. Rigby	203
Pierce v. Bowker	465, 918	v. Toovey	536
v. Brady	438	Pitney v. Bolton	79
v. Brewster	590	v. Everson	918
v. Burroughs	541, 554	Pitt v. Jackson	324
v. Emery	757, 758, 759	v. Pitnay	602 <i>x</i>
v. Fort	75	Pitt's Case	165
v. Gates	239	Pittman v. Pittman	359
v. Hower	147	Pitts v. Bonner	848, 876
v. McKeehan	836	v. Cottingham	171
v. Pierce	132	v. Edolph	830
v. Robinson	602 <i>f</i>	v. James	701
v. Scott	789, 812	v. Pelham	121
v. Thompson	639	v. Pitt	348
v. Thorniley	639	Pittsfield Savings Bank v. Berry	310
v. Waring	200	Planck v. Schermerhorn	287, 595, 598
v. Weaver	294	Planters' Bank v. Prater	828
Piercy, <i>In re</i>	72, 720	Plass v. Plass	124, 865
Pierpont v. Cheney	614	Platel v. Craddock	438
v. Graham	592, 593	Platmone v. Staple	103
Pierson v. Armstrong	299	Platt v. McClure	602 <i>ee</i>
v. David	232, 238, 239	v. New York Railway	757
v. Garnet	112, 116, 249	v. St. John's College	700
v. Shore	196, 605, 611	Player v. Nicholls	312
v. Thompson	744	Plomley v. Richardson	56
Pieschel v. Paris	714, 729	Plowman v. Kiddle	236
Piety v. Stace	464, 468, 900	Pluman v. Slocum	429
Piggott v. Penrice	248	Plumb v. Fluit	223
Piggott v. Green	272	Plumbe v. Neild	544, 545
Pike v. Bacon	591	Plume v. Beale	182
v. Baldwin	795	Plumer v. Reed	206, 215
v. Collins	639, 644	Plymouth v. Hickman	82
v. Fitzgibbon	658	Plympton v. Boston Dispensary	554
Pilcher v. Flinn	230, 861, 867	v. Fuller	566
v. Randall	117	v. Plympton	466
v. Rawlins	223	Poage v. Bell	330
Pilkington v. Bailey	76	Pocock v. Att.-Gen.	727
v. Boughey	112, 160	v. Reddington	453, 457, 460, 468, 508, 844, 902
Pillars v. McConnell	137	Podmore v. Gunning	82, 181, 216
Pillot v. Landon	359	Poillon v. Martin	203, 438
Pillow v. Brown	166	Poindexter v. Blackburn	546, 639
v. Shannon	219	v. Burwell	437 <i>a</i>
Pillsbury — Washburn F. M. Co. v. Kistler	82	v. Jeffries	627, 629
Pilmore v. Hood	173	Pole v. Pietsch	510
Pinchain v. Collard	232, 237	v. Pole	54, 143, 145, 147
Pine St. Soc. v. Weld	737	Polk v. Boggs	163
Pingree v. Coffin	80, 122	v. Robinson	814
v. Comstock	594	Pollard, <i>Ex parte</i>	71
Pingrey v. Nat. Ins. Co.	104	v. Cleveland	680
Pingry v. Washburn	214	v. Downes	907
Pink v. De Thuisey	507, 508, 511	v. Doyle	432
Pinkard v. Pinkard	97	v. Greenville	585
Pinkston v. Brewster	863, 867	v. Maddox	757
v. Semple	827 <i>a</i>	v. Merrill	647, 649
Pinn v. Downing	418, 419	Pollard's Trusts	152
Pinnell v. Hallett	475	Polley v. Johnson	212
Pinney v. Fellows	79, 82, 126, 127, 132, 139, 161, 647	Pollexfen v. Moore	38, 231, 272
v. Newton	246, 465	Pollock v. Croft	514, 517
Pinnock v. Clough	81, 133, 135	v. Hooley	499
Pinson v. McGehee	82	v. Kearsley	602 <i>dd</i>
Pinston v. Ivey	863	Pomfret v. Perring	253
Pintard v. Goodloe	239	v. Winsor	433, 584, 863, 869
Pipe v. Jordan	223	Pond v. Hine	261
Piper's Appeal	275	Ponder v. McGruder	328
Pipkin v. Casey	814	Pontet v. Basingstoke Canal Co.	752
Pitcairn, <i>In re</i>	348, 450, 506	Pool v. Bate	512
		v. Cummings	240
		v. Dial	481

[References are to sections.]

Pool v. Harrison	65, 160	Pottow v. Fricker	319
v. Lloyd	167	Potts, <i>Ex parte</i>	275, 280, 282, 618
v. Morris	628	v. Potts	372
v. Phillips	147	v. Philadelphia Assoc.	710
Poole v. Anderson	411	v. Richards	555
v. Franks	820	Pott's Appeal	652
v. Glover	602 j	Poullain v. Poullain	200
v. Munday	407, 454, 467	Powell v. Att.-Gen.	699
v. Pass	243, 330, 602, 901, 910	v. Brandon	380
Pooley v. Quilter	195, 199, 428	v. Cleaver	455
Poor v. Hazleton	188, 639, 641	v. Cobb	194
Poor of Chelmsford v. Mildmay	742	v. Evans	438, 440, 444, 465
Pope v. Brandon	602 e	v. Glen	312
v. Burlington Savings Bank	82	v. Glover	430
v. Dapray	142, 166	v. Hankey	665
v. Durant	602 g	v. Knox	343, 414
v. Elliott	386 a, 555	v. Merritt	327, 437
v. Farnsworth	848, 851	v. Monson, &c., Manuf. Co.	126, 132, 137
v. Jackson	610	v. Murray	199, 228, 229, 230, 666
v. Pope	113, 114	v. Powell	126, 133, 468, 900, 918
v. Whitcomb	250, 255, 257, 258	v. Price	361, 362, 828
Popham v. Bamfield	308	v. Tuttle	409, 411
v. Brooke	178, 210	v. Wright	885
Popkin v. Sargent	723	Power v. Lester	684
Poppleton and Jones' Contract, <i>In re</i>	593	Powers v. Bergen	610
Porcher v. Reid	655	v. Bullwinkle	378, 466
v. Daniel	668	v. Hale	187
Porey v. Juxon	94	Powerscourt v. Powerscourt	701, 729
Portarlington v. Soulby	71, 72	Powis v. Burdett	580
Porter v. Baddeley	551	v. Corbett	568
v. Bank of Rutland	86, 242	Powlett v. Herbert	419, 466, 844, 900
v. Doby	305, 359, 370	Powys v. Blagrave	477, 540, 552
v. Dubuque	237	v. Capron	506
v. Morris	330	v. Mansfield	144
v. Powell	612	Poythress v. Poythress	819
v. Raymond	330	Pracht & Co. v. Lange	437 a
v. Tournay	547	Prance v. Sympton	862
v. Watts	901	Prandle v. Fielder	668
v. Williams	590	Pranker v. Pranker	126, 146, 147
v. Woodruff	195	Prather v. McDowell	765
Porter's Case	693, 700	Pratt v. Adams	596, 597, 600
Porter's Estate	465	v. Ayer	81
Portington v. Eglington	189	v. Barker	190, 204, 210
Portington's Case, Lady	94	v. Beaupre	158, 814
Portland S. Co. v. Dana	122	v. Church	117
v. Locke	828	v. Flamer	66
Portlock v. Gardner	228, 246, 745, 864, 865, 907, 923	v. Jenner	671
Portmore v. Morris	226	v. Matthew	66
v. Taylor	188	v. Oliver	768
Portsmouth v. Fellows	275, 282	v. Philbrook	171, 175
Posey v. Cook	305	v. Pond	167
Post v. Rohrbach	382, 736	v. Rice	499
Postage Stamp Automatic Delivery Co., <i>In re</i>	207	v. Roman Cath. Orphan Asylum	699, 730
Postell v. Postell	380	v. Sladden	157, 158
Postlethwaite, <i>Re</i>	197, 861	v. Thornton	195
Potter v. Chapin	748	v. Trustees	114
v. Chapman	19, 505, 507, 510, 511, 378, 671, 827 a	v. Vanwyck	232
v. Couch	598, 794, 795, 800	Pray v. Hedgeman	398
v. Gardner	72	v. Pierce	299, 302
v. Hollister	231	Pray's Appeal	440, 465
v. Jacobs	243	Preachers' Aid Soc. v. England	300, 312
v. McDowall	205	v. Rich	724, 730, 748
v. Pearson	217	Prendergast v. Lushington	439
v. Saunders	733, 736, 748	v. Prendergast	450, 451, 509, 510, 511, 547, 548
v. Thornton	724	Prentiss v. Hall	920
v. Thurston	511 b	v. Paisley	658
Pottle v. Lowe			

cxvii

Present v. Goodwin	119	Pritchard v. Bailey	671
Presbyterian Cong. v. Johnston	17, 328	v. Brown	137, 165, 239
Prescott v. Pitts	262	v. Junehant	256
v. Walker	322	v. Wallace	127
v. Ward	843	Pritchett v. Nashville Trust Co.	545
v. Wright	171	Probate Court v. Niles	639
Presley v. Davis	615, 863	Proctor v. Clark	72
v. Stribling	330	v. Thrall	184
Preston v. Casner	82	Proof v. Hines	192, 203
v. Grand	885	Prop. of Brattle Sq. Church v. Grant	380, 385
v. Horwitz	865		
v. McMillan	127	Prosens v. McIntire	131, 141
v. Melville	544, 545	Prosser v. Edmunds	65
v. Tubbin	222	Proudfoot v. Hume	827
Prevost v. Walters	126	Proudley v. Fielder	626
Prevost v. Clarke	112, 251	Providence Inst'n v. Carpenter	82
v. Gratz	82, 197, 205, 228, 596, 745, 850, 863, 865, 918	Provost of Edinburgh v. Aubrey	735, 741
Prewett v. Buckingham	863	Pryn v. Byrne	229
v. Coopwood	194	Pryor v. Hill	632, 633
v. Laud	602 a, 661	Puckett v. Benjamin	124
Price v. Stanley	671	Pugh, <i>Ex parte</i>	636, 657
Price, <i>Ex parte</i>	480	v. Bell	137, 195, 217
v. Anderson	440, 544, 545	v. Currie	127, 136
v. Bassett	248	v. Hayes	520
v. Berrington	35, 189	v. Miller	166
v. Blakemore	775, 837, 841, 842	v. Pugh	127, 135
v. Brown	127	v. Vaughan	329
v. Byrn	228, 229, 869	Puleston v. Puleston	329
v. Courtney	511 b	Pulitzer v. Livingston	382
v. Cutts	918	Pullen v. Ready	184, 513
v. Dewhurst	182	Pulpress v. African Church	511, 511 a, 720
v. Gibson	348	Pulteney v. Warren	871, 872
v. Great Western Railway	752	Pulvertoft v. Pulvertoft	98, 100, 108, 367
v. Hewitt	170	Pundmann v. Schoenich	828
v. Huey	766	Purcell v. MacNamara	206, 230
v. Louden	907	Purdew v. Jackson	626, 639, 641
v. Lovett	69	Purdie v. Whitney	598, 602 g
v. Maxwell	697, 700, 730, 748	Purdum v. Pavey	72
v. Minot	17, 82	Purdy v. Lynch	415
v. Mulford	863, 865	v. Purdy	132
v. Phillips	166	Purefoy v. Purefoy	585, 597, 602
v. Pickett	556	Puryear v. Beard	660
v. Price	98, 100, 108, 219, 223, 568	v. Puryear	660
v. Reeves	92	Pusey v. Clemson	244, 918
Price's Appeal	860, 869, 999	v. Deshouvrie	184
Pritchard v. Ames	647, 648	Pushman v. Filliter	112, 113, 116
Priddy v. Rose	69	Pussnell v. Landers	602 g
Pride v. Fooks	371, 397, 417, 457, 462, 472, 844, 894, 902	Putnam v. Gunning	242
Prideaux v. Lonsdale	104, 194	Putnam Free School v. Fisher	499, 501
Priestley v. Ellis	593	Pybus v. Smith	306, 655, 667, 670, 847
v. Lamb	636	<i>Pyb, Ex parte</i>	96, 98
Priestman v. Tindall	848, 876	v. George	217, 241, 828
Primrose, <i>In re</i>	922, 928	Pyle, <i>In re</i>	418
v. Bromley	260	Pym v. Blackburn	226
Prince v. Heylin	862	v. Lockyer	388
v. Hine	618, 915	Pynent v. Pyncent	881
v. Ladd	281	Pvott's Estate	449
v. Logan	618	Pyron v. Mood	263, 303
v. Sisson	299		
Princeton v. Adams	733		
Prindle v. Holcombe	266	Q.	
Pring v. Pring	216	Quackenboss v. Southwick	281
Pringle v. Allen	541	Quackenbush v. Leonard	132, 428, 770
Printup v. Patton	145	Quarles v. Lacy	602 c, 602 y, 771
Prior v. McIntire	865	Quarrell v. Beckford	915
v. Talbot	263, 574	Quayle v. Davidson	112, 123
Prise v. Sisson	304, 357	Queade's Trusts, <i>Re</i>	627
		Queen v. Abrahams	1

[References are to sections.]

Reading v. Wilson	607	Reid v. Morrison	324
Ready v. Kearsley	75, 299	v. Mullins	433, 782
Reagan v. McKibben	127	v. Reid	79, 82, 248, 277, 297
Rearich v. Swineheart	226	v. Shergold	511 b
Rector v. Fitzgerald	223	v. Vanarsdale	97
v. Gibbon	127	Reiff v. Horst	587
Rede v. Oakes	786	Reil v. Baker	602 bb
Redenour v. Wherritt	260, 261	Reilly v. Whipple	95
Redfern v. Middleton	299	Reinhard v. Bank of Kentucky	593
Redfield v. Redfield	802	Reinhart v. Bradshaw	127
Redford v. Catron	235	Relf v. Eberly	861
v. Gibson	232, 235, 237, 239	Relfe v. Relfe	234
Redheimer v. Pyron	598, 794, 798, 800	Remick v. Butterfield	602 v
Redington v. Redington	126, 131, 139, 143, 145, 146, 147, 347	Remnant v. Hood	903 a
Redwick, <i>In re</i>	275	Ren v. Bulkeley	784
Redwood v. Riddick	863, 880	Renard v. Graydon	592
Reece v. Allen	17, 328, 602 aa	Rendlesham v. Meux	768, 784
v. Frye	433, 863	Rene v. Oakes	773
Reech v. Kennegal	900	Renew v. Butler	195
Reed v. Beazley	672, 673	Rennecker v. Scott	675
v. Buys	658	Rennie v. Ritchie	275, 670
v. Dickey	217	v. Young	870
v. Gordon	301	Renwick v. Renwick	631
v. Johnson	601	Renz v. Stoll	83
v. Lukens	82, 122, 231	Reorganized Church v. Church of Christ	861
v. Marble	438	Repp v. Repp	232, 239
v. Norris	206	Reresby v. Newland	578
v. O'Brien	102, 878	Resor v. Resor	127
v. Painter	137, 865	Revel v. Revel	639
v. Warner	206	Revell v. Hussey	122
v. Whitney	324, 342	Ravett v. Harvey	284
Reede v. Emery	590	Reynell v. Sprye	171, 173, 187, 214
Reeder v. Barr	242	Reynes v. Dumont	247 a
Rees, <i>Ex parte</i>	282	Reynish v. Martin	512, 514, 517
v. Keith	633, 640	Reynolds, <i>Ex parte</i>	198, 209, 275
v. Livingston	82	v. Bank of Virginia	594
v. Waters	627, 628, 631	v. Brandon	476 a
v. Williams	315, 353, 469	v. Bristow	715
Reese v. Holmes	633	v. Caldwell	126
v. Meetze	917	v. Hennessy	861
v. Murnan	127	v. Jones	240, 346, 871
v. Wallace	226	v. Morris	132
v. Wyman	171	v. Sisson	910
Reeside v. Peter	764, 770, 782	v. Stark County	31
Reeve v. Att.-Gen.	40, 308, 325, 705, 721, 722, 729, 731	v. Sumner	855, 863
v. Parkins	816	v. Walker	468
v. Rocher	632	v. Waller	191
v. Strawn	133	Reynolds's Settlement, <i>In re</i>	275
Reeves v. Baker	112, 113	Rex v. Anstreay	511 b
v. Brayton	299	v. Commissioners	910
v. Brymer	615	v. Essex	910
v. Dougherty	855	v. Flockwood	414
v. Evans	133	v. Lexdale	286
v. Herne	514	v. Netherseal	93
v. Tappan	248	v. Newman	700
Reformed Dutch Church v. Mott	744	v. Northwingfield	214
Reggs v. Swan	82	v. Partington	718, 724
Regina v. Fletcher	846	Rex v. Wallace	270
v. Shee	328	Rham v. North	205
v. White	478	Rhea v. Tucker	132
Rehden v. Wesley	417, 446, 848, 876	Rhett v. Mason	119, 250
Reichenbach v. Quinn	715	Rhineland v. Barrow	229
Reid v. Bank of Mobile	828	Rhodes v. Rhodes	615, 616
v. Blackstone	112	R. I. Hospital Trust Co. v. Harris	448, 549
v. Fitch	82, 88, 127, 142, 143	v. Olney	723
v. Gordon	6, 321, 765	Rhodes v. Bates	104, 204
v. Lamar	655, 661	v. Green	126, 221
		v. Sanderson	199
		Rice v. Barrett	23

[References are to sections.]

Rice v. Burnett	303, 310, 311	Riddle v. Whitehill	127, 863
v. Cleghorn	195, 198	Rideout v. Dowding	151, 158
v. Gordon	187	v. Lewis	665
v. Rice	124, 127, 226	Rider v. Bickerton	230
v. Satterwhite	380	v. Hulse	645
v. Thompson	639	v. Kidder	126, 137, 139, 242
v. Tonnele	615, 617	v. Mason	386 a, 555
Rich v. Beaumont	656	v. Maul	230
v. Cockell	647, 666, 668	v. Rider	130
v. Jackson	226	v. Sisson	458, 768
Richards, <i>In re</i>	511 a	Ridgeley v. Johnson	274, 411, 412
v. Baker	516	Ridgely v. Cross	253
v. Chambers	633, 655	Ridgeway, <i>Ex parte</i>	195, 457
v. Delbridge	96, 99	Ridgway v. Wharton	84
v. Hazzards	591	Ridley, <i>Re</i>	671
v. Holmes	602 o, 602 p, 602 u, 602 v,	Ridley v. Hetman	855
	782	Rife v. Geyer	118, 307, 311, 386 a
v. Leaming	238	Rigby, <i>Ex parte</i>	404, 409, 411
v. Lewis	213	Rigden v. Vallier	136, 364
v. Manson	127	v. Walker	132
v. Merrimack, &c. Railway	754, 757, 758	Riggan v. Riggan	104
	758	Rigges v. Swann	75
v. Perkins	818	Riggs v. Murray	590, 591
v. Reeves	104	v. Palmer	181
v. Richards	79, 640	Right v. Cathill	263
v. Seal	415	v. Smith	298, 306
Richardson, <i>Ex parte</i>	454, 585	Riker v. Alsop	343, 848
v. Adams	137, 181	Riley v. Garnett	308
v. Baker	232	v. Hampshire County Nat. Bank	76
v. Bank of England	826, 827	v. Martinelli	169
v. Bleight	186	Rindle, Matter of	54
v. Chapman	116, 259	Ring v. Hardwick	380, 509 a
v. Cole	921	Ringham v. Lee	243
v. Day	133	Ringgold v. Bryan	239
v. Eyton	185	v. Malott	436
v. Hulbert	271, 503, 876	v. Ringgold	418, 419, 420, 458, 463, 468, 471, 475, 602 v, 769, 770, 851, 918
v. Jenkins	260, 848, 876, 877		
v. Jones	195, 230	Ringo v. Binns	206
v. Larpent	885	v. R. E. Band	588
v. Linney	200	Rinker v. Bissell	39
v. Mounce	126	Ripley v. Seligman	124, 131
v. Richardson	97, 98, 101	v. Waterworth	242
v. Ridgely	237	Rippen v. Priest	338
v. Rusbridge	903 a	Ripperdone v. Cozine	239
v. Spencer	430	Ripple v. Ripple	569
v. Stodder	310, 312, 647, 666, 677	Rippon v. Dawding	656
v. Taylor	138	v. Norton	386 b
v. Thompson	226	Rippy v. Gant	189, 190
v. Woodbury	336, 338	Rishon v. Cobb	515, 637
Richelieu Hotel Co. v. Miller	790	Ritchie v. Broadbent	633
Richen v. White	645	Rittgers v. Rittgers	117
Richerson, <i>In re</i>	448	Rittson v. Stordy	64, 327
Richeson v. Ryan	343	Rivers v. Thayer	644
Richmond v. Adams Nat. Bank	200	Rives v. Lawrence	172
v. Davis	484, 736	Rivett's Case	739
v. Hughes	602 g	Roach v. Caraffa	837, 863
v. Tayloe	748	v. Gavan	614
v. Voorhees	511 b, 678	v. Haynes	511 c
Richter v. Jerome	875	v. Hudson	215
Richwine v. Keim	641	v. Jelks	468
Rick's Appeal	171	Roanoke B. & L. Co. v. Simmons	233
Ricker, <i>Re</i>	471	Roarty v. Mitchell	602 p
v. Moore	122	Robards v. Wortham	564
Ricketts v. Bennett	486	Roberts v. Haley	127
v. Murray	127	Robb's Appeal	127, 918
v. Ricketts	468	Robbins v. Bates	602 w
Ricketts's Trusts	784	v. Masteller	237
Riddle v. Emerson	86	Robenetti's Appeal	918
v. Mandeville	244		

[References are to sections.]

Roberdeau v. Rouse	71, 871	Robinson v. Pett	259, 428, 904, 916, 918
Robert, <i>Ex parte</i>	277	v. Pierce	321
v. Corning	23	v. Preston	136
v. West	646, 653, 660	v. Queen	568
Roberts, Matter of	918	v. Robinson	127, 134, 147, 164, 187, 398, 440, 457, 458, 462, 468, 469, 551, 607
v. Armstrong	863	v. Schmitt	377
v. Broom	841	v. Smith	112, 207, 507
v. Collett	633	v. Taylor	151, 152
v. Dixwell	324, 358, 359, 369	v. Tickell	117, 118, 620, 624
v. Kingsley	361	v. Townshend	583
v. Moseley	260, 261, 310	v. Wheelwright	671
v. Mullinder	97	v. Woelper	642
v. New York El. R. Co.	873	Robinson's Trust, <i>In re</i>	117
v. Opp	127	Robison v. Codman	322, 324
v. Remy	145	Robles v. Clark	140, 518
v. Roberts	100, 103, 104, 165, 195, 214	Robson v. Flight	19, 273, 530, 803
v. Robinson	815 c	v. Harwell	86, 226
v. Rose	239	Roby v. Boswald	676
v. Spicer	649	v. Colehour	79, 127, 206
v. Stuyvesant S. D. Co.	44	v. Smith	55
v. Tunstall	229, 230, 869	Roca v. Byrne	828
v. Ware	133	Roch v. Callen	862
v. Wynne	182	Rochdale Canal Co. v. King	869
v. Yancey	926	Roche, <i>In re</i>	275, 279, 290, 291, 292
Robertson v. Bullions	733, 748	v. Farnsworth	199
v. Claskey	658	v. George	137
v. Collier	546, 547	v. Hart	463, 464, 468, 894
v. Gaines	262, 499, 501, 602 m	v. O'Brien	851, 861, 867
v. Hardy	511 a	Rochehoucauld v. Boustead	162, 246, 823
v. Johnson	366, 662, 815 a	Rochell v. Tompkins	661
v. Macklin	141	Rochester, <i>In re</i>	451
v. Norris	633, 861	v. Att. Gen.	746
v. Paul	602 h	Rochford v. Hackman	388, 555
v. Rentz	142	Rochfort v. Fitzmaurice	359, 360, 361, 362, 369, 371, 372, 374
v. Robertson	215	v. Seaton	813
v. Scott	826	Rockwood v. Rockwood	182
v. Skelton	122	Roden v. Jaco	602 p
v. Sublett	593, 594, 602 e	v. Murphy	330
v. Wendell	901	Rodgers v. Marshall	107, 108
v. Wood	864	v. Rodgers	541
Robinett's Appeal	470	Rodman v. Munson	783
Robins v. Deshon	343	Rodney v. Chambers	672
v. Embry	287, 588, 590, 592	Rodriquez v. Hefferman	243
Robinson, Matter of	259, 277, 282	Roe v. Jeffery	380
v. Allen	253	v. Read	336, 337
v. Appleton	234, 238	v. Tranmer	379
v. Bishop	381	v. Vingut	398, 511 b
v. Briggs	202	Rogan v. Walker	602 d
v. Burritt	166	Roger's Trust	556
v. Butler	602 v	Rogers, <i>In re</i>	472
v. Comyns	304	v. Acaster	633
v. Cox	214	v. Adams	828
v. Cudwin	199	v. Bonner	239
v. Cullum	602 v	v. Bumpass	639
v. Cuming	13, 347	v. Daniel	843
v. Dart	661	v. Dill	610
v. Gee	214	v. Donnellan	126
v. Geldard	573	v. Earl	226, 361
v. Grey	298, 305, 310	v. Fales	864
v. Hardcastle	383	v. Jones	223
v. Harkin	813, 848, 863	v. Keokuk	744
v. Hook	855	v. Linton	883
v. Huffman	678	v. Linton	310, 660
v. Jones	127	v. Ludlow	828
v. King	216	v. Marshall	133
v. Lowater	597, 795, 802, 803, 805	v. Murray	
v. Macdonald	68		
v. Maulden	67, 330		
v. Miller	324		

[References are to sections.]

Rogers v. Patterson	606	Rossiter v. Trafalgar Life Ass. Co.	779
v. Ramey	79	Rosslyn's Trust	395
v. Rogers	59, 128, 127, 145, 151, 153, 163, 205, 297, 559, 562, 600, 672, 698, 826	Rotch v. Livingston	891
v. Simmons	134, 215	Roth, <i>Re</i>	465
v. Skillicorne	795, 796, 800	Rothmaler v. Myers	272
v. Smith	661	Rothschild v. Daugher	223
v. Soutten	616	v. Frank	264
v. Thomas	699	Rothwell v. Dewes	126, 135, 215
v. Tyley	126	v. Rothwell	826, 827
v. Vail	591	Roupe v. Atkinson	633
v. Ward	661, 680	Rous v. Jackson	503
v. Wheeler	762	Routh v. Howell	406, 443, 465, 914
v. White	330, 668	v. Kinder	595, 877
Roger's Appeal	891, 900	Routledge v. Dorrill	379
Roger's Estate	393, 472	Row v. Dawson	63
Roggenkamp v. Roggenkamp	166, 245	v. Jackson	645
Roland v. Coleman	248	Rowan v. Chute	122
Rolfe v. Budder	647	v. Lamb	199, 602 <i>aa</i>
v. Gregory	166, 828, 840, 861, 865	Rowe, <i>In re</i>	863
Roller v. Spilmore	172	v. Beckett	490
Rollins v. Marsh	607	v. Chichester	538
v. Mitchell	181, 245	v. Lewis	490
Rolt's Case	693	v. Rowe	451, 666
Ronald v. Buckley	607	Rowell v. Freese	137
Roofer v. Harrison	438	Rowland v. Best	468
Rook v. Worth	605, 611	v. Morgan	373, 390, 476 <i>a</i> , 928
Rooke v. Worrell	572	v. Witherden	444, 463
Rooker v. Rooker	828	Rowletts v. Daniel	299
Roome v. Phillips	500, 766	Rowley v. Adams	438, 476, 535, 536
Roosevelt v. Ellithorp	891	v. Rowley	511 <i>a</i>
v. Mark	559	v. Union	665, 691, 349
v. Roosevelt	441	Rowton v. Rowton	84, 324
v. Van Alen	913	Roy v. Beauforts	192
Root v. Blake	126	v. Gibbon	825, 827
Roper, <i>In re</i>	646	v. McPherson	149
v. Halifax	597, 785	v. Monroe	448
v. Holland	17	Royal v. Royal	901, 913
v. McCook	232, 238	Royall v. McKenzie	415
v. Radcliffe	152	Royce v. Adams	277, 287
v. Roper	679	Royds v. Royds	901
Roscommon v. Fowke	511 <i>c</i>	Royer's Appeal	458, 463, 606, 607
Rose v. Crockett	275	Rozell v. Vansyckle	189
v. Cunningham	93	Rucker v. Abell	149
v. Gibson	126	Rudisell v. Watson	647, 649, 651
v. Rose	747, 891	Rudland v. Crozier	119
Roseberry v. Taylor	584	Rudy's Estate	160, 451
Roseboom v. Mosheer	262, 270, 785	Rudyard v. Neirin	635
Rosenbaum v. Garrett	72	Ruff v. Summers	918
Rosenberger's Appeal	852	Ruffin v. Harrison	263
Rosevelt v. Fulton	171, 187	Rugby School	700
Rose Will Case	724	Rugely v. Robinson	815 <i>a</i>
Rosher, <i>In re</i>	671	Ruhe v. Buck	658
Roshi's Appeal	730, 733	Rumboll v. Rumboll	144, 145, 146
Ross v. Barclay	499, 500	Rumfelt v. Clemens	680, 685
v. Duncan	65	Rumph v. Abercrombie	187, 189
v. Ewer	655	Rundle v. Rundle	139
v. Gill	608	Rundlett v. Dale	590
v. Goodsall	509	Runkle v. Gaylord	602 <i>z</i>
v. Hegeman	132, 136	Runyan v. Coster's Lessee	45
v. Horton	222	Rupp's Appeal	127
v. Morton	639	Rush v. Dilks	656
v. Ross	699, 826	v. Steele	468
v. Whitson	237	v. Vought	173, 664
v. Willoughby	672	Rush's Estate	459, 460
Ross's Charity	701	Rushloy v. Mansfield	189
Ross's Trust	670	Rushworth, <i>Ex parte</i>	210
Rossett v. Fisher	602 <i>v</i>	Rushworth's Case	196
		Russell v. Allen	133, 138, 142, 693, 730
		v. Buckhout	466

INDEX TO CASES CITED.

cxxiii

[References are to sections.]

Russell v. Clark	244	Salinas v. Pearsall	127
v. Clowes	437	Salisbury, <i>In re</i>	605, 610
v. Coffin	299, 302	v. Bigelow	428, 602 k
v. Dickson	652	v. Clarke	137
v. Duffon	602 f	Salmon, <i>In re</i>	467
v. Jackson	77, 83, 93, 116, 126, 128, 133, 714	v. Cutts	195, 199, 202
v. Kellett	624, 699, 726	v. Hoffman	232
v. Kennedy	251	Salomans v. Laing	877
v. Lasher	594	Saloway v. Strawbridge	340, 494, 495
v. Lode	126	Salisbury v. Bagott	890
v. Loring	544	v. Black	171
v. McCall	245, 343	Salt v. Chattaway	160
v. Milton	815 a	Salter, <i>Ex parte</i>	617
v. Peyton	24, 129, 863	v. Bradshaw	188
v. Plaice	225, 768, 809	v. Cavanagh	151, 855
v. Russell	768, 769	Saltern v. Melhuish	183
v. Southard	226	Saltmarsh v. Barrett	152, 158, 468, 470, 471
v. Woodward	593	v. Bean	209
Russell's Appeal	104	v. Burn	602 v
Case	52, 53	Saltonstall v. Sanders	687, 699, 705, 709, 712, 720, 724, 748
Patent	67	Saltoun v. Hanston	260
Russian Spratts' Patent, <i>In re</i>	752	Salisbury v. Deuton	248, 251, 252, 255, 256, 714
Ruston v. Ruston	562, 565, 571	Salway v. Salway	443, 635
Rutgers v. Kingsland	218	Sammes v. Richmond	894
Rutherford v. Ruff	191	Sampay v. Gould	287, 288, 375, 509
Rutland v. Rutland	134	Sample v. Coulson	134, 137
Rutledge, <i>Ex parte</i>	536	Sanborn v. Plowman	863
v. Smith	79, 83, 320, 598, 798	v. Sanborn	97
Ryall v. Rolle	68, 345, 438, 835, 837	Sanchez v. Dow	861
v. Ryall	82, 835, 839	Sanders v. Richards	809
Ryan v. Bibb	328, 330	Sanders v. Deligne	218
v. Dox	215, 226	v. Miller	903 a
v. Doyle	217	v. Page	633, 653
v. Mahan	252	v. Rodney	672
v. O'Connor	79	v. Rogers	460, 847
v. Porter	820 a	Sanderson v. Pearson	918
v. Spurill	639	v. Walker	128, 195, 198, 902
Rycroft v. Christy	102, 104, 105, 649	v. White	724, 736, 744, 748
Ryder, Matter of	616	Sanderson's Trust	119, 152, 386, 386 b
v. Bickerton	453, 460, 462, 467, 848	Sandes v. Cooke	358
v. French	849	Sandford v. Flint	602 ee
v. Hulse	676, 678	v. Jodrell	882
v. Loomis	133	Sandford Charity	282
Ryland v. Smith	639, 640	Sandon v. Hooper	915
Rymer, <i>In re</i>	720	Sands v. Champlin	560
S.		v. Nugee	502
Saagar v. Wilson	197	Sandys v. Sandys	578, 892
Sabin v. Heape	785, 800, 801, 802, 803, 805	v. Watson	900
v. Stickney	602 o, 602 v	Sanford v. Hamner	166
Sacia v. Berthoud	225, 810	v. Irby	305
Sadd, <i>In re</i>	907	v. Sanford	79, 166
Sadler v. Hobbs	261, 416, 417, 419, 421, 422	Sangster v. Love	602 n
v. Houston	660	Sangston v. Gaither	592
v. Lee	543	v. Gordon	63
v. Pratt	511 a	Sansom v. Rumsey	183
Sadler's Appeal	217	Sargent v. Baldwin	104
Safford v. Hind	142, 206	v. Bourne	118
v. Rantoul	79	v. Burdett	827 a
Sage v. Culver	242	v. Cornish	43
Sale v. Moore	112, 113, 116	v. Franklin Ins. Co.	98
v. Saunders	633	v. Howe	602 d, 602 i, 602 n
v. Thornberry	114, 166	v. Sargent	551, 899
Salem Mill Dam v. Ropes	757	Sartill v. Robeson	324
		Satterwhite v. Littlefield	918
		Saul v. Pattinson	517
		Saulsbury v. Corwin	658

[References are to sections.]

Saulsbury v. Denton	112	Schell, <i>In re</i>	918
Saunders v. Bournford	347	Schenck v. Barnes	96, 142
v. Collin	855	v. Ellenwood	782
v. Cramer	208	v. Schenck	264, 341, 344
v. Davies	571	Schermerhorn v. Barhydt	238, 562, 566
v. Dehew	217, 218, 828	v. Cotting	382
v. Gregory	456	Schermerhorne v. Schenck	264, 344, 419
v. Houghton	546, 547	v. Schermerhorne	581
v. Leslie	235, 236	Schieffelin v. Stewart	462, 471
v. Miller	908	Schierloh v. Schierloh	126, 142
v. Richards	433, 848	Schlaeper v. Corson	127
v. Saunders	891, 896	Schlessinger v. Mallard	160
v. Schmaelzle	334, 343	Schley v. Brown	828
v. Vautier	396, 509 a, 622	v. Lyon	311, 330
v. Webber	401, 410	Schluter v. Bowery S. Banks	51
Saunderson v. Stearns	262	Schnebley v. Ragan	234
Sauzre v. De Montigny	223	Schnure's Appeal	569
Savage v. Benham	639	Schofield v. Jones	658
v. Brocksopp	176	v. Wolley	863
v. Carroll	842	Scholefield v. Redfern	544, 551
v. Dickson	891	v. Templar	172
v. Foster	53	Scholey v. Goodman	672
v. O'Neil	676	Scholle v. Scholle	195
v. Tyers	359	School v. Dunkleberger	117, 328
v. Williams	204	v. Kirwan	463
Savery v. King	202	v. McCully	769
Saville v. Tancred	246	School Directors v. School Directors	865
Savings Bank v. Bates	588	School District v. Peterson	437 a
Savings Fund's Appeal	927	School Dist. Greenfield v. First Na-	
Sawtelle v. Witham	700	tional Bank	443
Sawyer v. Baldwin	903 a	School Trustees v. Wright	84
v. Birchmore	924	Schoolbred v. Drayton	501
v. Hoag	207	Schoonmaker v. Sheely	359
v. Hovey	186	v. Van Wyke	428
v. Sawyer	669, 848	Schoonoven v. Pratt	602 x
Sawyer's Appeal	262	Schouler, Petitioner	276 a, 705, 715
Saxby v. Thomas	511 b	Schroder v. Schroder	872
Saxon v. Barksdale	225	Schultze v. New York City	126
Saxon Life Ass. Co., <i>In re</i>	851	Schuster v. Schuster	143
Say v. Barnes	851, 918	Schutt v. Large	222
v. Barwich	171, 191	Schutter v. Smith	382, 391
Saye & Sele v. Jones	312	Schuyler v. Hoyle	639, 640, 641
Sayer's Trusts	385	Schwartz v. Sears	602 cc
Sayers, <i>Ex parte</i>	345, 835, 837	Schwartz's Estate	245, 765
Sayles v. Bates	678	Scoby v. Blanchard	137, 165
v. Smith	602 u	Score v. Ford	825
Sayre v. Flourney	639, 642	Scott, <i>In re</i>	290
v. Frederick	137	Scott v. Atchison	456
v. Townsends	132	v. Beach	60
Scadden Flat Co. v. Scadden	207	v. Becher	816, 818, 827
Scales v. Baker	842	v. Berkshire County S. Bank	82
v. Maude	98, 99, 101	v. Colburn	754
Scanlan, <i>In re</i>	603	v. Cumberland	563
Scarborough v. Borman	646, 648, 652, 653	v. Davis	195, 428, 670
v. Parker	900	v. Depeyster	207
Scarisbrick v. Skelmersdale	160, 393	v. Devlin	593
Scarpellini v. Acheson	640	v. Dobson	546
Scarsdale v. Curzon	364, 373, 389	v. Dorsey	918
Scattergood v. Edge	377, 379	v. Freeland	195, 205, 602 w
v. Harrison	432	v. Gamble	602 v
Scawen v. Scawen	146, 147	v. Haddock	850, 864
Schaffer v. Lauretta	311	v. Harbeck	82
v. Wadsworth	920	v. Harris	79, 226
Schaffner v. Grutzmacher	127	v. Hastings	438
Schafroth v. Ambs	652, 680	v. Hollingworth	551
Schammel v. Schammel	612	v. James	633
Schanck v. Arrowsmith	576	v. Kane	96
Schanewerk v. Hoberecht	511 b, 766	v. Knox	866
Scheffermeyer v. Schaper	181	v. Mann	199

INDEX TO CASES CITED.

CXXV

[References are to sections.]

Scott v. Moore	361	Segond v. Garland	660
v. Nesbitt	71	Segrave v. Kirwan	181, 182
v. Nicoll	873	Sequin's Appeal	471
v. Orbinson	232, 237, 239	Seibert v. Minneapolis, &c. Ry. Co.	894
v. Perkins	546	Seibert's Appeal	616, 715
v. Rand	275	Seibold v. Chrisman	143
v. Scott	683	Seichrist's Appeal	206, 215
v. Sierra Lumber Co.	828	Seidler's Estate	459
v. Spashett	629, 632, 636	Seitzinger's Estate	827 a
v. Steward	375, 766	Selatter v. Cottam	904
v. Surnam	58, 239, 345	Selby v. Alston	13, 347
v. Thompson	210	v. Bowie	770
v. Thorpe	55	v. Cooling	768
v. Tyler	225, 512, 514, 516, 809, 810, 811, 815	v. Stanley	237, 239
v. West	393	Selden v. Vermilyea	286
Scott's Estate	891, 894	Selden's Appeal	82
Seaburn v. Hawley	325	Seldner v. McCreery	460, 790
Scowercroft, <i>In re</i>	701	Sell v. West	212
Scrags v. Hill	233	Sellers v. Reed	378
Scriven v. Tapley	645	Sellew's Appeal	764
Scroggins v. McDougald	195	Sellick v. Mason	386 a
Scroggs v. Scroggs	511 a	Selph v. Howland	681
Scroope v. Scroope	54, 146	Selsey v. Rhoades	206, 228, 229
Scrope's Case	511 c	Selyard v. Harris	877
Scruggs v. Driver	41	Semphill v. Hayley	512
Scudder v. Crocker	918	Semple v. Bird	292
Scul v. Reeves	602 c, 602 m	Senhouse v. Earle	834
Scully v. Delany	262, 419, 424, 440	Sergeant v. Ingersoll	218
v. Scully	878	Sergison, <i>Ex parte</i>	54, 336
Sculthorpe v. Burgess	161	v. Sealey	605
v. Tiffer	439	Servis v. Beatty	232
Scurfield v. Howes	416, 419, 421, 423, 424, 847	Seton's Decrees	283
Seaburn v. Seaburn	748	Settembre v. Putnam	126, 127, 129
v. Seagrave	674	Sewall v. Boston W. P. Co.	814
Seale v. Seale	366	v. Roberts	104
Seaman v. Cook	126, 127, 128, 132	v. Wilmer	511 b
v. Wood	385	Sewell v. Baxter	139
Seamans v. Gibbs	816 a	v. Denn	150
Seamonds v. Hodge	114	v. Moxsy	101
Sear v. Ashwell	103, 107	Sexton v. Hollis	126
Searing v. Searing	639, 643, 647	Seymour v. Bull	769
Searle v. Law	96, 100	v. Delancey	187
Sears v. Chapman	722	v. Freer	82, 863
v. Choate	920	v. McAvoy	827 a
v. Cunningham	119	v. Milford, &c. Ry.	757
v. Livermore	782	Seys v. Price	611
v. Putnam	381, 382	Shackleford v. Bank of Mobile	500, 591
v. Russell	312, 380, 383	Shaeffer v. Sleade	173, 187
v. Shafer	194, 201, 230	Shafer v. Davis	184
v. Smith	232, 237	Shaffer v. Watkins	591
Seaver v. Fitzgerald	381	Shainwald v. Davids	873
v. Lewis	562, 566	Shakeshaft, <i>Ex parte</i>	848, 876
Seaving v. Brinkerhoff	592	Shales v. Shales	146, 147
Second, &c. Church v. Desbrow	116	Shall v. Biscoe	232, 238
Second Cong. Soc. v. First Cong. Soc.	714, 724, 748	Shallcross v. Oldham	204, 210
Second Cong. Soc. North Bridge-		Shalter's Appeal	490
water v. Waring	328	Shankland's Appeal	299, 305, 386 a
Security Co. v. Garrett	124	Shanley v. Baker	160
v. Snow	248, 252, 382	Shannon v. Bradstreet	764
Seddon v. Connell	878, 879	v. Cannev	680
Sedgwick v. Stanton	214	Shapland v. Smith	298, 305, 312
Seeger v. Leakin	358	Shapleigh v. Pilsbury	299, 748
Seeley v. Jago	108	Sharp, <i>In re</i>	465
Seeling v. Crawley	672	v. Leach	104
Seers v. Hind	900	v. Long	134, 215
Seessel v. Ewan	602 o	v. Maxwell	676
		v. Pratt	499
		v. Sharp	271, 273, 290, 294, 337, 344, 503

[References are to sections.]

Sharp <i>v.</i> Toy	634	Shephard <i>v.</i> Stark	468
<i>v.</i> Wright	869	Shepherd <i>v.</i> Bevin	109
Sharpe <i>v.</i> Cossent	388, 555	<i>v.</i> Mauls	469
<i>v.</i> San Paulo Ry. Co.	401, 873	<i>v.</i> McEvers	38, 98, 261, 268, 274, 401, 594
Sharpless <i>v.</i> Adams	829	<i>v.</i> Nottidge	112, 116
<i>v.</i> Welch	438	<i>v.</i> Philbrick	602 <i>bb</i>
Sharpsteen <i>v.</i> Tillow	783, 785	<i>v.</i> White	143
Sharshaw <i>v.</i> Gibbs	552, 554	Sheppard, <i>In re</i>	282
Shatter's Appeal	771	<i>v.</i> Smith	900
Shattock <i>v.</i> Shattock	658, 659, 663, 849	Sheppard's Trusts, <i>In re</i>	275
Shattuck <i>v.</i> Cassidy	71	Sheppards <i>v.</i> Turpin	865
<i>v.</i> Freeman	591, 593	Sheratz <i>v.</i> Nicodemus	234, 235, 237, 238, 239
Shaw, <i>Ex parte</i>	336, 337	Sheridan <i>v.</i> Jones	926
<i>v.</i> Borrer	476, 597, 789, 802, 915	<i>v.</i> Joyce	808, 832, 835, 850
<i>v.</i> Boyd	34	<i>v.</i> Welch	602 <i>h</i>
<i>v.</i> Bunney	199	Sheriff <i>v.</i> Axe	432, 904
<i>v.</i> Burney	97	<i>v.</i> Butler	671
<i>v.</i> Conway	891	<i>v.</i> Neal	206, 215
<i>v.</i> Delaware	104	Sheril <i>v.</i> Shuford	918
<i>v.</i> Galbraith	320	Sherley <i>v.</i> Sherley	79
<i>v.</i> Huzzey	546	Sherman <i>v.</i> Baker	571, 715
<i>v.</i> Lawless	112, 123, 907	<i>v.</i> Burnham	654
<i>v.</i> Mitchell	626, 641	<i>v.</i> Dodge	299
<i>v.</i> Norfolk Co. Railway	758, 761	<i>v.</i> Leman	910
<i>v.</i> Pickthall	903 <i>a</i>	<i>v.</i> New Bedford S. Bank	82
<i>v.</i> Read	143	<i>v.</i> Parish	467, 602 <i>x</i>
<i>v.</i> Rhodes	395	<i>v.</i> Sandell	137
<i>v.</i> Shaw	129, 137	<i>v.</i> Sherman	569
<i>v.</i> Spencer	157, 158, 225, 800, 809, 810, 814, 846	<i>v.</i> Turpin	655
<i>v.</i> Thackray	191	Sherrard <i>v.</i> Carlisle	632
<i>v.</i> Turbett	890	<i>v.</i> Harbrough	152, 427
<i>v.</i> Weigh	314, 315	Sherratt <i>v.</i> Bentley	270, 271, 898
<i>v.</i> Wright	312	Sherrington <i>v.</i> Yates	640
Shaw's Trusts, <i>In re</i>	484	Sherwin <i>v.</i> Kenny	305
Shay <i>v.</i> Sessamon	641	Sherwood, <i>In re</i>	432, 923
Shearer <i>v.</i> Lofton	602 <i>e</i>	<i>v.</i> Amer. Bible Soc.	748
Shearin <i>v.</i> Eaton	863	<i>v.</i> Andrews	98
Shearman <i>v.</i> Morrison	246	<i>v.</i> Read	411, 602 <i>aa</i>
Sheatfield <i>v.</i> Sheatfield	361	<i>v.</i> Smith	615
Shee <i>v.</i> Hale	388, 555	<i>v.</i> Sutton	228
Sheener <i>v.</i> Lautzerbeizer	590	Shewell <i>v.</i> Dwaris	648
Sheen's Estate	81, 262	Shewen <i>v.</i> Vanderhorst	474, 481
Sheffield <i>v.</i> Buckingham	182	Shibley <i>v.</i> Ely	540, 863
<i>v.</i> Orrery	379, 516	Shields <i>v.</i> Atkins	433, 863
<i>v.</i> Parker	465	<i>v.</i> Thomas	828
Sheidle <i>v.</i> Weishlee	667	Shiers <i>v.</i> Higgons	191
Shelborne <i>v.</i> Inchquin	226	Shine <i>v.</i> Gough	218
Shelby <i>v.</i> Perrin	237	<i>v.</i> Hill	781
<i>v.</i> Tardy	126, 145	Shingley, <i>In re</i>	121
Sheldon <i>v.</i> Dodge	590	Shinn's Estate	465
<i>v.</i> Dormer	581, 597	Ship <i>v.</i> Hettrick	462
<i>v.</i> Easton	734	Ship Warre, <i>In re</i>	68
<i>v.</i> Harding	133	Shipbrook <i>v.</i> Hinchinbrook	416, 419, 421, 423, 424, 444
<i>v.</i> Stockbridge	699	Shipp <i>v.</i> Bowmar	655, 656
<i>v.</i> Wildman	863	Shipton <i>v.</i> Rawlins	876
Shellenberger <i>v.</i> Ransom	181	Shirk <i>v.</i> La Fayette	55
Shelley <i>v.</i> Nash	88	Shirley, <i>Ex parte</i>	656
Shelley's Case	357, 370	<i>v.</i> Shattuck	918
Shelly <i>v.</i> Eldin	315	<i>v.</i> Shirley	51, 277, 646, 647, 649, 653, 666
Shelthar <i>v.</i> Gregory	672	<i>v.</i> Sugar Refinery	232, 239
Shelton <i>v.</i> A. & T. Co.	126	Shirly <i>v.</i> Ferrers	585, 600
<i>v.</i> Hadlock	658	Shirras <i>v.</i> Caig	219
<i>v.</i> Homer	195, 308, 499	Shively <i>v.</i> Bowlby	41
<i>v.</i> Shelton	75	Shockley <i>v.</i> Fisher	286
<i>v.</i> Watson	369, 371	Shoemaker <i>v.</i> Comm'rs	41
Shepard <i>v.</i> Creamer	225, 437 <i>a</i>		
<i>v.</i> Pratt	137		
Shephard <i>v.</i> Richardson	602 <i>d</i>		

[References are to sections.]

Shoemaker v. Smith	132	Simpson v. Sikes	587
v. Walker	324	v. Simpson	672, 673
Shoofstall v. Adams	75	Simpson's Appeal	262
Shook v. Shook	343, 411, 414, 884	Sims v. Huntley	602 <i>bb</i>
Shore v. Shore	820	v. Lively	598, 794, 795
v. Wilson	733	v. Marryal	67
Short v. Currier	184	v. Pierce	358
v. Moore	627, 639	v. Sims	562
v. Wilson	920	Simon v. Jones	34
Shortel's Appeal	851	Simon's Trusts	455
Shortz v. Unangst	334, 343	Sinclair v. Jackson	349, 402, 404, 409, 411, 412, 415, 528, 529, 779
Shotwell v. Mott	699, 730, 737, 748	Sing Bow v. Sing Bow	126
v. Murray	184	Singleton v. Lowndes	919
Shoufe v. Griffiths	166, 169	v. Scott	254, 408, 602 <i>o</i> , 602 <i>q</i> , 602 <i>x</i> , 602 <i>y</i> , 602 <i>z</i> , 602 <i>aa</i>
Shouk v. Brown	652	Sires v. Sires	254
Shovelton v. Shovelton	112, 120, 888	Sise v. Willard	920
Shrewsbury v. Hornbury	705	Sisson v. Shaw	615, 618
v. Shrewsbury	348, 581, 597	Siter v. McClanahan	640
Shrewsbury, &c. Railway v. London & N. W. Railway	757	Siter's Case	633, 640, 641, 643
Shrewsbury School, <i>In re</i>	427	Sites v. Eldredge	248
Shryock v. Waggoner	58, 279	Sitwell v. Bernard	480, 550, 551
Shubar v. Windig	589, 593	Skeats v. Skeats	143, 146, 147
Shuman v. Reigart	641	Skeats' Settlement, <i>In re</i>	289
v. Shuman	66	Skeggs v. Nelson	238
Shumway v. Cooper	611	Skett v. Whitmore	86, 137
Shunk's Appeal	918	Skillman v. Skillman	147
Shupe v. Bartlett	145	Skingley, <i>In re</i>	121, 477, 552
Shurtleff v. Witherspoon	918	Skinner v. Dodge	243
Sickles v. New Orleans	744	v. James	126
Siddon v. Charrells	218	v. McDonall	84
Sidle v. Walters	77, 137	v. Orde	603
Sidmouth v. Sidmouth	130, 143, 144, 146, 147	v. Skinner	863
Sidney v. Shelley	157	v. Tirrell	658
Sidway v. Nichol	386 <i>a</i>	Skinner's Appeal	641, 642
Sieman v. Austin	142	Trusts, <i>Re</i>	119
v. Schunck	142	Skipwith v. Cunningham	591, 592, 593, 602 <i>e</i> , 602 <i>aa</i>
Siemers v. Schrader	890 <i>a</i>	Skirwing v. Williams	451
Siggers v. Evans	270, 593, 596	Skrine v. Simmons	226
Sigourney v. Munn	136	v. Walker	65
Silcox v. Harper	732, 741	Skrymsher v. Northcote	157, 160, 397
Silk v. Prime	567	Slack v. Slack	146, 147
Sillibourne v. Newport	511	Slade v. Rigg	761, 878
Silsbury v. McCoon	128	v. Van Vechten	197, 428
Silverman v. Kristufek	299	Slaney v. Witney	272
Silvers v. Potter	127	Slanning v. Style	541
Silverthorn v. McKinister	205, 501, 785	Slater v. Hurlbut	121, 920
Sime v. Howard	82	v. Oriental Mills	828
Simes v. Eyre	877	v. Wheeler	414, 877
Simmonds v. Borland	536	Slattery v. Watson	827 <i>a</i>
v. Palles	593	Slaymaker v. Bank	641
Simmons v. Baynard	52, 511 <i>b</i>	v. St. Johns	75
v. Burrell	729	Slee v. Manhattan Co.	602 <i>c</i> , 602 <i>n</i>
v. Drury	569	Sleech v. Thornington	637
v. Horwood	648	Sleeper v. Iselin	99
v. McKinlock	277	Sleight v. Lawson	862
v. Oliver	453	v. Read	676
v. Richardson	328, 520	Slemon v. Schurch	142
Simms v. Smith	76, 86, 863	Slevin, <i>In re</i>	727
Simon v. Barker	714, 729	v. Brown	311, 312, 475
Simond v. Hilbert	239	Slide & Spur Gold Mines v. Seymour	237
Simons v. Bedell	79	Slinn, <i>In re</i>	97
v. S. W. Ry. Bank	242	Sloan v. Cadogan	98, 101, 102
Simpson v. Chapman	430	v. Coolhaugh	602 <i>ee</i>
v. Gutteridge	244	Sloan's Appeal	568
v. Jones	605	Slocombe v. Glubb	213
v. Moore	545	Slocum v. Ames	545
v. Munder	232		

[References are to sections.]

Slocum <i>v.</i> Barry	819	Smith <i>v.</i> Henry	677
<i>v.</i> Marshall	77, 137, 201	<i>v.</i> Hewett	677
<i>v.</i> Slocum	127, 783	<i>v.</i> Hollenback	134
Sloman <i>v.</i> Bank of England	929	<i>v.</i> Howe	680
Sloo <i>v.</i> Law	276, 413, 427, 822	<i>v.</i> Howell	82, 83, 85, 139
Sloper <i>v.</i> Cottrell	17, 105	<i>v.</i> Howlett	467
Small <i>v.</i> Atwood	173, 639, 841, 849, 851, 874	<i>v.</i> Isaac	428
<i>v.</i> Ayleswood	260	<i>v.</i> Jackman	568
<i>v.</i> Ludlow	590	<i>v.</i> Jameson	17
<i>v.</i> Marwood	270, 273, 585, 593	<i>v.</i> Jeffreys	82
Smart <i>v.</i> Bradstock	885	<i>v.</i> Kane	627
<i>v.</i> Prujean	93, 108	<i>v.</i> Kay	210
Smedley <i>v.</i> Varley	202	<i>v.</i> Kennard	471
Smee <i>v.</i> Martin	613	<i>v.</i> Kimbell	378
Smeed, <i>Re</i>	615	<i>v.</i> King	54, 151
Smethurst <i>v.</i> Hastings	458	<i>v.</i> Kinney	490, 771, 783
Smiley <i>v.</i> Dixon	538	<i>v.</i> Knowles	250, 260, 261
<i>v.</i> Pearce	171	<i>v.</i> Lansing	428, 451
<i>v.</i> Wright	324	<i>v.</i> Leavitt	593
Smilie <i>v.</i> Biffle	621	<i>v.</i> Lockabill	299
Smilie's Estate	633, 641	<i>v.</i> Loewenstein	448
Smith, <i>Ex parte</i>	412	<i>v.</i> Lowell	591
Smith, <i>In re</i> 83, 90, 263, 453, 460, 466, 517, 541, 783, 917		<i>v.</i> Lyne	104
<i>v.</i> Acton	863	<i>v.</i> McConnell	414
<i>v.</i> Anders	602 <i>bb</i>	<i>v.</i> McCrary	500
<i>v.</i> Atkins	759	<i>v.</i> McDonald	52
<i>v.</i> Attersoll	86	<i>v.</i> Mason	142
<i>v.</i> Atwood	630	<i>v.</i> Matthews	79, 83, 633
<i>v.</i> Aykwell	214	<i>v.</i> Maxwell	361
<i>v.</i> Babcock	171	<i>v.</i> Metcalf	312
<i>v.</i> Baker	126	<i>v.</i> Mitchell	171
<i>v.</i> Bank of Scotland	171, 178, 179	<i>v.</i> Moore	386 <i>a</i> , 555, 815 <i>a</i>
<i>v.</i> Barnes	821	<i>v.</i> Oliver	275, 724
<i>v.</i> Bolden	900, 926	<i>v.</i> Patton	77, 138
<i>v.</i> Bowen	217, 828	<i>v.</i> Perkins	770
<i>v.</i> Brotherline	202, 203	<i>v.</i> Phillips	347
<i>v.</i> Bruning	214	<i>v.</i> Pincombe	185
<i>v.</i> Burgess	223	<i>v.</i> Porter	559
<i>v.</i> Burnham	79, 127, 133, 137	<i>v.</i> Portland	873
<i>v.</i> Calloway	863, 869	<i>v.</i> Provin	199, 602 <i>p</i>
<i>v.</i> Camelford	126, 665	<i>v.</i> Ramsey	127
<i>v.</i> Clay	228, 229, 855	<i>v.</i> Rickards	171
<i>v.</i> Colvin	602 <i>bb</i>	<i>v.</i> Roberts	347
<i>v.</i> Collins	358	<i>v.</i> Sackett	126, 133, 137
<i>v.</i> Combs	837, 863	<i>v.</i> Smith 49, 117, 118, 134, 213, 270, 284, 305, 438, 451, 453, 459, 465, 591, 603, 764, 818, 890, 903 <i>a</i> , 924	
<i>v.</i> Conkwright	591	<i>v.</i> Snow	882
<i>v.</i> Cooke	131	<i>v.</i> Speer	82
<i>v.</i> Cowdery	513, 517	<i>v.</i> Starr	310 <i>a</i> , 652, 653
<i>v.</i> Cuff	212	<i>v.</i> Stowell	739
<i>v.</i> Cuninghame	394	<i>v.</i> Sutton	260
<i>v.</i> Davis	260	<i>v.</i> Swan	408
<i>v.</i> Death	765	<i>v.</i> Thompson	318
<i>v.</i> Des Moines Nat. Bank	122	<i>v.</i> Tome	82
<i>v.</i> Doe	602 <i>d</i>	<i>v.</i> Towers	827 <i>a</i>
<i>v.</i> Drake	195, 205	<i>v.</i> Townshend	195
<i>v.</i> Dresser	907	<i>v.</i> Walter	217
<i>v.</i> Dunwoody	380	<i>v.</i> Wheeler	270, 273, 806
<i>v.</i> Evans	578	<i>v.</i> Wildman	117, 118, 411, 511
<i>v.</i> Everett	809	<i>v.</i> Wilkinson	82
<i>v.</i> Foley	578	<i>v.</i> Willard	145
<i>v.</i> French	849	<i>v.</i> Wood	855
<i>v.</i> Frost	602 <i>w</i>	<i>v.</i> Wright	206
<i>v.</i> Gillam	858	<i>v.</i> Wyckoff	573
<i>v.</i> Glover	865	<i>v.</i> Young	57
<i>v.</i> Guvon	795, 796	<i>v.</i> Zaner	55
<i>v.</i> Hall	466	Smith's Estate	82, 163, 359
<i>v.</i> Harrington	699, 920	Smith's Settlement, <i>In re</i>	282

INDEX TO CASES CITED.

CXXIX

[References are to sections.]

Smitheal v. Gray	126	South Yorkshire, &c. Ry. v. Great Northern Ry.	757
Smithsonian Inst'n v. Meech	126, 145	Southampton v. Hertford	160, 393, 395
Smyth v. Burns	459	Southard v. Plummer	679, 678
v. Carlyle	243	Southcomb v. Exeter	869
v. Phillips Academy	742	Southern Indiana Express Co. v. U. S. Express Co.	21
Smythe v. Smythe	540	South Eastern Ry. Co. v. Jortin	751
Snake v. Turton	511 c	Southouse v. Bate	152, 157
Snashall v. Met. R. Co.	678	Southwell v. Ward	277, 287
Sneer v. Stutz	264	Souverbye v. Arden	103, 104, 161
Sneesby v. Thorne	770, 809	Sowersby v. Lacy	582, 610, 787, 793
Snelgrove v. Snelgrove	218	Sowerby v. Clayton	461
Snell v. Dwight	21	Sowers v. Cyrenius	701
v. Elam	127	Spalding v. Miller	553
Snelling v. McCreary	456	v. Shalmer	416, 597, 789, 796
v. Utterback	137	Spangler's Appeal	918
Snider v. Johnson	137	Sparhawk v. Buell	418, 422, 426, 612, 618, 624
v. Udell W. Co.	212	v. Cloon	386, 555
Snow v. Booth	863	v. Sparhawk	275
v. Callum	918	Spark's Estate	262
v. Cutler	379	Sparks v. Hess	232
v. Hutchins	656	v. Kearney	602 p
v. Teed	256	Sparling v. Parker	439, 551
Snowden v. Dunlavy	35	Spaulding v. Kendrick	790
Snowdon v. Dales	386, 555	Speakman v. Speakman	380
Snowhill v. Snowhill	610, 611, 639, 641	v. Tatem	401, 875
Snyder v. Snyder	648, 652, 676	Spear v. Grant	242
v. Sporable	222	v. Spear	453, 612
Snyder's Appeal	652, 670, 918 u	v. Tinkham	463, 468, 541, 547
Soames v. Martin	118	v. Ward	680
Soar v. Ashwell	246, 863	Speed v. St. Louis, &c. R. Co.	299
v. Foster	144	Speer v. Burns	126
Socher's Appeal	171	v. Haddock	602 p
Society v. Pelham	468	Speidel v. Henrici	863, 865
Soc., &c. v. Hartland	299	Speight v. Gaunt	404, 409, 457, 813
Soc. for Propagating the Gospel v. Att.-Gen.	701, 731, 736, 741	Speiglemyer v. Crawford	173
Soc. of Orphan Boys v. New Orleans	748	Spence v. Duren	171
Socket v. Wray	52, 630, 633, 655	v. Spence	305, 358
Soggins v. Heard	172, 863	v. Whitaker	918
Sohier v. Eldredge	476 a, 551, 556	v. Widney	700, 920
v. Mass. Gen. Hosp.	610, 724	Spencer v. Anon	602 s, 602 x
v. St. Peter's Church	748	v. Duncan	863
v. Trinity Church	121, 737	v. Ford	602 e
v. Williams	784	v. Hawkins	598
Solinsky v. Lincoln Sav'gs Bk.	918	v. Smith	420
Sollie v. Croft	836, 842, 864, 914, 918	v. Spencer	393, 901, 917
Soller v. Chandler	428	v. Terrel	137
Solliday v. Bissett	918	v. Weber	466, 790
v. Gruver	575	Spencer, Re, Thomas v. Spencer	671
Solliday's Estate	448	Sperling v. Rochfort	630
Somers v. Craig	647	Spessard v. Rohner	315
v. Overhulser	126	Spicer v. Ayres	164
Somerset, In re	646, 848, 861	v. Dawson	652
Somes, In re	287	Spickernell v. Hotham	859, 863
v. Skinner	246 a	Spies v. Chicago &c. R. Co.	875
v. Stokes	200	Spindle v. Shreve	72, 815 a, 827 a
Sonley v. Clockmakers' Co.	38, 45, 240	Spindler v. Atkinson	205, 428
Soohan v. Philadelphia	748	Spink v. Lewis	160
Soper v. Brown	371	Spinning v. Blackburn	681
Soresby v. Hollins	709	Spirrett v. Willows	164, 635, 649
Sothron, In re	93	Spitzer v. Spitzer	248
Sothone v. Scott	843	Spokane County v. First Nat. Bank	828
Soulard's Estate	97, 163	Spooner v. Whiston	212
South, Ex parte	68	Spotswood v. Pendleton	610
v. Alleyne	310	Spottiswoodie v. Stockdale	585, 593
v. Hay	426	Sprague v. Bond	865
South Scituate S. Bank v. Ross	766	v. Edwards	437 a
South Sea Co. v. Wymondsell	861, 862		

[References are to sections.]

Sprague v. Smith	762	Stall v. Cincinnati	137
v. Sprague	358	Stallings v. Foreman	195, 205
v. Thurber	163	Stambaugh's Estate	462
v. Tyson	660, 873	Stamford, <i>In re</i>	277, 290
v. Woods	162, 299	v. Hobart	359
Sprange v. Barnard	113, 116	Stamp v. Cooke	257
Sprigg v. Bank of Mount Pleasant	226	Stamper v. Barker	34
v. Sprigg	162	v. Millar	414
Spring v. Biles	256	Standard Oil Co. v. Hawkins	828
v. Pride	195, 202, 670	Standing v. Bowring	99
v. Randall	827 a	Standish v. Babcock	832
v. South Carolina Ins. Co.	585	Stanes v. Parker	902
v. Woodworth	603	Stanger, <i>Re</i>	248
Spring's Appeal	460	Stanford v. Mann	166, 206
Springe v. Berry	683	v. Marshall	657, 662, 667
Springer v. Arundel	310 a, 652	v. Roberts	477
v. Kroeschell	137	Stanhope v. Toppe	187
v. Springer	126, 865	Stanlar v. Evans	902
v. Walters	232	Staniforth v. Staniforth	578
Springett v. Dashwood	821, 900	Stanley v. Brannon	143
Springfield H. Ass'n v. Roll	212	v. Colt	121, 737
Sproule v. Bouch	545	v. Jackman	369
Spurgeon v. Collier	828	v. Leigh	364, 377
Spurr v. Scoville	71, 72	v. Lennard	305, 359
Spurrier v. Hancock	122	v. Stanley	359, 578
Spurway v. Glynn	571	Stanley's Appeal	459, 851
Squire v. Dean	665	Stansell v. Roberts	238
v. Harder	139, 162	Stanton v. Hall	388, 626, 647, 648, 649
v. Whitton	178, 179	v. King	526
Squire's Appeal	76, 135, 205, 206, 226	v. Kirsch	677
Squires v. Ashford	634	Stanwood v. Stanwood	639, 640
St. Albyn v. Harding	188	Staples v. Hawes	386
St. Aubin v. St. Aubin	556	Stapleton v. Langstaffe	610
St. George v. Wake	213	v. Stapleton	96, 185, 373
St. James Church v. Church of the Redeemer	207	Starbuck v. Farmers' Loan Ass'n	103
St. John v. St. John	214, 672, 673	Stark v. Canady	126
v. Turner	869	v. Olsen	223
St. Johnsbury v. Morrill	828	Stark's Estate	457
St. John's Church, <i>In re</i>	725	Starke v. Starke	643, 863
St. John's College v. State	742	Starkey v. Brooks	151, 154
St. Louis v. Priest	779	v. Fox	869
St. Louis Union Society v. Mitchell	828	Starkie, <i>Ex parte</i>	617
St. Mary's Church v. Stockton	797	Starnes v. Hill	358
St. Patrick's Church v. Daly	127	Starr v. Ellis	347
St. Paul v. Dudley	347	v. Starr	75, 76
St. Paul Trust Co. v. Kittson	454	v. Wright	33
St. Paul's Church v. Att.-Gen.	700, 736, 738	State v. Adams	742
St. Stephens, <i>Re</i>	727	v. Ausmus	700
Staats v. Bergen	195	v. Bevers	828
v. Bingen	847	v. Boston &c. Ry. Co.	756
Stacey v. Elph	261, 267, 268, 269, 270, 271, 273	v. Brown	263
Stackhouse v. Barnston	228, 229, 851, 872	v. Bryce	30
Stackpole v. Arnold	226	v. Cincinnati	766, 795
v. Beaumont	512, 513, 514, 515, 635, 636	v. Commercial Bank	757
v. Davenport	867, 872	v. Commissioners	223
v. Howell	272	v. Digges	843
v. Stackpole	471, 472, 900, 912	v. Fay	847
Stafford v. Buckley	765	v. Gerard	699, 731, 738, 748
v. Stafford	851, 870	v. Griffith	276 a, 732
v. Van Renselaer	232	v. Guilford	404, 415, 417, 418
Stafford Charities, <i>In re</i>	733	v. Hamilton County Com'rs	200, 607
Stagg v. Beekman	555	v. Hearst	262
Stahlschmidt v. Lett	481	v. Hollingworth	550
Staines v. Burton	736	v. Holloway	171
v. Morris	786	v. Howarth	471
Stainton v. Carson Co.	185	v. Hunt	277
Stair v. Macgill	550	v. Kock	348
		v. Krebs	628
		v. Lord	413

INDEX TO CASES CITED.

CXXXI

[References are to sections.]

State <i>v.</i> Macalester	774	Stephenson <i>v.</i> Heathcote	506
<i>v.</i> Mayor of Mobile	44	<i>v.</i> January	782
<i>v.</i> McGowen	700, 748	<i>v.</i> Stephenson	918
<i>v.</i> Mexican Gulf Ry.	757, 759	<i>v.</i> Taylor	171
<i>v.</i> Midland State Bank	122	Stephenson's Estate	918
<i>v.</i> Netherton	476 a, 815 a	Sterling <i>v.</i> Sterling	672
<i>v.</i> Nicols	262	Sterrett's Appeal	416, 418, 421
<i>v.</i> Northern Railway	759	Stevens <i>v.</i> Austen	340, 495, 770
<i>v.</i> Paup	184	<i>v.</i> Bagwell	29, 69
<i>v.</i> Platt	916	<i>v.</i> Beals	640
<i>v.</i> Prewett	694, 748	<i>v.</i> Bell	585, 593
<i>v.</i> Real Estate Bank	588	<i>v.</i> Buffalo & New York Ry.	709
<i>v.</i> Reigart	632	<i>v.</i> Dethick	578
<i>v.</i> Robertson	639	<i>v.</i> Earles	602
<i>v.</i> Roeper	452	<i>v.</i> Ely	160
<i>v.</i> Rush	47	<i>v.</i> Gaylord	266
<i>v.</i> Simpson	456	<i>v.</i> Gregg	562, 568, 569, 570
<i>v.</i> Somerville, &c. Railway	759	<i>v.</i> Melcher	477, 552, 915 a, 917
<i>v.</i> Standard Oil Co.	21, 861	<i>v.</i> Olive	672, 673
<i>v.</i> Stebbins	44	<i>v.</i> Savage	636
<i>v.</i> Tolan	892	<i>v.</i> South Devon R. Co.	478
State Bank <i>v.</i> Campbell	239	<i>v.</i> Stevens	144, 438
<i>v.</i> Marsh	918	<i>v.</i> Trevor-Garrick	671
State Nat. Bank <i>v.</i> Thomas Manuf. Co.	44	<i>v.</i> Wilson	126
State of Maryland <i>v.</i> Bank of Maryland	31, 588	Stevenson, <i>In matter of</i>	602 m
States <i>v.</i> Rives	757	<i>v.</i> Agry	585
Steacy <i>v.</i> Rice	653	<i>v.</i> Brown	627
Stead <i>v.</i> Clay	668	<i>v.</i> Crapnell	79, 162
<i>v.</i> Culley	637	<i>v.</i> Kyle	206, 828
<i>v.</i> Nelson	654, 658	<i>v.</i> Maxwell	918
Stearnes <i>v.</i> Hubbard	84, 85	<i>v.</i> Phillips	918
Stearns <i>v.</i> Brown	463	Stephenson's Appeal	277
<i>v.</i> Fraleigh	274, 277	Estate	918
<i>v.</i> Mathews	676	Stewart's Estate	547
<i>v.</i> Palmer	17, 302, 312, 320, 328	Stewart, <i>In re</i>	275
Stebbins <i>v.</i> Eddy	174	<i>v.</i> Ball	677
<i>v.</i> Morris	126	<i>v.</i> Brown	126, 132
Steel <i>v.</i> Cobham	818	<i>v.</i> Dailey	165
<i>v.</i> Steel	647, 648	<i>v.</i> Fellows	195
Steel Edge S. & R. Co. <i>v.</i> Manchester		<i>v.</i> Hall	593
<i>S. Bank</i>	593	<i>v.</i> Hatton	234
Steele <i>v.</i> Kinkle	167, 228	<i>v.</i> Hubbard	192
<i>v.</i> Levisay	794	<i>v.</i> Iglehart	165
<i>v.</i> Steele	559, 907	<i>v.</i> Ives	232, 339
<i>v.</i> Wallar	96	<i>v.</i> Jenkins	686
<i>v.</i> Worthington	165	<i>v.</i> Kirkland	68, 438
Steere <i>v.</i> Steere	20, 76, 79, 82, 83, 120, 133, 139	<i>v.</i> McMinn	910
Stehman's Appeal	918	<i>v.</i> Noble	600
Steib <i>v.</i> Whitehead	815 a, 827 a	<i>v.</i> Parnell	460
Steinberger <i>v.</i> Potter	364	<i>v.</i> Pettus	343, 414
Steinhardt <i>v.</i> Cunningham	79	<i>v.</i> Sanderson	467
Steinman <i>v.</i> Ewing	680	<i>v.</i> Stewart	185, 668
Steinmetz <i>v.</i> Haltkin	645	Stewart's Appeal	643
Stell's Appeal	415, 421	Stewart's Estate	863
Stent <i>v.</i> Baillis	122	Stickland <i>v.</i> Aldridge	84, 90, 93, 216
Stephen <i>v.</i> Swann	55	Stickney <i>v.</i> Sewell	297, 453, 457, 461
Stephens, <i>In re</i>	308, 558	Stickney's Will, <i>In re</i>	382
<i>v.</i> Bateman	183, 187	Stiffle <i>v.</i> Everitt	626
<i>v.</i> Green	438	Stikeman <i>v.</i> Dawson	53
<i>v.</i> Hotham	786	Stile <i>v.</i> Griffin	232
<i>v.</i> James	388, 555	<i>v.</i> Thompson	496
<i>v.</i> Lawry	612, 615	Stileman <i>v.</i> Ashdown	54, 145, 146, 149
<i>v.</i> Stephens	379	Still <i>v.</i> Ruly	49
<i>v.</i> Trueman	111, 367	<i>v.</i> Spear	386 a
<i>v.</i> Venables	438	Stillwell <i>v.</i> Leavy	863
<i>v.</i> Yandle	918	<i>v.</i> Wilkinson	187
Stephenson <i>v.</i> Hayward	585	Stimpson <i>v.</i> Fries	602 h, 602 aa
		Stine <i>v.</i> Wilkson	602 p, 602 r, 782
		Stiner <i>v.</i> Stiner	172

[References are to sections.]

Stivers v. Gardner	114	Stratton v. Physio-Medical College	729, 894
Stock v. Moyle	122	Strauss v. Goldsmid	699, 702
v. Vining	903 a	Strauss's Appeal	232
Stockbridge v. Stockbridge	309, 766	Straut's Estate	861
Stocken v. Dawson	904, 906	Stretch v. Watkins	615, 616
v. Stocken	612	v. Gowdry	918
Stocker v. Hutter	891	Stretton v. Ashmall	457
v. Whitlock	660, 685	Strickland v. Weldon	732
Stockett v. Ryan	104	Striker v. Mott	305
Stockley v. Stockley	185	Strimpfler v. Roberts	126, 137, 141, 865
Stocks v. Dobson	438	Stringer v. Harper	918
Stockton v. Anderson	875	Stringham v. Brown	602 ee
v. Ford	202	Strode v. Russell	336
Stoddart v. Allen	593, 597	Strong v. Brewer	546
Stodder v. Hoffmann	92	v. Carrier	591
Stogden v. Lee	671	v. Glasgow	76
Stoke's Appeal	320	v. Gordon	142
Stoker v. Yelby	330	v. Ingraham	571
Stokes Trusts, <i>In re</i>	286	v. Messinger	126
Stokes v. Cheek	119	v. Perkins	93
v. Payne	268	v. Skinner	590, 591
v. Terrell	467	v. Smith	642
Stone v. Bishop	99	v. Weir	104
v. Clay	457	v. Willis	268
v. Denny	172, 173	Strong's Appeal	699
v. Framingham	735, 743	Strother v. Law	602 n
v. Godfrey	185, 433, 863, 867	Stroud v. Burnett	562, 566
v. Grantham	590	v. Grozer	671
v. Griffin	240, 748	v. Gwyer	430, 551
v. Hackett	98, 204, 338	v. Norman	511 a
v. Hammell	863	Stroughill v. Anstey	597, 768, 783, 785,
v. Hinton	786 a	795, 797, 800, 801, 810, 812	
v. Keyes	602 bb	v. Gulliver	208
v. Lidderdale	69	Stroup v. Stroup	324
v. Perkins	43	Stuart, <i>In re</i>	460, 848
v. Stone	109, 110, 147	v. Bruere	550
v. Theed	533	v. Bute	603
v. Welling	221	v. Carson	562
v. Westcott	555, 827 a	v. Easton	694, 712
Stone, Petitioner	920	v. Kirkwall	657, 658, 662
Stoner v. Commonwealth	642	v. Kissam	195, 428, 647, 648, 654
Stong's Estate	465	v. Stuart	539
Stonor v. Curwen	361, 369, 371	Stubbs v. Gargan	630
Stoolfoos v. Jenkins	170, 849	v. Roth	196
Storrs v. Barker	184	v. Sargon	112, 159, 253, 712, 715
v. Benbow	385	Stucky v. Stucky	132
Storry v. Walsh	802, 803, 805, 811	Studholme v. Hodgson	622, 903 a
Story v. Gape	260, 869	Stulz Trusts, <i>In re</i>	388, 555
v. Palmer	277, 520	Stump v. Gaby	199, 202, 227, 852
v. Winsor	219, 221	Sturgeon v. Stevens	104
Story's University Gift	735	Sturges v. Dimsdale	573
Stouffer v. Clagett	455	v. Knapp	280, 749
v. Holeman	232	Sturgis v. Champneys	626, 629, 632, 633,
Stoup v. Stoup	299	634	
Stout v. Betts	277	v. Corp	655, 670
v. Highbee	594	v. Morse	863, 865, 872
v. Levan	640	Sturt v. Mellish	17
v. Philippi Manuf. Co.	223	Sturtevant v. Jaques	157, 158, 159, 814
Stover v. Flack	134, 142	Stuyvesant, <i>In re</i>	283
Stow v. Kimball	127	v. Hall	241
Stowe v. Bowen	416	Styan, <i>In re</i>	438
Strafford v. Powell	360	Styer v. Freas	783
Strain v. Walton	237	Styles v. Guy	262, 419, 424, 440, 453, 870
Strange v. Fooks	851	Suarez v. De Montigny	790
v. Smith	517, 519	Succession of Wilder	34
Stratheden and Campbell, <i>In re</i>	705	Sudeley, <i>In re</i>	248, 498, 506
Strathmore v. Bowe	213	Sugden v. Crossland	274, 427
Stratton v. Dialogue	126, 127	Sugg v. Tillman	591
v. Grimes	511, 514	Suir Island Charity School, <i>In re</i>	737

INDEX TO CASES CITED.

cxxxiii

[References are to sections.]

Sullivan v. Chambers	299	Syester v. Brewer	864
v. Latimer	277	Sykes v. Hastings	432
v. Portland R. Co.	862	v. Sheard	493, 778, 784
v. Sullivan	133	Sykes's Trust	657, 658
Summers v. Moore	133	Sylvester v. Jarman	337
Summer v. Marcy	72	v. Wilson	305
Sumrall v. Chaffin	774	Symes v. Hughes	214
Sunderland v. Sunderland	141, 147	v. Symes	378
Supple v. Lawson	256	Symon's Case	724
Susquehanna Bridge Co. v. General Ins. Co.	754	Symson v. Turner	303, 305, 309
Susquehanna Canal Co. v. Bonham	757	Synge v. Hales	357, 360, 377
Sussex v. Worth	528	v. Synge	122
Sutcliffe v. Cole	152	Synnott v. Simpson	593
Sutherland v. Brush	421	Sypher v. McHenry	197
v. Cook	449, 451, 551	Syracuse S. Bank v. Porter	82, 248
Sutphen v. Fowler	780		
Sutton v. Aiken	520	T.	
v. Cradock	541	Tabb v. Archer	34
v. Hanford	590	v. Baird	299, 303
v. Jewke	515	Tabele v. Tabele	602 ff
v. Jones	199, 432, 530	Taber v. Willetts	248
v. Myrick	917	Tabor v. Brooks	511
Sutton v. Sharp	464, 468	v. Grover	13
Sutton Colefield's Case	830	Taft v. Dimond	79
Suydam v. Martin	217, 591	v. Providence, &c. R. Co.	545
Swain, <i>In re</i>	863	v. Stow	79
Swaine v. Perine	554	Taggart v. Baldwin	640
Swale v. Swale	413, 818	v. Taggart	364
Swallow v. Binns	580	Taintor v. Clark	259, 499, 500, 700, 748, 765, 921
Swan, <i>In re</i>	630	Tait v. Jenkins	819
v. Frick	97	v. Lathbury	766
v. Ligan	220, 541	v. Northwick	600
Swarez v. Pumpelly	287	Taite v. Swinslead	498
Swarr's Appeal	733	Talbot v. Bowen	84
Swartswalter's Account	918	v. Calvert	652
Swartwout v. Burr	56	v. Cook	438
Swartz v. Swartz	206	v. Dennis	640
Swasey v. Amer. Bible Soc.	699, 700, 706,	v. Field	511 c
v. Emerson	748	v. Mansfield	822, 823, 826
v. Little	796	v. Marshfield	474, 508
Swearingin v. Slicer	592	v. Radnor	272, 476 a, 922, 928
Swedesborough Church v. Shivers	733	v. Scott	188
Sweeney v. Sampson	694, 700, 748	v. Staniforth	79, 863
v. Smith	680	Taliaferro v. Minor	918
v. Sparling	127	v. Taliaferro	126, 133, 135
v. Warren	253	Talley v. Starke	610
Sweet v. Jacocks	206	Tally v. Thompson	676
v. Southcote	222	Tanaux v. Ball	918
Sweetapple v. Bindon	323, 324, 366	Taner v. Ivie	800
Sweeting v. Sweeting	327	Taney v. Fahnley	358
Sweezy v. Thayer	611	Tankard v. Tankard	171, 215
Sweigart v. Berks	556, 783	Tann v. Tann	903 a
Swift, <i>Ex parte</i>	613, 618	Tanner v. Dancey	892
v. —	920	v. Elworthy	129, 196, 538
v. Davis	147	v. Hicks	232
v. Gregson	256	v. Skinner	98
v. Smith	863	Tanney v. Tanney	169
Swinburne v. Swinburne	137, 142	Tanqueray-Williamme, <i>In re</i>	570
Swindall v. Swindall	471	Tapley v. Butterfield	814
Swinfen v. Swinfen	348, 443, 446	Tappan v. Deblois	694, 705, 724, 730, 748
Swink v. Snodgrass	225	Tappenden v. Burgess	587
Swinnoek v. Crisp	618	Tarback v. Marbury	590
Swinton v. Egleston	160	Tarbox v. Grant	103
Swishholm's Appeal	204, 209	Tardiff v. Robinson	535
Switzer v. Skiles	84, 401	Targus v. Puget	364
Swoyer's Appeal	453, 590, 786 a		
Sykle v. Kline	126		

[References are to sections.]

Tarleton v. Hornby	848, 875	Taylor v. Miles	124, 133, 147
v. Vietes	84	v. Millington	267
Tarlton v. Gilsey	411	v. Mitchell	715
Tarpley v. Poaze	126	v. Morris	499
Tarr v. Williams	655, 660	v. Phillips	605
Tarrant v. Backus	277, 382	v. Plumer	345, 835, 837, 842
Tarrant's Trust, <i>In re</i>	511 c	v. Pownal	82, 95, 122
Tarsley's Trust, <i>In re</i>	648	v. Pugh	213
Tarver v. Tarver	182	v. Radd	226
Tasburgh's Case	630	v. Roberts	415
Tasker v. Small	122, 874	v. Root	892
v. Tasker	32	v. Salmon	206, 885
Tassey's Trust	652	v. Shelton	678
Tastor v. Marriott	196	v. Shum	536
Tatam v. Williams	869	v. Stibbert	217, 828
Tate v. Connor	863	v. Tabrum	781, 848, 876, 901
v. Leithhead	87, 105	v. Taylor	54, 109, 139, 146, 147, 162, 194, 201, 654, 667
Tatge v. Tatge	226	v. Weld	226
Tatham v. Drummond	668, 709	Taylor's Case	697
v. Vernon	357, 359	Tayman v. Mitchell	171
Tatlock v. Smith	585	Teague v. Dendy	618
Tator v. Tator	380	Teakle v. Bailey	206
Taussig v. Reel	511 b, 528	Teall v. Schroder	863
Tavener v. Barrett	877	v. Slaven	861
v. Robinson	921	Teas's Appeal	573
Taylor, <i>Ex parte</i>	587, 848	Tebbetts v. Tilton	126, 133
<i>In re</i>	727, 895, 904	Tebbitt v. Tebbitt	364
v. Allen	816, 818	Tebbs v. Carpenter	438, 440, 444, 464, 465, 468, 471, 527, 900, 902
v. Alloway	232	Tecumseh Nat. Bank v. Russell	166
v. Alston	144, 147	Tee v. Ferris	511 a
v. Ashton	171	Teegarden v. Lewis	145, 166
v. Atkins	602 p	Teele v. Bishop of Derry	158, 701, 715, 727, 741
v. Austen	633	Tefft v. Stearn	891
v. Bacon	117	Telford v. Barney	404, 779
v. Benham	64, 131, 336, 415, 441, 602 m, 765, 855	v. Patton	92
v. Biddal	379	Teller v. Bishop	678
v. Blakelock	828	Tempest, <i>In re</i>	39, 55, 59, 277
v. Boardman	215	v. Canoy	248
v. Bond	547	Temple v. Hawley	34, 365
v. Buttrick	104	Templeton v. Brown	122
v. Clark	550, 551	Tenant v. Brown	121
v. Crompton	871	Tendrill v. Smith	201
v. Davis	437 a	Teneick v. Simpson	38, 231
v. Dickinson	413	Tennant v. Stoney	593, 649
v. Galloway	769	v. Tennant	245
v. George	112	Tennent v. Tennent	390
v. Glanville	280, 476 a, 667, 894, 901, 922, 928	Tenny v. Jones	355
v. Gooche	865	v. Simpson	133
v. Harwell	815 a	Terhune v. Colton	576
v. Hawkins	811	Terre v. Am. Board	499, 510
v. Haygarth	157, 327, 434, 437	Terrell v. Matthews	416, 423
v. Henry	99	Terrett v. Crombie	218, 222
v. Hibbert	550, 551	v. Taylor	743
v. Holmes	862	Terry v. Brunson	633, 639
v. Hopkins	402	v. Collier	298
v. Huber	920	v. Hopkins	213
v. Hunter	232, 237, 239	v. Laible	768
v. James	109, 143	v. Terry	453, 476, 605, 610, 621, 915
v. Keep	83, 732	Tessier v. Wyse	562
v. Kelly	127	Tetlev v. Griffith	658
v. Kemp	466	Thacker v. Kay	254
v. King	17, 328, 602 i, 602 aa	Thackery v. Sampson	380
v. Lucas	160	Thallheimer v. Brinckerhoff	68
v. Luther	226	Thatcher v. Candee	274, 921
v. McKinney	232	v. Churchill	86
v. Mahoney	276	v. Corder	268
v. Meads	656		

INDEX TO CASES CITED.

CXXXV

[References are to sections.]

Thatcher v. Omans	298, 299, 302	Thompson v. Marley	128, 163, 166
Thayer v. Gould	849	v. Meek	270
v. Thaver	511 <i>b</i>	v. Murphy	827 <i>a</i>
v. Wellington	88, 90, 93, 272	v. Murray	48
The Skinners' Case	693	v. Norris	251
Theebridge v. Kilburn	363	v. Parker	128
Thelluson v. Woodford	379, 394, 737	v. Quinly	53
Theological Ed. Soc. v. Att. Gen.	739	v. Shakespear	710
Thetford School	693, 725	v. Simpson	361, 833, 860, 867
Thicknesse v. Vernon	136	v. Spiers	438
Thiebaud v. Dufour	261 <i>a</i>	v. Thomas	66
Third Nat. Bank v. Stillwater Gas Co.	828	v. Thompson	75, 109, 134, 143, 146, 166, 245, 275, 324, 526, 699, 700, 712, 732
Thomas v. Bennett	665	v. Tryon	358
v. Brinsfield	863	v. Tucker-Osborn	122, 367
v. Bowman	433	v. Wheatley	195
v. Churchill	79	Thompson's Appeal	127, 128
v. Chicago	143, 144	Thomson v. Clydesdale Bank	122
v. Dunning	873	v. Eastwood	433
v. Elimaker	704, 706, 710	v. Peake	913
v. Folwell	661	Thong v. Bedford	317
v. Glendinning	863	Thorby v. Yates	654, 667, 889, 900, 901
v. Gregg	545	Thorn v. Newman	347
v. Higham	282	Thornber v. Wilson	701
v. Hole	257	Thornborough v. Baker	226
v. Jenks	586, 591, 592	Thorndike v. Hunt	828
v. Kelsoe	641	v. Loring	393, 737
v. Kennedy	239, 627, 632	Thorne v. Cann	347
v. McCann	171, 172	v. Heard	861
v. McCormack	162	Thorner v. Thorner	134
v. Merry	75, 79, 86, 863	Thornhill v. Gilmer	602 <i>i</i>
v. Oakley	871	Thornton v. Boyden	782
v. Scruggs	404, 420	v. Ellis	450, 451
v. Sheppard	189, 627, 628	v. Gilman	245
v. Standiford	137	v. Henry	84
v. Stone	221	v. Howe	700
v. Thomas	858, 863, 871, 872	v. Irwin	602 <i>v</i>
v. Townsend	774	v. Jarvin	199
v. Walker	126	v. Knox	235, 237, 239
v. Williams	213, 547	v. Ogden	915 <i>a</i>
Thomassen v. Van Wyngaarden	437 <i>b</i>	v. Stokill	842
Thomman's Estate	448	v. Wilson	703
Thompson, <i>In re</i>	622, 828, 902, 917	v. Winston	270
v. Ballard	248	Thorp, <i>In re</i>	429, 462, 463, 464, 468
v. Beaseley	654	v. Fleming	737
v. Blackstone	770, 787	v. Jackson	878
v. Blair	229, 230, 863	v. McCallum	195, 198, 430
v. Branch	134	v. Owen	117
v. Brown	465	Thorpe v. Holdsworth	554
v. Conant	299	v. Owen	86, 96, 118, 119
v. Corby	699	Thouron's Estate	917
v. Ellsworth	639	Thrasher v. Ballard	254, 511 <i>c</i>
v. Finch	402, 418, 850	Throckmorton v. Throckmorton	145
v. Fisher	359	Thrupp v. Collett	715
v. Ford	330	v. Harmon	665
v. Gaillard	765	Thrupton v. Att'y-Gen.	75, 509 <i>b</i>
v. Galloupe	518	Thurston v. Dickinson	552
v. Garwood	511 <i>c</i>	v. Essington	620
v. Gibson	299	v. Prentiss	602 <i>f</i> , 602 <i>p</i>
v. Grant	337	v. Thurston	552, 610
v. Griffin	612	Thurston, Petitioner	104
v. Hartline	195	Thynn v. Thynn	181, 182, 226
v. Harrison	851	Tibbitts v. Tibbitts	112, 113, 116, 123
v. Houze	602 <i>gg</i>	Tichenor v. Brewer	720
v. Judge	202	Tidd v. Lister	329, 526, 540, 626, 634, 818
v. Leach	259, 270	Tiernan v. Bean	232, 238
v. Lediard	750	v. Poor	97
v. McDonald	918	v. Rescaniere	855
v. McGaw	869		
v. McKissick	113, 253		

[References are to sections.]

Tiernan v. Roland	231	Torrence v. Shedd	126
v. Thurman	237, 239	Torrey v. Bank of Orleans	129, 206
Tierney v. Moody	305	v. Buck	171, 180
v. Wood	83, 105	v. Deavitt	243
Tiffany v. Clark	197, 205	Totham v. Vernon	100
v. Munroe	549	Tottenham, <i>In re</i>	196
v. Tiffany	142	Tourney v. Sinclair	673
Tiffin v. Longman	258	Tourville v. Naish	221
Tilbury v. Barbut	380	Tower v. Bank of River Raisin	588
Tilden v. Green	729	Towers v. Hagner	664, 665
Tilford v. Torrey	127	v. Moore	226
Tillaux v. Tillaux	162	Towle v. Ewing	511 c
Tilley v. Bridges	871	v. Mack	910
Tillinghast v. Bradford	386 a, 555	v. Nesmith	699
v. Champlin	414	v. Swasey	899
v. Coggeshall	324, 361, 476 a, 928	v. Wadsworth	126, 127
Tillison v. Ewing	861	Towler v. Towler	248
Tillott, <i>In re</i>	177	Towles v. Owsley	658
Tilt, <i>Re</i>	131	Towne v. Ammidown	262, 417, 420, 426
Tilton v. Hunter	241	Townend v. Townend	429, 430, 464
v. Tilton	84, 186	Townley v. Bidwell	704
Timbers v. Katz	639	v. Bond	267
Timson v. Ramsbottom	438	v. Sherborne	334, 412, 415, 416, 417, 419
Tindall v. Harkinson	175	Townsend, <i>Ex parte</i>	402, 405
Tinnen v. McCane	863	Townsend, <i>In re</i>	511 a
Tingier v. Chamberlin	382	v. Barber	422
Tinsley v. Tinsley	126	v. Carns	701
Tippetts v. Walker	757	v. Early	388
Tipping v. Power	892	v. Fenton	226
Tipton v. Powell	151, 165	v. Townsend	472
Titchenell v. Jackson	82	v. Wilson	344, 414, 492, 505
Titcomb v. Currier	786 a	v. Windham	68, 665
v. Morrill	81, 162	Townshend v. Brooke	891, 894
Titley v. Durant	672	v. Champenown	349
v. Wolstenholme	294, 339, 340, 494, 495	v. Grommer	351
Toby v. McAllister	232, 237	v. Stangroom	176, 185, 226
Todd v. Buckman	592, 602	v. Townshend	855, 861, 863, 865
v. Lee	660	v. Westacott	149
v. Moore	205	Townson v. Tickell	259, 270, 273
v. Munson	79	Tracy v. Gravois Rd. Co.	910
v. Sawyer	386	v. Keith	680
v. Todd	562	v. Sackett	189
v. Wilson	901, 904	v. Strong	556
Toder v. Sansom	395	v. Tracy	570
Toker v. Toker	98, 104	Trafford v. Boehm	380, 455, 460, 462, 848, 877
Tolar v. Tolar	98, 104, 109, 161	v. Trafford	373
Tollemache v. Coventry	373	v. Wilkinson	229
Toller v. Carteret	71	Tramp's Case	486
Tolles v. Wood	815 a	Trans. University v. Clay	466
Tolleson v. Blackstock	82	Trapnal v. Brown	85
Toman v. Dunlop	523	Trask v. Donaghue	259, 262
Tombs v. Rock	573	Travell v. Danvers	275
Tomkyns v. Ladbroke	635	Travers v. Townshend	901
Tomlin v. Hatfield	413	Travinger v. McBurney	214
Tomlinson v. Dighton	511 b, 657	Travis v. Illingworth	290, 291
v. Steers	347	Treadwell v. Cordis	499
Tompkins v. Mitchell	136, 238, 337	v. Salisbury Mills	757
v. Powell	218	Treat v. Peck	768
v. Tompkins	569	Treat's App.	38, 720, 724, 748
v. Wheeler	585, 593	Treats v. Stanton	330
v. Willan	315	Tregonwell v. Sydenham	151, 152, 160, 380, 385, 390, 396
Tompkyn v. Sandys	248	Trembles v. Harrison	55
Tongue v. Nutwell	380	Tremper v. Burton	143, 147
Topham v. Duke of Portland	511, 511 a	Trench v. Harrison	126, 127, 138, 842
Toppan v. Ricomio	816	Trenholme, <i>Ex parte</i>	126
Torbett v. Twining	649	Trent v. Hanning	312
Toronto G. T. Co. v. Chicago, &c., R. Co.	828, 878		

INDEX TO CASES CITED.

CXXXVII

[References are to sections.]

Trent v. Harding	309	Tucker v. Horneman	476 a, 928
v. Trent	569	v. Johnson	309
Trenton Banking Co. v. Woodruff	647	v. Kayess	152
Trephagen v. Burt	127	v. Moreland	33
Trevanion v. Morse	219	v. Nebeker	437 a
v. Vivian	622	v. Phipps	183
Trevelle v. Coke	536	v. Seamen's Aid Soc.	46, 93, 730, 748
Trevelyan v. Charter	204, 229, 230	v. State	261 a, 454
Treves v. Townshend	464, 468	v. Tucker	330, 863
Trevor v. Trevor	347, 361, 369, 371, 390, 823, 834	v. Zimmerman	815 b, 873
Trexler v. Miller	182	Tudor v. Samyne	653
Trezavant v. Howard	64	Tufinell v. Page	739
Tribble v. Oldham	235	Tug River Co. v. Brigel	903 a
Trickey v. Trickey	397	Tullett v. Armstrong	646, 648, 652, 653, 657, 658, 670, 671
Trim's Estate	699	v. Tullett	605, 611
Trimbletown v. Colt	584	Tullock v. Hartley	71
v. Hammil	468	Tunnard v. Littell	133
Trimmer v. Bayne	150	Tunno, <i>Ex parte</i>	275, 282, 297
Trimmer Church v. Watson	559	<i>In re</i>	571
Trinidad v. Milwaukee, &c. Co.	223	Tunstall v. Boothby	69
Trinity College v. Brown	326	v. Trappes	222
Triplett v. Jamson	918	Tupper v. Fuller	554
Tripp v. Frazier	160, 575	Tupple v. Viers	232
Tritt v. Colwell	640	Turnage v. Green	918
v. Crotzer	75, 77, 83	Turnbull v. Gadsden	171, 174
Trollop v. Linton	34, 511 c	v. Pomeroy	432
Trost v. Dingler	189	Turner, <i>Ex parte</i>	240, 795, 802
Trot v. Vernon	112, 569, 570	<i>In re</i>	309, 457, 848
v. Dawson	907	v. Buck	346
Trotter v. Blocker	60, 65	v. Corney	402, 821, 912
v. Erwin	232, 234	v. Davis	633
Trower v. Knightley	498	v. Flagg	607
Troy v. Haskell	45	v. Frampton	476 a, 928
v. Troy	610	v. Harvey	177, 180, 770
Troy, &c. Railway v. Kerr	757	v. Hill	196
Troy City Bank v. Wilcox	246 a	v. Hoole	212
Truebody v. Jacobson	232, 237	v. Hoyle	794
Truell v. Tysson	783	v. Jaycox	585
Truesdell v. Calloway	217	v. Johnson	602 g, 602 n, 602 y, 602 bb
Truett v. Williams	468	v. King	171
Trull v. Bigelow	218, 222	v. Laird	560
v. Eastman	188	v. Maule	279, 292, 927
v. Trull	814	v. Newport	556 a
Truluck v. People	222	v. Ogden	701
Trumbull v. Trumbull	358	v. Pettigrew	127, 836
Trust Co. v. Railroad	918	v. Russell	160
Trustees v. Wright	232	v. Sargent	360, 369, 375
Trustees, etc. v. Atlanta	437 a	v. Sawyer	127
v. Augusta	554	v. Smith	864
v. Chambers	748	v. State	658
v. Clay	466	v. Turner	184, 456, 616, 619
v. Jackson Square Church	131, 729	v. Wardle	260
v. Prentiss	602 n	Turner's Case	633, 653
v. Tufts	451	Turney v. Williams	468
Trustees of Phillips Academy v. King	42	Turnley v. Kelley	647
Trustees of Smith's Char. v. Northampton	508, 724	Turpin v. Sanson	456
Trustees of Theol. Sem. v. Kellogg	748	Turquand v. Marshall	467
Trutch v. Lamprell	402	Turvin v. Newcome	393
Tryon, <i>In re</i>	270, 901	Tusch v. German S. Bank	82
v. Sutton	640	Tuthill v. Tracy	602 bb
Tucker, <i>In re</i>	460	Tutt v. R. R. Co.	437 a
v. Andrews	213, 627	Tuttle, <i>In re</i>	545
v. Bean	52	v. Fowler	641
v. Boswell	550, 551	v. Gilmore	452
v. Burrow	144, 147	v. Merchants' Nat. Bank	277, 282
v. Gordon	641	v. Robinson	918
v. Guest	680	Twaddell's Appeal	458, 459, 914
		Tweddell v. Tweddell	201, 614

[References are to sections.]

Tweedy v. Urquhart	277, 296	Unitarian Society v. Woodbury	79, 82, 138
Twenty-Third St. B. Church v. Cornell	729	United States v. Addyston Co.	21
Twisden v. Wise	639, 640	v. Coffin	202
Twisleton v. Thelwell	747, 892	v. Joint Traffic Ass'n	21
Twitchell v. Drury	247 a	v. Trans-Missouri Freight Ass'n	21
Twopenny v. Peyton	119, 555	v. E. C. Knight Co.	21
Twynne's Case	590	v. Vaughn	438
Twympont v. Warcup	174	U. S. Ins. Co. v. Schriver	222
Tyars v. Alsop	203	U. S. Mortgage Co. v. Sperry	437 a
Tyford v. Thurston	926	U. S. Trust Co. v. Stanton	343
Tylden v. Hyde	499, 501, 787, 803	Univ. Soc. v. Fitch	724
Tylee v. Tylee	818	University v. Bank	863, 865
Tyler, <i>In re</i>	384	v. Fay	743
v. Black	171, 173, 184	University College, <i>In re</i>	743
v. Deblois	263	University College of London v. Yar-	
v. Granger	437 a	row	704, 738
v. Lake	348, 648, 649	Updegraph v. Commonwealth	697
v. Herring	764, 779	Upham v. Varney	297, 299, 312
v. Mayre	277	v. Wyman	859
v. Sanborn	206	Uppington v. Buller	202
v. Odd-Fellows' Ass'n	607	Upshaw v. Hargrove	220, 232, 239
v. Tyler	82, 86, 122, 212	Upshur v. Briscoe	58
v. Webb	222	Upson v. Badeau	407
Tyree v. Williams	780	Urann v. Coates	82, 103
Tyrrell v. Hope	310, 648	Urch v. Walker	261, 264, 271, 401, 503, 927
v. Marsh	784	Urkett v. Coryell	60
v. Morris	225, 809	Urury's Ex'rs v. Wooden	694, 699, 724, 748
Tyrrell's Case	161, 301	Utica Ins. Co. v. Lynch	471
Tyrrell's Trusts, <i>In re</i>	401	Utterson v. Maire	225
Tyrson v. Mattair	676	Uvedale v. Patrick	276
Tyrwhitt v. Tyrwhitt	347, 348	v. Uvedale	747, 892
Tyson v. Blake	546	Uzzell v. Mack	232
v. Jackson	574	Uzzle v. Wood	104
v. Latrobe	768		
v. Mickle	780, 784		
v. Passmore	38, 231		
Tyte v. Willis	330		

V

U.			
Udal v. Udal	511 c	Vaccaro v. Cicalla	910, 923
Udell v. Kenny	628, 630, 645	Vachell v. Roberts	451
Uhrich v. Beek	221	Vail v. Knapp	72
Ulrici v. Boeckeler	837	v. Vail	305
Ulman v. Barnard	243	Valentine v. Bell	658
Ulster Building Co., <i>In re</i>	122	v. Richardt	79, 166
Unckles v. Colgate	21	v. Valentine	918
Underhill v. Horwood	186, 187, 192	Vallance v. Miners' Life Ins. Co.	589
v. Morgan	843	Valle v. Bryan	127
Underwood v. Boston Five Cents S. Bank	843	Vallette v. Bennett	320
v. Curtis	382, 448	v. Tedens	206
v. Hutton	846, 924	Valliant v. Diodmede	536
v. Stevens	417, 419, 423, 424, 444, 466, 467, 849	Van Amringe v. Peabody	243
Uniacke, <i>In re</i>	259	Van Berghen v. Demarest	602 ee
v. Giles	103	Vanbever v. Vanbever	840
Union Bank v. Baker	130	Van Blarcom v. Dager	550
v. Jacobs	754, 757	Van Bokkelen v. Tinges	794, 873
v. Murray-Aynsley	122	Van Buskirk v. Ins. Co.	438
Union Bank of Tennessee v. Ellicott	588	v. Van Buskirk	126
Union College v. Wheeler	126, 132	Van Cott v. Prentice	82, 104
Union Life Ins. Co. v. Hanford	206	Vance v. E. Lancaster R. Co.	478
v. Spadis	828	v. Kirk	828
Union Nat. Bank v. Goetz	828	v. McLaughlin	642
Union Pac. Ry. Co. v. Artist	710	v. Vance	929
Union Stock Yards Bank v. Gillespie	206	Vandebende v. Livingston	872, 877
		Vandenberg v. Palmer	96, 165
		Vanderbilt, <i>In re</i>	511
		Vanderheyden v. Crandall	305, 307, 523
		v. Mallory	660
		v. Vanderheyden	468, 918
		Vanderplank v. King	376, 385, 390
		Vanderstegen v. Witham	17

INDEX TO CASES CITED.

CXXXIX

[References are to sections.]

Vander Volgen v. Yates	162, 705, 710	Vernon's Case	94
Vandervoot, <i>In re</i>	783	Verplanck v. Insurance Co.	207
Vandever v. Freeman	137	Verplank v. Caines	137
Vandever's Appeal	273, 411, 412, 415	Verulam v. Bathurst	369
Van Doren v. Olden	545	Vesey v. Jamson	159, 711, 712
v. Todd	242	Vestal v. Sloan	171
Van Duyne v. Van Duyne	115	Vestry, &c. v. Barksdale	918
Van Duzer v. Van Duzer	603, 627, 628, 631	Vetterlein v. Barnes	873
Vane v. Dungannon	511 a	Vez v. Emery	465, 901
Van Epps v. Van Deusen	627, 628, 629, 631, 632, 641	Vick v. McDaniel	160
v. Van Epps	129, 195, 205, 206, 430	Vickers v. Cowell	136
Van Grutten v. Foxwell	358	v. Scott	550, 551, 777
Van Horn v. Fonda	205, 262, 264, 401, 538	Vidal v. Girard	42, 43, 45, 46, 240, 694, 700, 724, 748
Vanhorn v. Harrison	312	v. Philadelphia	694
Van Horne v. Everson	680	Vigor v. Harwood	550
Van Houten v. First Reformed Dutch Church	742	Vigrass v. Binfield	453, 825, 826, 827
Van Kirk v. Skillman	680	Villard v. Chovin	618
Vann v. Barnett	816	Villers v. Beaumont	104, 108
Vanness v. Jacobs	928	Villers-Wilkes, <i>Re</i>	727
Vannyoy v. Martin	171	Villiers v. Villiers	315, 319
Van Rensalaer v. Stafford	438	Villines v. Norfleet	850
Van Rensselaer v. Dunkin	652	Vincent v. Beshopre	511 b
Van Saudan v. Moore	886	v. Ennys	784
Van Sittart v. Van Sittart	654	v. Godson	260
Van Vechten v. Van Vechten	380, 391, 619, 620	v. Newcombe	451
Van Vronker v. Eastman	554	Vine v. Raleigh	397, 498
Van Weckle v. Malla	205	Viney v. Abbott	104
Van Winckle v. Van Houten	569, 570	Vinton's Appeal	545
Van Wyck, <i>In re</i>	282, 411, 499	Virginia Coal Co. v. Kelly	127
Vardon's Trusts, <i>Re</i>	627, 671	Volaneau v. Peagram	655, 656
Varick v. Briggs	218	Volans v. Carr	623
v. Edwards	68, 188, 863	Volgen v. Yates	730
Varner v. Gunn	858	Von Hesse v. MacKaye	104
Varney v. Stevens	554	Von Hurter v. Spergeman	433
Varnum v. Meserve	199, 602 m, 602 ff	Von Trotha v. Bamberger	79
Varrell v. Wendell	254	Voorhees v. Church	206
Vartie v. Underwood	680	v. Stoothorp	918
Vattier v. Hinde	218, 219, 221	Vose v. Grant	242
Vaughan v. Barclay	71	Voyle v. Hughes	68, 101, 102, 438
v. Buck	451, 547, 634, 636	Vreeland v. Van Horn	849
v. Burslem	373	v. Williams	171
v. Evans	593	Vyse v. Foster	469
v. Thurston	900	Vyvyan v. Vyvyan	851
v. Vanderslegen	170, 658, 848, 849		
v. Walker	663		W.
Vaux v. Parke	305, 555	Wacker v. Wacker	124
Vaux's Estate	511 c	Wackerbath, <i>Ex parte</i>	416
Veale's Trusts, <i>In re</i>	256	v. Powell	404
Veasey v. Doton	173	Wadd v. Hazelton	97, 163, 260
Veasie v. Williams	228	Waddingham v. Loker	82
Veazie v. Forsaith	477	Waddington v. Banks	38, 231
Venables v. Coffinan	725, 748	Waddy v. Hawkins	918
v. East Ind. Co.	262	Wade v. Amer. Colonization Soc.	748
v. Foyle	243, 402	v. Dick	927
v. Morris	319	v. Fisher	647, 648
Vermont Marble Co. v. Smith	178	v. Greenwood	239
Verner's Estate	891	v. Harper	199, 209, 602 v, 602 z
Verney v. Carding	828, 837	v. Paget	13, 347
v. Verney	532, 578	v. Pettibone	125
Vernon, <i>Ex parte</i>	126	v. Pope	912
v. Blackley	874	Wadham v. Society, &c.	660
v. Board, &c.	831	Wadsworth, <i>In re</i>	275, 411
v. Keys	173	v. Schisselbauer	815 b
v. Morton	585, 591, 593, 602	v. Wendell	95
v. Vawdry	260, 844	Wagenseller v. Prettyman	915
v. Vernon	111, 112, 367, 611	Wager v. Wager	12

[References are to sections.]

Wagner v. Baird	228	Walker v. Walker	226, 229, 230, 422, 507,
Wagnon v. Pease	544, 820 <i>a</i>		508, 510, 666, 672,
Wagstaffe v. Lowerre	918		694, 748, 863, 918
v. Read	219, 220	v. Wetherell	618
v. Smith	306, 648, 655, 670	v. Whiting	121
v. Wagstaffe	93, 301	v. Williams	238
Wailes v. Cooper	218	v. Woodward	471
Wain v. Egmont	600	v. —	297, 453, 461
Wainwright v. Elwell	13	Walker's Estate	918
v. Low	827 <i>a</i>	Walkerly, <i>In re</i>	382, 920
v. Waterman	249, 503, 510	Wall v. Bright	38, 122, 231, 337, 342
Wait v. Day	143	v. Cockerell	202
v. Maxwell	35	v. Stubbs	176
Waite v. Morland	627	v. Tomlinson	639, 640
v. Whorwood	835, 837	v. Town	199
Wake v. Tinkler	330, 520	Wall St. Meth. Church v. Johnson	277
Wakefield v. Maffett	580	Wallace v. Anderson	386 <i>b</i>
v. Marr	52	v. Auld	627, 645
Wakeman v. Grover	590, 592, 594, 600	v. Berdell	104
v. Rutland	787, 874	v. Bowens	144
Walburn v. Ingilby	879	v. Coster	652, 661
Walcott v. Cady	541	v. Duffield	75, 126, 127, 128
Walden v. Karr	86, 863	v. Langston	225
Waldo v. Caley	699, 705	v. Marshall	133
v. Cummings	541	v. McCullough	127, 128
v. Waldo	540, 776	v. Taliaferro	639
Waldron v. Chastney	602 <i>p</i> , 602 <i>aa</i>	v. Wainwright	13
v. McComb	768, 786 <i>a</i>	v. Wallace	201
v. Sloper	438	Waller v. Armistead	213, 851
Wales v. Newbould	679	v. Barrett	846, 924
Waley's Trusts, <i>In re</i>	388	v. Catlett	452
Walford v. Gray	208	v. Childs	701, 702, 714
v. Liddel	862	v. Harris	602 <i>ff</i>
Walke v. Moore	253	v. Jones	891
Walker, <i>In re</i>	466, 584, 633, 636, 904	v. Teal	770
v. Beal	920	Wallasey Local Board v. Gracey	732
v. Brooks	873	Walley v. Whalley	196, 828, 878
v. Brown	145	Wallgrave v. Tebbs	77, 83, 93, 181, 216,
v. Brungard	134, 135, 199, 288, 292,		511 <i>a</i>
	598, 602 <i>p</i> , 602 <i>v</i>	Wallingford v. Heard	856
v. Burngood	126	Wallington v. Taylor	576
v. Bynam	468	Wallington's Estate	205
v. Crews	96	Wallis v. Freestone	506
v. Crowder	602 <i>h</i> , 612	v. Loubat	202
v. Daly	166	v. Thornton	416, 420, 602 <i>g</i>
v. Dean	327	v. Wallis	299
v. Drury	636	Walmesley v. Booth	188, 202, 203
v. Dunlop	171	Walraven v. Lock	75
v. Elledge	836	Walrond v. Walrond	107, 471
v. Fawcett	328	Walsh, <i>In re</i>	603
v. Locke	84, 162	v. Dillon	888
v. Maunde	257, 509	v. Gladstone	273, 291, 731
v. Miller	242	v. Stille	242
v. Mower	383	v. Wallinger	248, 250, 258, 507, 511 <i>b</i>
v. Ogden	72	v. Walsh	52, 618, 623
v. Page	456	v. Wason	645
v. Peck	678	Walston v. Smith	143, 145
v. Perkins	214	Walter v. Jones	206
v. Preswick	239, 876	v. Klock	215
v. Richardson	23, 384	v. Logan	501
v. Sedgwick	232, 237	v. Saunders	633
v. Sharp	920	v. Walter	305
v. Shore	500, 613, 771	Waltham's Case	169, 181
v. Smalwood	474, 764, 770, 789, 795	Walton v. Avery	918
v. Smyser's Ex'rs	511	v. Follansbee	76
v. Symonds	402, 412, 418, 419, 421,	v. Walton	94, 150, 151, 152
	440, 453, 467, 821, 830,	Walworth v. Holt	885
	847, 848, 851, 875, 923	Walwyn v. Coutts	367, 585, 593
v. Taylor	814	v. Lee	218, 219

[References are to sections.]

Wamble v. Battle	232	Warner v. Winslow	221
Wamburzee v. Kennedy	863	Warrall v. Morlar	239
Wankford v. Wankford	264	Warren v. Adams	863
Warburton v. Farn	784	v. Clancy	720
v. Sandys	414, 505	v. Copelin	438
v. Warburton	510, 581	v. Davies	571
Ward v. Amory	312, 627	v. Fenn	232
v. Arch	863	v. Haley	648
v. Armstrong	137	v. Howard	873
v. Arredondo	71	v. Rudall	272
v. Audland	101	v. Steer	139
v. Bakkelen	229	v. Tynan	84, 85
v. Barrows	783, 785	v. Union Bank	454, 467
v. Brown	202	v. Warren	554
v. Butler	262, 264	v. Warrick	361
v. Davidson	128	Warriner v. Rogers	97, 98
v. Devon	501	Warter v. Anderson	922
v. Dorch	277	v. Hutchinson	306, 312, 315, 581
v. Harvey	863	Wartman v. Wartman	474
v. Hipwell	413, 733	Wartram v. Wartram	825
v. Kitchen	466	Warwick v. Edwards	665
v. Lant	161	v. Hawkins	648, 651
v. Lenthal	511 b	v. Warwick	222, 834
v. Lewis	593, 594	Wasby v. Foreman	246 a
v. Matthews	133	Washborne v. Downes	377
v. Morgan	250	Washburn v. Burns	681
v. Morrison	438	v. Sewell	46, 699, 724, 730, 741, 748
v. Screw Co.	610	Washington, &c. R. R. Co. v. Alexan-	
v. Smith	205, 456	der, &c. R. R. Co.	282
v. Spivey	133	Washington v. Emery	466
v. Tinkham	454	Wassell v. Leggatt	863
v. Trotter	590	Wasson v. Connor	223
v. Van Bokkelen	229, 230	Watchman, The	592
v. Ward 79, 121, 131, 142, 169, 476, 809		Waterhouse v. Stansfield	72
v. Webber	183	Waterman v. Alden	276, 891
v. Yates	903 a	v. Baldwin	768
Ward's Settlement	455	v. Cochran	891, 900
Warden v. Richards	499	v. Spaulding	780, 781, 783
Wardens v. Att. Gen.	865	v. Sprague Manuf. Co.	591
Wardlaw v. Gray	627, 628, 639	v. Webster	791
Wardle v. Claxton	648, 649	Waters v. Bailey	129, 196
v. Hargreaves	282	v. Conolly	590
Wardour v. Beresford	183	v. Groom	199
Wardwell v. McDowell	270, 499	v. Margerum	500
Ware v. Cann	386	v. Stickney	182
v. Horwood	187	v. Tazewell	515, 653
v. Mallard	112, 117	v. Thorn	199, 202
v. McCandlish	544, 545	Watertown v. White	757
v. Polhill	605	Watkins, <i>Ex parte</i>	65
v. Richardson	310, 312	v. Check	795, 800, 810
v. Sharp	660	v. Holman	41
Wareham v. Brown	510	v. Jones	277
Warfield, <i>Ex parte</i>	630	v. Quarles	380
v. Ross	187	v. Russell	239
Waring, <i>In re</i>	34	v. Specht	312, 316, 343, 858
v. C. & D. R. Co.	858	v. Stockett	226
v. Coventry	506	v. Weston	357
v. Darnall	438, 439, 786 a	Watkins v. Watkins	628, 633, 637, 673
v. Purcell	556	Watson, <i>Ex parte</i>	752
v. Waring	438, 457, 562, 672	v. Bagaley	589
Warland v. Colwell	328	v. Bane	238
Warley v. Warley	564, 566	v. Bothwell	182
Warman v. Seaman	161	v. Brickwood	566
Warneford v. Thompson	765	v. Holden	459
Warner v. Bates	112, 114, 115, 116	v. James	768
v. Daniels	167, 171, 173, 230	v. Knight	593
v. Martin	243	v. Le Row	142, 149, 218
v. Van Alstyne	232, 239	v. Marshall	630
v. Whittaker	221	v. Martin	248

[References are to sections.]

Watson v. Mayrant	121	Wedderburn v. Wedderburn	200, 429,
v. Pearson	312, 315, 414, 499,	430, 454, 470, 745, 851,	863, 864,
v. Saul	576, 745,		865, 923
v. Smith	378	Wedgewood v. Adams	787
v. Stone	456, 914	Weed's Estate	902, 910
v. Sutro	866	Weekham v. Berry	329
v. Thurber	680	Weekly v. Ellis	133
v. Toone	861	Weeks v. Cornwall	765
v. Wells	232	v. Lego	660
v. Young	622	v. Weeks	633
Watt v. Ball	323	Weems v. Coker	820 a
v. Creyke	511 a	v. Harrold	820 a
v. Watt	142	Weigand's Appeal	417, 420
Watton v. Penfold	750	Weil v. Lehmayr	894
Watts v. Bullas	107, 108	Weiland v. Townsend	510
v. Cresswell	53	Weir v. Tannehill	594
v. Girdlestone	453, 462, 466, 469, 509,	Weisbrod v. Chicago	678
	539, 777	Weisel v. Cobb	910, 917
v. Kancie	809	Weisham v. Hocker	76
v. Symes	347	Weiss v. Dill	912
v. Turner	520	v. Heitkamp	162
Watts' Settlement	292	Welborn v. Rogers	864
Waugh v. Riley	55	Welby v. Welby	189
v. Wyche	921	Welch, <i>In re</i>	618
Wavell v. Mitchell	875	v. Allen	320
Way v. Patty	237	v. Brimmer	378
Way's Settlement	101, 102	v. Greenhalge	783
Trust, <i>In re</i>	103, 104	v. Henshaw	96, 252
Wayman v. Jones	418, 419	v. Mandeville	330
Wayne v. Hanham	761	v. McGrath	195
Waynesburg College's App.	82	v. Parran	238
Weale v. Ollive	100	v. Welch	647, 649
Weall, <i>In re</i>	813, 902	Weld v. Bonham	885
Wearing v. Wearing	451	Weldon v. Riviere	646
Weatherby v. St. Giorgio	790	v. Winslow	646
Weaver v. Fisher	127, 128	Welford v. Beazeley	82
v. Leiman	863, 865	v. Chancellor	178
Webb, <i>In re</i>	466	Welhelm v. Falmer	58
v. Bailey	133	Welker v. Wallace	846
v. Claverden	182	Well v. Thornagh	182
v. Crawford	520	Well Beloved Weeks, <i>In re</i>	700
v. Daggett	586, 590, 600	Wellbeloved v. Jones	702, 732
v. De Beauvoisin	908	Wellborn v. Williams	238
v. Deitrich	56, 276	Weller v. Fitzhugh	433
v. Grace	516	v. Ker	508, 517
v. Jones	566	v. Weller	508
v. Kelley	119	Welles v. Ely	555
v. Ledsam	404, 411, 412	v. Lewis	502
v. Lugar	196	v. Middleton	202
v. Neal	43, 276, 698	v. Yates	186
v. Robinson	238, 239	Wellesley v. Beaufort	613
v. Sadler	254	v. Wellesley	122, 672
v. Shaftesbury	275, 280, 282, 293, 358,	Wellman v. Lawrence	602 r
	427, 458, 508, 912, 913	Wells, <i>In re</i>	104, 253, 622
v. Vermont Central R. Co.	875	v. Chapman	330
v. Webb	395, 569, 888, 918	v. Doane	705, 720, 724, 748
v. Woods	112, 113, 115, 118, 620	v. Foster	69
Webb's Appeal	633, 641	v. Francis	129
Webb's Estate	587	v. Heath	736, 737, 748
Webber v. Webber	480	v. Lewis	499
Weber v. Bryant	699	v. Malbon	920, 926
Webster v. Boddington	385, 508	v. McCall	118, 310 a, 320, 386 a, 652,
v. Cooper	299, 307, 312, 315, 317		671
v. King	203	v. Price	636
v. Morris	112, 384, 713, 736	v. Prince	856
v. Newbold	863	v. Stout	672
v. Vandeventer	274, 343, 921	v. Thorman	655, 660
v. Webster	438, 672, 674	v. Wells	602 q
v. Wiggin	705	Wells-Stone Merc. Co. v. Grover	926

INDEX TO CASES CITED.

cxliii

[References are to sections.]

Welsh v. Brown	917	Weymouth v. Sawtelle	145
v. Foster	380, 381	Whale v. Booth	810, 811
v. London Ass. Co.	553	Whaler v. Cox	571
Welston v. Hildreth	678	Whaley v. Drummond	511 b
Welt v. Franklin	299	v. Eliot	186
Welton v. Devine	143, 144	v. Whaley	126, 127, 133
Wemyss v. White	277, 289, 827 a	Whall v. Converse	920
Wendell v. French	463, 918	Whalley v. Whalley	861
Wentworth v. Read	568	Whallon v. Scott	590, 592
v. Shibles	79	Wham v. Love	900
v. Tubb	480	Wharf v. Howell	226
Werborn v. Austin	866	Wharton v. Masterman	399, 622
West v. Berry	765	Whatford v. Moore	580
v. Biscoe	299	Whatley v. Oglesby	790
v. Erissey	361, 367, 834	Wheate v. Hall	375, 498, 511 a
v. Fitz	298, 312	Wheatley, Re	627
v. Jones	419	Wheatley v. Badger	262
v. Kerr	516	v. Boyd	343
v. Knight	695, 699	v. Purr	86, 98
v. Moore	170	Wheaton v. Wheaton	226
v. Palmer	693	Wheeler, In re	290
v. Ray	511 c	v. Bingham	512
v. Raymond	202	v. Bowen	629, 642
v. Robertson	455	v. Howell	570
v. Shuttleworth	160, 701, 702, 726	v. Kirtland	133, 324
v. Sloan	863	v. Lane	232
v. Smith	918	v. Moore	642
v. Snodgrass	592	v. Newhall	305
v. Utica	891	v. Perry	262, 455, 928
v. West	647	v. Reynolds	173
Westbroke, In re	904	v. Smith	117, 253
Westbrook v. Harbeson	226, 230	v. Stone	602 b
Westcott v. Cady	541	v. Sumner	593
v. Culliford	476 a	v. Warner	757
v. Edmands	310, 311	Wheeler's Appeal	273, 411
Wester's Appeal	194	Wheelock v. Am. Tract Society	699
Westerfield, In re	457, 848	v. Moulton	757
v. Janssen	188	Wheete v. Hale	498, 511 a
v. Kimmer	133	Whelan v. Palmer	511
Western v. Cartwright	861	v. Reilly	117, 287
Western R. R. Co. v. Nolan	328, 330, 877	v. Whelan	83, 189, 201
Westervelt v. Hoff	222	Wheldale v. Partridge	499
v. Matheson	187	Wheless v. Wheless	448
Westgate v. Handlin	602 u	Whelpdale v. Cookson	195
v. Monroe	680	Wherry v. Hale	815 b
Westley v. Clarke	416, 421	Whetham v. Clyde	134
v. Williamson	891	Whetstone v. Sis. Bury	301, 309
Westmacott v. Robins	231	v. Whetstone's Ex'rs	863
Westmeath v. Salisbury	672	Whichcote v. Lawrence	195, 867
v. Westmeath	672, 673	v. Lyle	34, 299
Weston v. Barker	98, 593, 843	Whicker v. Hume	700, 709, 741
Westover v. Carman	468	Whipple v. Adam	115, 116
v. Chapman	297, 461, 468	v. Clure	189
Westvelt v. Gregg	676	v. Fairchild	827 a
Wetherbee v. Farrar	656	Whistler v. Newman	658, 669, 900
Wethered v. Safe Deposit Co.	581	v. Webb	873
Wetherell v. Collins	873, 892	Whiston v. Rochester	742
v. Hamilton	75	Whitall v. Clark	667
v. O'Brien	837	Whitcomb v. Cardell	82
v. Wetherell	511 c	v. Jacob	835, 837
v. Wilson	117	v. Minichin	195
Wethered v. Wethered	68	White v. Albertson	330
Wetherill v. Hough	451	v. Att.-Gen.	730, 748
Wetmore v. Brown	918	v. Barton	261, 827
v. Parker	43, 738	v. Baugh	443
v. Porter	815 c	v. Baylor	311, 312
v. Truslow	386 a	v. Briggs	112, 113, 390
v. Wetmore	827 a	v. Brutton	113
Wetzel v. Chaplin	98	v. Bullock	421, 918

[References are to sections.]

White v. Callinan	679	Whitehouse v. Whitehouse	95, 163
v. Cannon	529	Whitehurst v. Harper	251, 255, 639
v. Carmarthen, &c. Ry.	752, 754	Whiteley v. Central Trust Co.	238
v. Carpenter	126, 132, 133, 139	v. Learoyd	458
v. Carter	369	Whitesides v. Carman	660
v. Casanave	232	v. Dorris	627, 628
v. Commonwealth	877	v. Greenlee	191
v. Cook	795	Whitfield v. Burnett	540
v. Cuddon	770	v. Prickett	388, 555
v. Damon	183, 187	v. Whitfield	617
v. Ditson	281, 471, 705	Whiting v. Gould	84, 85
v. Dougherty	237	v. Whiting	112, 117, 343,
v. Drew	127		866
v. Evans	94, 150	Whitley v. Ogle	145, 147
v. Ewer	855	Whitlock v. Washburn	408
v. Fisk	713, 720	Whitlock's Case	530
v. Flora	187	Whitman's Appeal	200
v. Foljambe	774, 786	Whitmarsh v. Robertson	826, 894, 901
v. Grane	612	Whitmore v. Turquand	593, 826
v. Hale	384, 730, 737	v. Weld	53
v. Hall	748	Whitney v. Fox	861
v. Hampton	38, 240, 721	v. Krows	590
v. Haynes	873	Whitridge v. Williams	545
v. Hicks	509 c	Whittaker, <i>In re</i>	603
v. Hildreth	678	Whittemore v. Cowell	167
v. Howard	393, 715, 748, 765	Whitten, <i>Re</i>	332
v. Keller	384	v. Whitten	143
v. Leavitt	864	Whittenden Mills v. Upton	757
v. Lincoln	446, 821	Whittick v. Kane	218
v. McDermott	503	Whittle v. Halliday	878
v. McKeon	277	v. Henning	633
v. Malcomb	602 r	v. Vanderbilt M. Co.	828
v. Mass. Inst. of Technology	262,	Whittlesey v. Hughes	402
	401, 571	Whitton v. Whitton	162
v. McNutt	660, 680	Whitworth v. Carter	686
v. Montserratt	590	v. Davis	231
v. Nuts	122	Whorwood v. University Coll.	718
v. Parker	305, 307	Whyte v. Arthur	85
v. Patten	246 a	Wickes v. Clarke	628
v. Rice	63	Wickesham v. Savage	254
v. Ross	85	Wickham v. Berry	305, 526
v. Selden	843	v. New Brunswick & Canada Rail-	
v. Sheldon	140	way	750
v. Sherman	453, 467, 471	Wickliffe v. Lexington	863, 864
v. Simpson	317	Wickman v. Robinson	231
v. Sprague	893	Wicks v. Westcott	770
v. St. Barbe	511 a	Widdowsen v. Duck	457, 474
v. Stanfield	366, 827 b	Widgery v. Haskell	593
v. Story	680	Widmore v. Woodroffe	255, 701
v. Stover	238	Widner v. Fay	918
v. University	748	Wiener v. Davis	586
v. Watkins	411, 602 ff	Wier v. Simmons	873
v. Weldon	137	Wigg v. Wigg	121, 217, 221
v. White 71, 72, 82, 118, 240, 256, 277,		Wiggin v. Swett	556
287, 386 a, 532, 533, 559, 564, 690,		v. Wiggin	133
699, 719, 727, 729, 730, 849, 863		Wiggins v. Bethune	52
	864, 874	Wigglesworth v. Steers	191
v. Whitney	602 i, 602 j	Wight v. Leigh	359
v. Williams	94, 150, 232, 237, 238	Wightman v. Doe	602 t, 782
v. Wilson	248	Wightwick v. Lord	450, 551, 771
White's Trust, <i>In re</i>	250, 251, 727	Wigram v. Buckley	223
White School House v. Post	244, 245	Wigsell v. Wigsell	348
Whiteacre, <i>Ex parte</i>	337	Wike's Case	40, 325, 633
Whitecar's Estate	462	Wilbur v. Spofford	602 h
Whitehead, <i>Ex parte</i>	619	Wilcock, <i>Re</i>	131
v. Lord	864	Wilcocks v. Hannington	96, 101, 102
v. Whitehead	910	Wilcox v. Calloway	239
Whitehorn v. Hines	189, 204	v. Gilchrist	83, 729
Whitehouse v. Cargill	568	v. Kellogg	586

[References are to sections.]

Wilcox v. Morris	602 d	Williams v. Branch Bank	910
v. Quinby	275	v. Brown	126, 585
v. Wilcox	312	v. Callow	634, 637
Wild v. Wells	871	v. Carle	213
Wilde v. Davis	397	v. Carter	375, 767
v. Gibson	172, 180	v. Chitty	34, 569
Wilder v. Secor	863	v. Clairborne	647
Wilderman v. Baltimore	748	v. Coade	160
Willey v. Robinson	277, 848	v. Conrad	262
Wilding v. Bolder	59, 277, 297	v. Corbett	123, 907
v. Richards	593	v. Cork	863
Wiles v. Cooper	888	v. Cushing	259, 262
v. Gresham	438, 440, 460, 482, 847	v. Donaldson	660
v. Greshon	185	v. First Pres. Soc.	229, 299, 312, 320, 860, 864
v. Wiles	627, 628, 629	v. Fitch	182
Wiley v. Collins	593	v. Haddock	448
v. Smith	359, 370	v. Harrington	610
Wilhelm v. Folmer	127	v. Haskins	163, 910
Wilkes v. Ferris	585	v. Headland	924
v. Holmes	511 b	v. Hollingworth	126, 127
v. Steward	453, 460	v. Jones	150, 153
v. Wilkes	672	v. Kershaw	159, 573, 712, 748
Wilkins v. Anderson	217	v. King	270
v. Frye	786	v. Knight	371
v. Gordon	602 ee	v. Lewis	369
v. Hogg	417	v. Lonsdale	325, 484
v. Hunt	892	v. Maitland	421
v. Stevens	137	v. Mans	72
Wilkinson, <i>Ex parte</i>	263	v. Marshall	205
<i>In re</i>	455	v. Massey	812
v. Bewick	443	v. Mattocks	891
v. Bradfield	189, 226	v. Maull	648, 649
v. Buist	248	v. McConico	305
v. Charlesworth	641	v. Moslyn	593
v. Cheatham	647	v. Munroe	782
v. Duncan	450	v. Nichol	276
v. Getty	248	v. Nixon	262, 412, 417, 419, 421, 423, 424, 466
v. Gibson	920	v. Otey	598, 602 g, 602 m, 621, 795
v. Lindgren	903 a	v. Owen	226
v. Malin	413, 725	v. Parry	274
v. May	520	v. Pearson	694, 721, 722, 730, 748
v. Parry	285, 286, 402	v. Powell	200, 468, 471, 851
v. Stafford	465	v. Roberts	232, 237
v. Stewart	243	v. Salmond	885
v. Wilkinson	66, 162, 189, 388, 555, 678, 912	v. Stevens	427, 429
v. Wright	682	v. Teal	376
Wilkinson's Estate	863	v. Thorn	386 a
Wilks v. Fitzpatrick	627	v. Van Tuyl	126
v. Groome	443, 446	v. Vreeland	104, 171, 181, 182
Wilks v. Leland	610	v. Waters	298, 301, 310
Willan v. Willan	171, 184, 189	v. Wentworth	480
Willard v. Eastman	661	v. Williams	96, 112, 113, 114, 146, 147, 222, 396, 398, 443, 493, 687, 694, 709, 728, 737, 748, 838
v. Fenn	425	v. Wood	239
v. Ware	338	v. Woodward	768, 769
v. Willard	77, 82, 147	v. Young	234, 238
Willard's Appeal	119	Williams's Appeal	652
Willats v. Busby	883	Williamson v. Beckham	655, 660
Willetts v. Willets	121	v. Berry	603, 610
Willet v. Blanford	429, 430	v. Branch Bank	225
v. Sandford	7	v. Cline	658
Willey's Estate	709	v. Coddington	111, 367
William v. Mosher	918	v. Curtis	597, 795
William's Case	554, 610, 618	v. Field	230, 768
Estate, <i>In re</i>	787	v. Gihon	214
Settlement	291	v. Kohn	428
Williams, <i>Ex parte</i>	511 b, 614		
v. Allen	543, 877		
v. Bailey	652		

[References are to sections.]

Williamson v. Morton	25, 794, 800, 810	Wilson v. Maddison	117
v. New Albany, &c. Ry. Co.	759, 760	v. Major	113, 116
v. Suydam	282, 766	v. Md. Life Ins. Co.	768
v. Wichersham	282	v. Mason	408
v. Williamson	462, 468, 547, 548, 551, 660	v. Moore	245, 848, 863, 875, 876
v. Woodard	768	v. Mushet	672
v. Yager	82, 163	v. Peake	472
Williamson's Estate	448	v. Pennock	273
Williard v. Williard	133, 134, 215	v. Shively	732
Willie v. Ellice	875	v. South Park Com'rs	785
Williman v. Holmes	300, 310, 312	v. Squire	993 a
Willington v. Adam	93	v. Tappan	93
Willink v. Morris Canal, &c. Co.	759	v. Towle	240, 287, 294
v. Vanderveer	142	v. Troup	602 d, 602 g, 602 h, 602 n, 853
Willis v. Brown	706	v. Turner	612
v. Cadenhead	677	v. Wilson	94, 275, 282, 385, 395, 397, 654, 672, 673, 900, 918
v. Foster	828	Wilson's Appeal	910
v. Hiscox	520, 900, 901	Estate	68, 262
v. Kibble	904	Wilt v. Franklin	259, 590, 593
v. Roberts	865	Wiltbank's Appeal	545
v. Sharp	466	Wilton v. Devine	143
v. Smith	511 b	v. Hill	654, 671, 826, 849
v. Smyth	82	v. Jones	873
v. Willis	126, 137	Wimbish v. Montgomery Mut. Build- ing & Loan Assoc.	122
v. Yernegan	187, 189	Winch v. Brutton	112
Williston v. Michigan, &c. Railw.	545	v. James	636
Willmot v. Jenkins	263, 574	v. Keeley	345
Willoughby v. Willoughby	218	v. Railway Co.	757
Wills v. Cooper	347	v. Winch	615
v. Cowper	500	v. Winchester	174
v. Sayers	647, 649	Winchelsea v. Garrety	206
Wills's Appeal	440, 453	v. Nordcliff	458, 605, 611
Willson v. Louisville Trust Co.	858, 865	Winchelsea's Policy Trusts, <i>In re</i>	848
v. Tyson	918	Winchester v. Baltimore R. R. Co.	222
Wilmerding v. McKesson	469, 471	v. Knight	871
v. Russ	865	v. Machen	653
Wilmot v. Pike	438	Winchester, &c. Turnpike C.	157
Wilmoth v. Wilmoth	166	Winder v. Diffenderfer	842
Wilson, <i>In re</i>	610, 910	Winebrenner v. Colder	733
v. Allen	349, 351, 354, 355	v. Weisiger	214
v. Anderson	104	Wing v. Cooper	602 g
v. Ball	113, 117	Winged v. Lefebury	217, 231
v. Bennett	339, 340, 394, 495, 503, 504	Wingfield v. Rhea	815 a
v. Brownsmith	903 a	Wingfield's Case	701
v. Castro	126	Winkfield v. Brinkman	127
v. Cheshire	165, 301	Winn v. Dillon	206
v. Clapham	122	v. Fenwick	258
v. Daniel	213	Winnall, <i>Ex parte</i>	402
v. Davison	239, 598, 797, 798	Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.	816 a
v. Day	587, 590	Winslow, <i>In re</i>	902
v. Dennison	408, 413	v. Ancrum	600
v. Dent	77, 82	v. Cummings	701, 724, 730, 748
v. Doster	810	v. Tighe	196
v. Duguid	252, 256	v. Trowbridge	724
v. Eden	511 c	Winsmith v. Winsmith	815 a
v. Edmonds	540	Winsor v. Mills	382, 386
v. Forsyth	591	Winston v. Gwathmey	174
v. Goodman	848	v. Jones	766
v. Graham	237	Winter v. Anson	235, 236, 239
v. Gray	590	v. Geroe	205, 602 v
v. Halliley	597	v. Rudge	291
v. Harman	556	v. Walters	677
v. Hoare	326	Wintermute v. Snyder	184
v. Kenrick	571	Winthrop v. Att. Gen.	287
v. Leary	920	Wintle, <i>In re</i>	450
v. Lynt	738, 748		
v. McAuley	748		
v. McCullough	34		

INDEX TO CASES CITED.

cxlvii

[References are to sections.]

Wisden v. Wisden	511 c	Wood v. Mann	221
Wise, <i>In re</i>	541, 618, 803	v. Mather	305, 610
v. Foote	189	v. Midgeley	84
v. Wise	259	v. Paine	699
Wiseman v. Baylor	86	v. Perkins	76, 127
v. Beake	188	v. Partridge	438
v. Koper	111	v. Richardson	117, 511, 770, 787
Wistar's Appeal	468, 911, 918 n	v. Snow	602 n
Wiswall v. Ross	602 e, 602 h, 602 r, 602 bb	v. Sparks	262, 499
v. Stewart	428	v. Stane	275
v. Ticknor	592	v. Vanderburg	891
Wiswell v. First Cong. Church	476 a, 928	v. White	498, 766, 802
Witham v. Brooner	298, 299, 520	v. Williams	891
Withers v. Allgood	358	v. Wood	256, 305, 391, 411, 417, 420, 460, 466
v. Ewing	280	Wood's Appeal	918
v. Hichman	618	Woodard v. Wright	477
v. Withers	126	Woodbridge v. Perkins	438
v. Yeaton	38, 117, 121, 248, 251, 254, 255	Woodburn v. Mosher	590
Witherspoon, <i>Ex parte</i>	918	v. Woodburn	539
Withey v. Mangles	257	Woodbury v. Obear	891
Withington v. Withington	292	v. Woodbury	189
Whitman v. Lex	701, 724, 728, 731, 748	Woodcock v. Dorset	580
v. Norton	570	v. Kenneck	250, 258
Witman's Appeal	918	Wooden v. Kerr	281, 917
Witmer's Appeal	462	Woodford v. Charnley	101, 102
Witte v. Wolfe	827 a	v. Parkhurst	699
Wittenbrock v. Cass	82	v. Stevens	127
Witter v. Duley	263	Woodgate v. Flint	317
v. Witter	17, 466, 521, 605	Woodhead v. Marriott	900
Witters v. Sowles	678	Woodhouse v. Haskins	359
Wittingham v. Lighthipe	163	v. Meredith	206
Witts v. Boddington	248, 250, 251, 258	Woodhull v. Longstreet	769
v. Dawkins	655, 670	v. Osborne	135
v. Horney	126, 137	Woodin, <i>Ex parte</i>	246, 907
v. Steere	544, 545	<i>In re</i>	618
Woddrop v. Weed	466	Woodlee v. Burch	199
Woelper's Appeal	633	Woodlife v. Drury	161
Woerz v. Rademacher	142	Woodman v. Good	540, 541
Wolcott v. Wileys	861	v. Morrel	126, 143, 144, 146, 147, 151
Wolf v. Corley	75	v. Neal	678
v. Eichelberger	606	Woodmeston v. Walker	652, 671
v. Hill	776	Woodroff v. Burton	183
Wolfe v. McDowell	602 d	Woodruff v. Cook	205, 218, 476 a, 928
v. Washburn	438, 440	v. Marsh	131
Wolff v. Van Meter	680	v. New York, &c. R. Co.	760, 910
Wolford v. Hewington	172, 215	v. Orange	328
Wolfort v. Reilly	454	v. Robb	602 d
Wollaston v. Tribe	104	v. Snedecor	441, 918
Wolley v. Jenkins	498	v. Woodruff	277
Wolmershausen v. Gullick	848, 863	Woodrum v. Kirkpatrick	648
Wolstoncraft v. Long	597	Woods v. Axton	907
Womack v. Austin	847	v. Bailey	232
Women's Ch. Ass'n v. Campbell	727	v. Dille	84
Wood v. Abrey	183, 187, 192	v. Farmene	241
v. Bank of Kentucky	237	v. Stevenson	865
v. Brown	821, 884	v. Sullivan	546, 547
v. Burnham	330, 359, 370	v. Tombs	456
v. Colvin	602 i	v. Williams	873
v. Cox	112, 114, 152, 153	Woodside v. Hewel	137
v. Downes	200, 201, 202, 827	v. Woods	113, 117, 118, 620, 886
v. Dudley	571	Woodson v. McClelland	109
v. Dummer	242	v. Perkins	660
v. Garnett	468	Woodward v. Halsey	511 b
v. Goodridge	768	v. Jewell	790
v. Hardisty	260	v. Schatzell	72
v. Harman	509, 794, 799	v. Seaver	685
v. Lee	918	v. Stubbs	299
v. McCann	214	v. Woodward	239, 607

INDEX TO CASES CITED. cxlix

[References are to sections.]

Yates v. Compton	119, 308, 765	Young v. Scott	888
v. Hamblly	873	v. Snow	386 <i>a</i> , 920
v. Yates	548, 551, 748	v. Swiggs	769
Yeakel v. McAttee	145	v. Waterpark	863, 866
Yearance v. Powell	571	v. Wood	466
Yeates v. Grover	68	v. Williams	238
v. Prior	175	v. Wilton	558
Yeatman v. Bellmain	658	v. Wood	237
v. Yeatman	873	v. Young	283, 499, 648, 649, 655, 820 <i>a</i> , 856, 920
Yeldell v. Quarles	627	Young's Estate	454
Yem v. Edwards	196	Young Men's Society v. Fall River	730
Yerby v. Lynch	643	Younge v. Cocker	52
Yerger v. Jones	225, 836, 841, 842	v. Graff	680
Yerkes v. Perrin	83	Younger v. Welham	413
v. Richards	437 <i>a</i>	Younghusband v. Gisborne	119, 386, 555
Yesler v. Hochstettler	678	Youse v. Martin	221
Yoke v. Barnett	640	Yundt's Appeal	468
Yonge v. Hooper	195		
Yore v. Cook	72		
York v. Brown	432, 895		
York v. Eaton	136		
v. Mackenzie	867	Z.	
v. North Midland Ry. Co.	207	Zabriskie v. M. & E. R. R. Co.	321
York, &c. Ry. Co. v. Myers	602 <i>ee</i>	Zacharias v. Zacharias	863
York Railway v. Hudson	904	Zambaco v. Cassanetti	482
Yorkshire Ry. Wagon Co. v. Maclure	485	Zanesville C. & M. Co. v. Zanesville	731,
You v. Flinn	299		748
Younge v. Furst	515	Zeback v. Smith	499, 765
Young, <i>Ex parte</i>	918	Zehnbar v. Spillman	282
v. Benthuyssen	783	Zeisweiss v. James	697, 721, 730, 732,
v. Bradley	312		748
v. Brush	468	Zeller v. Eckert	863, 864
v. Bumpass	180	v. Jordan	171
v. Comb	468	Zentmyer v. Miltower	232
v. Com'rs	727	Zieverink v. Kemper	223
v. De Putron	511 <i>b</i>	Zimmerman v. Anders	731, 748
v. Easley	827 <i>a</i>	v. Barber	131
v. Frost	187	v. Harmon	195
v. Graff	32, 602 <i>f</i>	v. Kinkle	815 <i>c</i>
v. Jones	664	v. Makepeace	878
v. Keogh	610	Zimmerman's Will, <i>In re</i>	715
n. MacCall	863	Zoach v. Lloyd	611
v. Martin	112, 113, 115	Zouch v. Parsons	33
v. Mutual Life Ins. Co.	790	Zundell v. Gess	131
v. Miles	329	Zwingle v. Wilkinson	23
v. Peachy	104, 151, 162, 201, 225		

LAW OF TRUSTS.

CHAPTER I.

INTRODUCTION.

ORIGIN, HISTORY, DEFINITION, AND DIVISION OR CLASSIFICATION OF TRUSTS.

- § 1. The general nature of trusts.
- § 2. The technical nature of trusts, and their origin in the *fidei commissa* of the Roman law.
- § 3. The origin of uses.
- § 4. The inconveniences that arose from the prevalence of uses.
- § 5. The statute of uses.
- §§ 6, 7. The effect of the statute of uses, and the origin of trusts.
- §§ 8, 9, 10. Developments of trusts in England and America.
- § 11. Advantages of the late adoption of trusts in America.
- § 12. Object of this treatise.
- §§ 13-17. Definition of trusts.
 - Classification of trusts.
- § 18. Simple and special trusts.
- § 19. Ministerial and discretionary trusts.
- § 20. A mixed trust and power, and a power annexed to a trust.
- § 21. Legal and illegal trusts.
- § 22. Public and private trusts.
- § 23. Duration of a private trust and of a public trust.
- §§ 24-27. Express trusts, implied trusts, resulting trusts, and constructive trusts.

§ 1. IN the earlier states of society the rules that govern the ownership, disposition, and use of property are simple and of easy application. But as States increase, as property accumulates, and the business and relations of life become more complex, the rules of law which the new complications demand become themselves complicated, and sometimes difficult to understand and apply. The law, doctrine, and learning of trusts thus had a late origin and a slow and gradual

development. The word "trust," in its popular and broadest sense, embraces a multitude of relations, duties, and responsibilities. Thus, executors and administrators, guardians of infants and lunatics, assignees in insolvency and bankruptcy, bailees, factors, agents, commission merchants, and common carriers, as well as the officers of public and private corporations, all exercise a kind of trust. Indeed, one definition of a trustee is "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." This definition embraces all the trusts and offices above named, but the law in relation to many, if not all of them, is or may be administered in the common-law courts. It is not of the law of such trusts that this treatise concerns itself.

§ 2. The trusts here treated are defined to be "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence."¹ Another author says that "a trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party."² Such trusts originated, and were first defined and reduced to practice, under the jurisdiction of courts by the civil law. It was a rule of that law that a testator could not name a devisee to succeed the first devisee of property, but the first devisee took the absolute legal and beneficial ownership of the property; that is, a testator could not direct and control the use of his property after his death. This rule was modified so far that a testator might name an heir to succeed, if the first heir died too young to make a will, but in all other cases the testator could only rely upon the good faith of the first taker of his property, to bestow the use according to his directions. This trust or confidence was called *fidei commissum*, but there were no means whereby the

¹ Stair's Institutions of the Laws of Scotland, B. IV. tit. 6, § 2, p. 591; § 3, pp. 592-594.

² Erskine's Institutes of the Laws of Scotland, B. III. p. 454.

performance of the commission could be compelled. It was called *infirmum* or *precarium*, because it depended upon the personal inclination, integrity, and good faith of the person trusted. There were many of these *imperfect* trusts, where in conscience the first taker was bound to give the beneficial use, or to transfer the property itself, to a third person. Such third persons had an equitable, moral claim or right, but no legal remedy. Under these circumstances, application was made to the Emperor Augustus, and he directed the consuls to interpose their authority, and compel the execution of such trusts. Finally a prætor was appointed, called *fidei commissarius*, who had jurisdiction over all *fidei commissa*, and full power to give adequate relief in all proper cases.¹

§ 3. It is supposed that these *fidei commissa* were the models of uses which were afterwards introduced into England by the clergy to elude and avoid the operation of the statutes of mortmain. After the passing of those statutes, which were intended to forbid and prevent the accumulation of the lands of the kingdom in the hands of religious houses and corporations, it became the practice to convey lands to one person for the use of another, or for the use of a corporation. Thus the legal title was in one individual, but the beneficial use was in another. At this time the writ of subpoena was contrived, which issued out of chancery, and compelled a person who held a legal title to another's use to answer in chancery, and to perform and execute the use. Thus uses were introduced in England to circumvent the public policy of the kingdom and to avoid the statutes of mortmain, and the writ of subpoena was introduced after the model of the jurisdiction of the *prætor commissarius* to prevent those persons who were trusted to execute a use, from committing a fraud in refusing to perform it.² These contrivances, originating in evasions

¹ Ulpianus, tit. 25; Inst. Lib. II. tit. 23, § 2; 2 Fonb. Eq. p. 2; 1 Cruise, Dig. p. 398; and see Willis on Trustees, pp. 1-8, and notes; Bacon, Readings upon the Stat. of Uses, Vol. XIV. pp. 301, 302, Boston ed. 1861.

² Att. Gen. v. Sands, Hard. 491. "The parents of trusts were *fraud* and *fear*, and a court of conscience was the *nurse*."

of the law, were laid hold of during the civil wars of York and Lancaster to facilitate family settlements, and to prevent the forfeiture of estates for treason during those unhappy strifes. Thus conveyances to uses became the common form of transferring land.(a)

§ 4. Under this practice a very refined system grew up. The legal estate was in one person, and the use and enjoyment was in another. There were two titles and estates in the same land, — that of the feoffee, who was the legal owner, and yet had nothing, and that of the *cestui que use*, who had the whole beneficial right and interest, and yet had no legal right or title. He had nevertheless a substantial interest and estate which he could convey, devise, and otherwise deal with, as with tangible property. Great inconveniences arose from this double system. Bacon's Abridgment, Uses and Trusts, sums them up as follows: "By this course of putting lands into uses there were many inconveniences, as this use, which grew first from a reasonable cause, namely, to give men the power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights, as, namely, a

(a) In Pollock & Maitland's recent History of the English Law, Vol. II., p. 226, 227, it is said: "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.' In tracing its embryonic history, we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived not from the Latin word *usus*, but from the Latin word *opus*, which in old French becomes *os* or *oes*. True that the two words are in course of time confused, so that . . . the scribe

of the charter will write *ad opus* (*Johannis*) or *ad usum* (*Johannis*) indifferently, or the fuller formula *ad opus et ad usum*; nevertheless, the earliest history of 'the use' is the early history of the phrase *ad opus*. Now this, both in France and in England, we may find in very ancient days. . . . In the thirteenth century we commonly find that where there is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere, there is but little talk of 'procuration;' there is no current word that is equivalent to our *agent*." See also Mr. Maitland's article on the Origin of Uses in 8 Harv. L. Rev. 127.

man that had cause to sue for his land knew not against whom to bring his action nor who was the owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his wardship, relief, heriot, and escheat, the creditor of his extent for debt, the poor tenant of his lease; for these rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee of the trust."

§ 5. Many statutes were passed during a series of years to cure or to prevent these mischiefs or hardships. At last the statute of uses, 27 Hen. VIII. c. 10, was enacted, which converted the beneficial use into the legal ownership; that is to say, if lands were conveyed to A. to the use of B., the statute executed or converted the use into a legal estate in B., and divested all title out of A. By the operation of this statute the Court of Chancery lost for a time much of its business; for after the statute the legal title as well as the beneficial use was in the *cestui que use*, and he could deal with his estate as his own in every respect; he was no longer compelled to appeal to the conscience of the feoffee to uses, nor to the equity powers of the court.

§ 6. But there were certain gifts, grants, or estates to uses which the statute did not touch, and which remained as before the statute. Thus, if A. enfeoffed B. to the use of C., in trust for D., the statute immediately transferred the legal estate to C., and extinguished all interest in B., but it did not touch or affect the use or trust for D. It had been settled before the statute, as a rule of property, that a use could not be raised upon a use. At law such use raised upon a use was simply void. And at law it was held that the statute extended only to execute the first use by transferring the legal estate from B. to C., and that all its powers were exhausted in that act, and thus C. held a legal title in trust or for the use of D., which the statute did not execute.¹ And although C. was

¹ Reid v. Gordon, 35 Md. 183; Croxall v. Shererd, 5 Wall. 268; Mathews v. Ward, 10 G. & J. 443.

bound in equity and good conscience to give to D. the use and enjoyment of the estate, there was no remedy for D. at law, and he could only proceed as before the statute by subpoena in chancery to compel C. to perform the trust. Again, if A. conveyed land to B. for a term of years for the use of C., the statute did not execute the legal title in C., for it was held, under the words of the statute, that it only executed the legal titles of estates of which the first taker was *seized*, and that according to the use of the words in the law no one could be said to be *seized* of a term of years. Thus in this last case C. could have relief only by subpoena in chancery. And, again, the statute did not execute the legal title to the *cestui que use*, if the first taker was to perform any active duties in regard to the estate; as if he was to hold the same for a certain time, or if he was to improve or lease the same and pay over the rents and profits to the use of C., the statute left the estate where it was before, and C. had no redress for any abuse of the trust or use except by subpoena in chancery. And, further, the statute did not apply at all to personal chattels given to one for the use and benefit of another. In these four cases the parties beneficially interested in the property, and equitably owning the whole of it, had no remedy at law for any withholding of their rights. The Court of Chancery laid hold of these four instances of a want of redress at law, and by its writ of subpoena compelled the performance of these four *uses* under the name of *trusts*. The legislation of our States now recognizes trusts, and provisions and rules are made for their creation, regulation, and duration, and in some States for their administration; but they are still left to the exclusive cognizance and jurisdiction of courts of equity, or to the equity powers of the common-law courts.

§ 7. Thus interests in land became of three kinds: first, the estate in the land itself, the *old common-law fee*; secondly, the *use*, which was originally a creature of equity, but after the statute of uses it drew the estate in the land to itself, so that the fee and use were joined and made but one legal estate, not differing from the old common-law fee except in the man-

ner of its creation; and, thirdly, the trust of which the common law takes no notice, but which in a court of equity carried the beneficial interest and profits, and is still a creature of that court, as the use was before the statute.¹ The statute of uses has never been repealed, and is still in force in many of the United States, so that if a trust should now be created in such form that the statute would have executed it if it had been a use, the statute will now execute the trust by giving the *cestui que trust* the legal title as well as the equitable without any action on the part of the trustee.²

§ 8. It is thus seen that our present trusts are almost identical with the old uses.³ Of course the growth of this system of jurisprudence has been slow and gradual, and it has sometimes fallen into inconsistencies and absurdities; but the abilities of upright and wise chancellors, aided by a learned and watchful profession, have finally given a regular and simple form to the administration of trusts. Lord Chief Justice Mansfield observed that in his opinion "trusts were not on a true foundation until Lord Nottingham held the great seal. By steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised. Trusts are made to answer the exigencies of families, and all other purposes, without producing one of the inconveniences, frauds, or private mischiefs which the statute of Henry VIII. c. 10, was intended to avoid. The forum where they are adjudged is the only difference between trusts and legal estates."⁴ During the development of this system a vast number of distinctions and subtleties have been established and exploded. It is not necessary to follow them, as many of them never obtained a foothold in America.⁵

¹ Per Lord Hardwicke, in *Willet v. Sandford*, 1 Ves. 186; *Coryton v. Helyar*, 2 Cox, 342.

² *Shep. Touch.* 508; *post*, § 296.

³ *Penny v. Allen*, 7 De G. M. & G. 422.

⁴ *Burgess v. Wheate*, 1 Eden, 223; *Philips v. Brydges*, 3 Ves. 127; *Kemp v. Kemp*, 5 Ves. 858.

⁵ See them stated in *Lewin on Trusts*, pp. 2-17.

§ 9. Lord Nottingham became chancellor in 1673; consequently, when America was first settled, the doctrine of trusts had not been reduced to a system. Nor was there occasion for many years to apply the doctrine to the affairs of the colonists. Lands were abundant and cheap, and could be had by the taking; personal property had not accumulated; habits of life were simple and industrious; and there was little occasion for family or other settlements that rendered the intervention of a trustee either convenient or necessary. The statute of uses was passed before the colonists left England, and it became a part of the law of many, if not all the colonies. The system of trusts which grew upon the statute of uses was adopted in America much later. Even in England the development of the equitable jurisdiction of chancery met with great opposition, upon the ground, among others, that it subjected the laws of the realm to the arbitrary discretion of one man, or "made the rights of the subject depend upon the length of the chancellor's foot." Considering this opposition to the equity jurisdiction of the Court of Chancery in England, considering that trusts were not established upon a reasonable foundation when the colonists left England, and considering the pecuniary condition of America, it is not surprising that it was long before the system received any countenance here.

§ 10. Mr. Story says that there was no equity jurisdiction in any State prior to the Revolution, or at least a very imperfect and irregular administration of it.¹ There was an attempt to create such a jurisdiction in the province of New York in the governor and council; but it was so unpopular² that it did little or no business. A court was established in Massachusetts in 1692, with full equity powers; but the act failed to receive the approval of the king in council.³ In 1720 a Court of Chancery was established in Pennsylvania, and con-

¹ 1 Story, Eq. Jur. § 56; 1 Dane, Ab. c. 1, art. 7, § 51; 7 id. c. 225, arts. 1, 2; 2 Swift's Dig. 15; 3 Tuck. Black. App. 7.

² 1 John. Ch., Preface.

³ Ancient Char. c. 222; 1 Story, Eq. Jur. § 56.

tinued to administer a jurisdiction in equity in a separate court until 1736. And it is probable that some of the principles of equity were administered in the common-law courts of all the colonies, in order to relieve suitors from hardships which the stricter rules of the common law were unable to effect. In New York, New Jersey, Virginia, Pennsylvania, and South Carolina, the governor of the province was clothed with the power and duty of the chancellor.¹ Since the Revolution, equity jurisdiction as a system has been of slow growth, and it is only since the beginning of this century that it has received its present development in America. As property has increased, and pecuniary affairs have become complex, and it has become necessary or convenient to make marriage settlements, or settlements upon families, children, relations, or dependants, and upon charities, the English system of trusts, fully grown, has been introduced into most of the States, and they have conferred full equity powers either upon their common-law courts, or they have established separate courts with an equity jurisdiction very similar to the jurisdiction of the Lord Chancellor in the High Court of Chancery in England.²

§ 11. Mr. Story further observes that it is a favorable circumstance that jurisdiction in equity was conferred upon the courts in America at so late a period, and therefore they did not become acquainted with the system until it had been settled upon a broad and rational foundation ;³ thus they were saved from crude and unintelligent opinions and judgments, which must have been given in the then condition of the law in England, and of the profession in America. These judgments must of necessity have formed a body of precedents which would have continued to plague the profession and the courts, and would have marred the symmetry of the system. As now established, the doctrine of equity and of trusts in

¹ See *Equity in Pennsylvania*, a Lecture by William H. Rawle, Esq., McKay & Brother, Philadelphia, 1869.

² 1 Story, *Eq. Jur.* § 56, and notes.

³ 1 Story, *Eq. Jur.* § 58.

the United States is a well-formed system; and Mr. Story thinks it even more symmetrical than the original system in England.

§ 12. It is not the purpose of this treatise to trace the rise and growth of the law of trusts in each one of the States. It is, on the other hand, its purpose to state the general principles which prevail in all the States. It is not possible to know or to state the legislation of so many States upon the various matters connected with the administration of trusts. The intelligent lawyer must do this for himself, when the questions before him depend upon the statutes of his State rather than upon the general principles common to all the States.¹

§ 13. Sir Edward Coke's definition of a *use* has been adopted as an accurate legal description and definition of a *trust*. In his words applied to a use, "a trust is a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in chancery."² The *confidence* here spoken of need not be *expressly* reposed by one party in another, for the law frequently *implies* or *construes* it to arise out of transactions between parties, when neither party supposed at the time that a trust was created between them. The trust or confidence is a thing distinguished from *legal* property, or legal *right* to property. It is neither *jus in re* nor *jus ad rem*,³ and so the confidence may not always be reposed by a person other than the trustee, for any person may convert himself into a trustee, and give from his own acts an

¹ See 4 Kent, Com. 163, and notes. See Preface to Campbell and Cambreleng's Amer. Chan. Dig. (1828); 1 Fonb. Eq. 11-20, by Laussat, 1831; 1 Amer. Jurist, 314.

² Co. Litt. 272 b. A trust exists where the legal interest is in one person, and the equitable interest in another. *Wallace v. Wainwright*, 87 Penn. St. 263.

³ *Wainwright v. Elwell*, 1 Mad. 336, Bac. Uses, 5.

equitable right to another person, as *cestui que trust*. But no person can be both trustee and *cestui que trust* at the same time, for no person can sue a subpoena against himself. Therefore, if an equitable estate and a legal estate meet in the same person, the trust or confidence is extinguished, for the equitable estate merges in the legal estate. As when a father holds the legal title to land in trust for an only child, and the father dies, such legal title descends to the child as only heir, and thus both estates meet in the same person.¹ But both estates must be commensurate with each other, otherwise there can be no merger.²

§ 14. Again, a trust or confidence is something collateral to the land, and not part or parcel of it. Thus a charge, an incumbrance, or a term of years is a legal title in, or issuing out of, the land itself, and binds every person, however he may come into possession of the estate. The trust or confidence is an incident to the land, and so far collateral that it does not go inseparably with it. Thus it only charges those who are privy in the estate. If the trustee is disseized, or if he is turned out of the possession by a person holding a paramount title, the disseizor is not bound by the trust or confidence, because there is no privity of estate between a disseizor and disseizee. And so there must be privity between the persons to be bound by the trust; as, if a trustee dies, the legal estate will descend to his heir, who will be bound by the trust, because there is both privity of estate and of person in such

¹ *Goodright v. Wells*, Doug. 771; *Selby v. Alston*, 3 Ves. 339; *Harwood v. Oglander*, 8 Ves. 127; *Philips v. Brydges*, 3 Ves. 126; *Wade v. Paget*, 1 Bro. Ch. 363; 1 Cox, 76; *Finch's Case*, 4 Inst. 85, 3d Res.; *Creagh v. Blood*, 3 Jo. & La. 133. So where one of the beneficiaries is also trustee, to the extent of such trustee's personal interest. *Bolles v. State Trust Co.*, 27 N. J. Eq. 308.

² *Philips v. Brydges*, 3 Ves. 125; *Robinson v. Cuming*, T. Talb. 164, 1 Atk. 473; *Boteler v. Allington*, 1 Bro. Ch. 72; *Kendal v. Miefeld*, Barn. 47; *Buchanan v. Harrison*, 1 John. & Hem. 662; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Merest v. James*, 6 Mad. 116; *Canning v. Hicks*, 2 Ch. Cas. 187, 1 Vern. 412; *Tabor v. Grover*, 2 Vern. 367, 1 Eq. Cas. Ab. 328; *Clerkson v. Bowyer*, 2 Vern. 66, 193.

a case. And so if the trustee sell the estate to a purchaser with full notice of the trust or confidence, or if he transfer the estate to a volunteer without consideration, the estate and the persons to whom it comes in such manner will be bound by the trust, because there is both privity of estate and of persons. But if the trustee sells the estate to a third person for a valuable consideration, without notice of the trust, neither the estate nor the purchaser for value and without notice will be bound by the trust, for there is in such case no privity between the persons.¹

§ 15. All those persons who take under the trustee by operation of law are privies, both in estate and in person, to the trustee. Thus those who take as heirs under the trustee, or as tenants in dower or curtesy, or by extent of an execution,² or by an assignment in insolvency or bankruptcy, are bound by the trust. It has been thought that a lord, who takes by an escheat or by a title paramount, would not be bound by the trust; but the point has not been adjudged.³

§ 16. The doctrines of trusts are equally applicable to real and personal estate, and the same rules will govern trusts in both kinds of property.

§ 17. The *cestui que trust* has *no remedy except by subpœna in chancery*; that is, in some court with an equity jurisdiction, adequate to decree relief.⁴ The *cestui que trust* cannot maintain a real action upon his equitable title, but such action

¹ Finch's Case, 4 Inst. 85, 1st Res.; Gilbert on Uses, 429.

² Leake v. Leake, 5 Ir. Eq. 366.

³ Burgess v. Wheate, 1 Eden, 203.

⁴ Stuart v. Mellish, 2 Atk. 612; Allen v. Imlett, Holt, 641; Holland's Case, Styl. 41; Queen v. Orton, 14 Q. B. 139; Vanderstegen v. Witham, 6 M. & W. 457; Bond v. Nurse, 10 Q. B. 244; Edwards v. Lowndes, 1 El. & Bl. 81; Drake v. Pywall, 1 H. & C. 78; Miller's Case, Freem. 283; Witter v. Witter, 3 P. Wms. 102; King v. Jenkins, 3 Dow. & R. 41; Edwards v. Graves, Hob. 265; Farrington v. Knightly, 1 P. Wms. 549; McCartney v. Bostwick, 32 N. Y. 33; Dorsey v. Garcey, 30 Md. 489.

must be brought in the name of the trustee.¹ There is, however, this exception, the *cestui que trust* may maintain a real action upon his equitable title against a stranger who shows no title, or no title under the trustee.² But the trustee may successfully defend the legal title against a suit at common law by the *cestui que trust* unless the trust has ceased, or the trustee is enjoined by a court of equity.³ And so the grantee of the trustee can defend such action, even though the grant may be a breach of trust.⁴ At one time the common-law courts attempted to punish trustees for a breach of trust in damages, as upon an implied contract,⁵ but the exercise of such an authority was soon abandoned.⁶ And the rule of confining the administration of trusts to the courts of equity has been carried so far that the Court of King's Bench may issue prohibitions, forbidding spiritual courts from intermeddling with a trust.⁷ But a bill in equity cannot be maintained simply to establish the fact of a trust, no other relief being sought, even where its existence is denied; if, however, the supposed trustee is about to leave the jurisdiction, so that no relief could be obtained, the court will entertain the bill,

¹ Davis v. Charles River R. Co., 11 Cush. 506; Raymond v. Holden, 2 Cush. 268; Chapin v. Universalist Soc., 8 Gray, 581; Crane v. Crane, 4 Gray, 323; Fitzpatrick v. Fitzgerald, 13 Gray, 400; Baptist Soc. v. Hazen, 100 Mass. 322; Mordecai v. Parker, 3 Dev. 425; Cox v. Walker, 26 Maine, 504; Matthews v. Ward, 10 G. & J. 443; Beach v. Beach, 14 Vt. 28; Wright v. Douglass, 3 Barb. 559; Moore v. Burnet, 11 Ohio, 334; Hopkins v. Ward, 6 Munf. 38; Daggett v. Hart, 5 Fla. 215; Goodtitle v. Jones, 7 T. R. 47.

² Stearns v. Palmer, 10 Met. 35; Queen v. Abrahams, 4 Q. B. 157; Roper v. Holland, 3 Ad. & El. 99; Sloper v. Cottrell, 2 Jur. n. s. 1046.

³ Obert v. Bordine, 1 Spencer, 394; Nicoll v. Walworth, 4 Denio, 385; Stearns v. Palmer, 10 Met. 35.

⁴ Stearns v. Palmer, 10 Met. 35; Canoy v. Troutman, 7 Ired. 155; Taylor v. King, 6 Munf. 358; Reece v. Allen, 5 Gilm. 241.

⁵ Megod's Case, Godb. 64; Jevon v. Bush, 1 Vern. 344; Smith v. Jameson, 5 T. R. 603, 1 Eq. Cas. Ab. 384, D. A.

⁶ Barnadiston v. Soame, 7 St. Trials, 443; Sturt v. Mellish, 2 Atk. 612; Holland's Case, Styl. 41; Allen v. Imlett, Holt, 14; Burnett v. Preston, 17 Ind. 291.

⁷ Petit v. Smith, 1 P. Wms. 7; Edwards v. Freeman, 2 P. Wms. 441; Barker v. May, 4 M. & R. 386; *Ex parte Jenkins*, 1 B. & C. 655.

and declare the trust if proved, and retain the bill for further action.¹ In Pennsylvania, ejectment is an equitable action, and may be maintained by the *cestui que trust*, even against the trustee, when the former is entitled to the possession.²

§ 18. Trusts are divided into *simple* and *special* trusts. A *simple* trust is a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the *cestui que trust* has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as are necessary. A *special* trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has active duties to perform, as when an estate is given to a person to sell, and from the proceeds to pay the debts of the settlor.

§ 19. Trusts have been further divided into *ministerial* and *discretionary* trusts. A trust to do a simple act, as to convey to the *cestui que trust*, at his request, is a ministerial trust, as it is a mere ministerial or instrumental act requiring the exercise of no judgment or discretion; but if a choice of time, manner, or place is given to the trustee, or if he must use his best judgment in the execution of the trust, it is a *discretionary* trust.³ Mr. Fearne contends that a trust to sell is a ministerial trust, for the price is not arbitrary, nor at the trustee's discretion, but is to be the best that can be obtained;⁴ but Mr. Lewin insists that it is a discretionary trust, as there is much room for judgment in the proceeding,⁵ and it

¹ Baylies v. Payson, 5 Allen, 473; Price v. Minot, 107 Mass. 62.

² Kennedy v. Fury, 1 Dall. 76; Presbyterian Cong. v. Johnston, 1 W. & S. 56; School, &c. v. Dunkleberger, 6 Barr, 29.

³ Att. Gen. v. Gleg, 1 Atk. 356; Cole v. Wade, 16 Ves. 27; Gower v. Mainwaring, 2 Ves. 87; Hibbard v. Lamb, Amb. 309; Potter v. Chapman, Amb. 98; Att. Gen. v. Scott, 1 Ves. 413, 4 Kent, Com. 304, 305.

⁴ Fearne's P. W. 313.

⁵ Lewin on Trusts, 19; King v. Bellord, 1 Hem. & Mil. 343; Robson

may be added that there is room for skill in procuring the best possible price. But the distinction is not very important, as the duties of a trustee for sale are the same, whether the trust is called ministerial or discretionary.

§ 20. There is a mixed *trust and power*, as where the settlor sketches the outline of a trust and leaves the details to be settled and carried into effect, according to the best judgment of his trustees. The power joined to the trust in such case is *imperative* and must be exercised; but the mode of its execution is a matter of judgment and *discretionary*. But this kind of trust and power is not to be confounded with a trust to which a power is annexed. In this case the trust is complete in itself, and the power is a simple addition, which may or may not be exercised, as the trustee shall choose, as where lands are given to trustees for a particular purpose, and a power of sale, or of changing the securities, is added; the power is no part of the trust, but it is something collateral, which the court cannot compel the trustee to perform. But a trust to distribute the trust fund according to the discretion of the trustee is an imperative trust and power.¹

§ 21. Trusts are also said to be *legal* or *illegal*. Trusts are legal when they are for some honest purpose, as to pay debts or make a provision for families. They are illegal when they are for purposes of immorality, or vice, or of defrauding creditors, or contravene some statute, or are contrary to public policy. In such case a court of equity will not give its aid in carrying them into execution.² (a)

v. Flight, 5 N. R. 344; 4 De G., J. & S. 608; *Clarke v. Royal Panopticon*, 4 Drew. 29.

¹ *Cole v. Wade*, 16 Ves. 43; *Gower v. Mainwaring*, 2 Ves. 89; *Steere v. Steere*, 5 John. Ch. 1.

² *Bacon on Uses*, 9; *Lewis v. Nelson*, 14 N. J. Eq. 94.

(a) Thus, a bill in equity for an account cannot be maintained by a partner against his co-partners as to transactions with inhabitants of the seceding States during the Civil War. *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, id. 285. The combinations or "trusts"

§ 22. Again, trusts are either *public* or *private*. Private trusts concern only individuals or families, for private convenience and support. *Public trusts* are for public charities or for the general public good. They concern the general and indefinite public.

§ 23. Private trusts which concern individuals are limited in their duration. Being for individuals, they must be certain, and the individual or individuals must be identified within a limited period. They can endure only for a life or lives¹ in

¹ It is immaterial whether the designated lives are those of the beneficiaries or others. *Crooke v. King's County*, 97 N. Y. 421.

that have sprung up in recent years, for the purpose of controlling prices by uniting all those engaged in any great industry, are in strictness illegal as amounting to monopolies. See *e. g.*, *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *More v. Bennett*, 140 Ill. 69; *Bishop v. American Preservers' Co.*, 157 Ill. 284; *People v. North River Sugar Ref. Co.*, 121 N. Y. 582; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 43; *State v. Standard Oil Co.*, 49 Ohio St. 137; *United States v. Addyston Co.*, 78 F. R. 712; 24 Am. Law Rev. 143; 29 id. 293; 33 id. 63, 142; 30 Am. Law Reg. N. S. 751; 7 Harv. L. Rev. 338; 11 id. 80. The holder of certificates of such a "trust," which bind him to the terms of its formation, so far participates in its illegality that he cannot maintain a bill in equity against its trustees for an accounting. *Unckles v. Colgate*, 148 N. Y. 529. But forfeiture of a corporate charter for this cause can be enforced only by the State. *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; *Blindell v. Hagan*, 54 F. R. 40; *Greer v. Stoller*, 77 id. 1.

The Act of Congress of July 2, 1890, ch. 647 (26 Stat. at Large, 209), known as "The Sherman Anti-Trust Act," and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," has been held by the United States Supreme Court not to apply to a combination of corporations whose primary business is that of manufacturing rather than of selling, such a combination being regarded as within the police power of the States, and not as infringing upon interstate commerce. *United States v. E. C. Knight Co.*, 156 U. S. 1; s. c. 60 F. R. 306, 934; *Lowenstein v. Evans*, 69 F. R. 908. The act is constitutional, *United States v. Joint Traffic Ass'n*, 171 U. S. 505; and applies to all contracts in restraint of interstate commerce, irrespective of their reasonableness. *United States v. Trans-Missouri Freight Ass'n*, 162 U. S. 290. The remedy of a private citizen injured by a violation of this statute is by action at law for damages, and not by a bill in equity. *Southern Indiana Express Co. v. U. S. Express Co.*, 88 F. R. 659.

being, and twenty-one years and the period of gestation in addition.¹ On the other hand, public trusts or charities, existing for the general and indefinite public, may continue for an indefinite period.² It must be kept in mind, however, that this rule against perpetuities only applies to cases in which the power of alienation is suspended, and that the creation of a trust does not necessarily result in such suspension, for the trustee may have the right to alienate,³ and that the terms of the law are not everywhere the same. For example, in New York the ownership of *personal* property cannot be suspended for more than two lives, while the alienation of real estate may be suspended for two lives and a minority.⁴

§ 24. Trusts are divided in reference to their creation into express trusts, implied trusts, resulting trusts, and constructive trusts.⁵ Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust; hence they are called direct or express trusts in contradistinction from those trusts that are implied, presumed, or construed by law to arise out of the transactions of parties. They may be discretionary or imperative, absolute or on condition.⁶ As express trusts are directly declared by the parties, there can never be a controversy whether they exist or not. In such trusts these questions arise: Are they legal or illegal, and what is the construction of the various terms and provisions which they contain?

§ 25. Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is de-

¹ *Rice v. Barrett*, 102 N. Y. 161.

² *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; *Att. Gen. v. Aspinall*, 2 M. & Cr. 622; *Att. Gen. v. Heelis*, 2 S. & S. 76; *Att. Gen. v. Shrewsbury*, 6 Beav. 220; *Walker v. Richardson*, 2 M. & W. 892. See *Att. Gen. v. Forster*, 10 Ves. 344; *Att. Gen. v. Newcombe*, 14 Ves. 1; *Fearon v. Webb*, 14 Ves. 19.

³ *Robert v. Corning*, 89 N. Y. 225.

⁴ *Cook v. Lowry*, 29 Hun, 28.

⁵ See the definitions in *Russell v. Peyton*, 4 Brad. (Ill.) 473.

⁶ *Little v. Wilcox*, 119 Penn. St. 439.

clared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust.

§ 26. Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase-money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money.

§ 27. A constructive trust is one that arises when a person, clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be an advantage for the *cestui que trust* or a constructive trust.

CHAPTER II.

PARTIES TO TRUSTS ; AND WHAT PROPERTY MAY BE THE
SUBJECT OF A TRUST.

I. §§ 28-37. Who may create a trust.

- § 28. All persons competent to contract or make wills may create trusts.
- § 29. The king may create trusts.
- § 30. The State may create trusts ; and so may all its officers.
- § 31. Corporations may create trusts.
- § 32. The power of married women to create trusts.
- § 33. Capacity and power of infants to create trusts.
- § 34. The marriage settlements of infants.
- § 35. Of the ability of lunatics to create trusts.
- § 36. Of conveyances in trust by aliens.
- § 37. Trusts by bankrupts and insolvents.

II. §§ 38-59. Who may be a trustee.

- § 38. A person may convert himself into a trustee.
- § 39. Any person capable of taking the legal title may take as trustee. Rules that govern courts in appointing trustees.
- § 40. The sovereign may be trustee. Question as to remedy.
- § 41. The United States and the several States may be trustees.
- §§ 42-45. Corporations may be trustees.
- § 46. Unincorporated societies may be trustees for charitable purposes.
- § 47. Public officers as trustees.
- §§ 48-51. Married women as trustees.
- §§ 52-54. Infants as trustees.
- § 55. Aliens as trustees.
- § 56. Lunatics as trustees.
- § 57. A religious person or nun as trustee.
- § 58. A bankrupt as trustee.
- § 59. *Cestui que trust* may be a trustee for himself and others.

III. §§ 60-66. Who may be *cestui que trust*.

- § 60. All persons may be *cestuis que trust* who may take the legal title.
- §§ 61, 62. The Crown and the State may be *cestuis que trust*.
- § 63. Corporations as *cestuis que trust*.
- § 64. Aliens as *cestuis que trust*.
- § 65. Those who cannot take a legal interest cannot take an equitable interest.
- § 66. Except in certain charitable trusts.

IV. §§ 67-72. What property may be the subject of a trust.

§ 67. A trust may be created in every kind of valuable property.

§ 68. Possibilities, *choses in action*, expectancies, and property not at the time *in esse* may be assigned in trust.

§ 69. *Choses in action* and expectancies that cannot be assigned in trust.

§§ 71, 72. Trusts in land lying in a foreign jurisdiction, and their administration.

I. *Who may create a Trust.*

§ 28. It may be stated, as a general proposition, that every one competent to enter into a contract, or to make a will, or to deal with the legal title to property, may make such disposition of it as he pleases; and he may annex such conditions and limitations to the enjoyment of it as he sees fit; and he may vest it in trustees for the purpose of carrying out his intention. All persons, *sui juris*, have the same power to create trusts that they have to make a disposition of their property. A conveyance or disposition of property by persons not *sui juris* is valid to the extent of their legal capacity.

§ 29. The king may, by charter, grant his private property to one person upon trust for another.¹ But the trust must appear upon the face of the patent, and cannot be proved by parol.² He can also by will in writing under the sign-manual bequeath his private personal property to trustees for the use of another.³ He may by warrant grant prizes taken in war to trustees, to be distributed among the captors,⁴ and by statute he is authorized to convey trust property which has escheated to the Crown to trustees to execute the trust.⁵

§ 30. In the United States the sovereignty resides in the organized people; and all public officers are subjects and

¹ Bacon on Uses, 66.

² Fordyce v. Willis, 3 Bro. Ch. 577.

³ 39 & 40 Geo. III. c. 88. But it is said that probate of his will can not be granted. Williams's Ex'rs, 13.

⁴ Alexander v. Duke of Wellington, 2 R. & M. 35; Stevens v. Bagwell, 15 Ves. 140. But it is said that the *cestui que trust* cannot maintain a suit against the trustees in such cases.

⁵ 39 & 40 Geo. III. c. 88.

citizens, and they can convey their private property to trustees in the same manner as private individuals. The State itself by its legislation, or by its public officers duly authorized, can create a trust, convey property, and appoint trustees;¹ and such trustees are equally amenable to the jurisdiction of chancery.² But a State cannot remove the trustees of a private corporation and appoint others in their stead.³

§ 31. All corporations, subject to the terms of the charters and laws under which they exist, may alienate their property; and their power to appoint trustees and to declare in what manner the property shall be enjoyed, is coextensive with the right of alienation.⁴

§ 32. By the civil law married women could alienate their property and dispose of it by will. By the common law they were almost wholly incapacitated from dealing with their estates. The tendency of modern legislation is to remove these disabilities, and to enable them to make contracts and wills, as if they were sole, in relation to property held by them in their own right. By joining their husbands in fines and recoveries in England,⁵ and in deeds in America executed according to the prescribed formalities, they can, as a general rule, convey their property to trustees.⁶ In those

¹ *Commissioners v. Walker*, 6 How. (Miss.) 143.

² *Cotterel v. Hampson*, 2 Vern. 5; *Buchanan v. Hamilton*, 5 Ves. 722.

³ *State v. Bryce*, 7 Ohio, 411; *Dart. College v. Woodward*, 4 Wheat. 518.

⁴ *Colchester v. Lowten*, 1 V. & B. 226; *Att. Gen. v. Aspinall*, 2 M. & Cr. 613; *Att. Gen. v. Wilson*, 1 Cr. & Ph. 1; *Catlin v. Eagle Bank*, 6 Conn. 233; *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205; *Dana v. Bank of United States*, 5 W. & S. 224; *Arthur v. Comm. Bank*, 9 S. & M. 391; *Barry v. Merchants' Exch. Co.*, 1 Sand. Ch. 280; *Hopkins v. Turnpike Co.*, 4 Humph. 403; *Reynolds v. Stark County*, 5 Ham. 204; *Angell on Corp.* § 191; *Barings v. Dabney*, 19 Wall. 1. In England, municipal corporations are declared by statute to be trustees of their real and personal estate, and they are debarred from alienating it without the consent of the Lords of the Treasury. 5 & 6 Wm. IV. c. 76, § 94.

⁵ 3 & 4 Wm. IV. c. 74.

⁶ *Durant v. Ritchie*, 4 Mason, 45. And they can make mortgages of their property with powers of sale. *Young v. Graff*, 28 Ill. 20.

States where a married woman can convey her real and personal property without joining her husband, she can convey it to trustees to such uses as she may appoint; and where statutes have given her a testamentary capacity, she can create trusts and appoint trustees by her will.¹ A married woman is considered in all respects as a *feme sole* in regard to property settled to her separate use;² as if real estate is conveyed to a trustee and his heirs, or if personal estate is assigned to a trustee and his executors, for her sole and separate use, the absolute interest to be at her sole disposal, she has the entire control, and may exercise her ownership or implied power of appointment by creating a trust extending even beyond her coverture.³ If she is tenant for life, to her sole use, she can make a settlement of her life-estate. But if the power of anticipation is restrained, she can make no disposition except of the annual produce which has actually accrued or become due. A married woman will be treated as a *feme sole* only in regard to property *settled* upon her; and her power of disposing of property thus *settled* will be governed by a strict interpretation of the instrument of settlement. If the deed of settlement points out the manner in which she may dispose of her interest, she must follow that particular manner; as if the power is given her to convey or appoint by deed, she cannot convey or appoint by will; and if by will, she cannot convey by deed. If the instrument is silent as to her power to convey, she may devise the property by will.⁴ Savings by a wife out of an allowance made by her husband for her separate maintenance are treated in equity as her separate estate, which she may dispose of;⁵ and so are the accumulations

¹ 1 Redfield on Wills, pp. 21-28.

² Lewin on Trusts, p. 23 (5th London ed.); Hill on Trustees, p. 421 (4th Amer. ed.).

³ The English rule is stated in the text. The courts in some of the United States follow the same rule; in others a different rule is established. All the distinctions are stated, and the authorities collected in the chapter upon Trusts for Married Women.

⁴ Mory v. Michael, 18 Md. 227.

⁵ Brooke v. Brooke, 25 Beav. 342.

and savings from the income of a trust for her sole benefit.¹ But savings from pin-money allowed by the husband for the personal expenses, clothing, and adornment of the wife, revert to the husband, and the wife cannot dispose of them.² (a)

§ 33. Infants can create trusts which are good until they are avoided.³ The tendency of modern decisions is to hold that the acts and contracts of infants are voidable only, and subject to their election when of age either to avoid or confirm them.⁴ Mr. Greenleaf says that "it may be safely stated as the result of the American authorities, that the act or contract of an infant is in no case to be held purely void, unless from its nature and solemnity, as well as from the operation of the instrument, it was manifestly and necessarily prejudicial to him. Wherever it *may be* for his benefit, it is at most but voidable; and if it be an act which it was either his duty⁵ to do, or was manifestly for his benefit, it shall bind him."⁶ But a court of equity would not allow an equitable interest to be enforced against an infant to his prejudice, and would give him the same power of avoidance over the equitable, as over the legal estate. And if the infant died without having avoided the trust, the court

¹ Story, Eq. Jur. § 1375; *Frazier v. Center*, 1 McCord, Eq. 270; *Picquet v. Swan*, 4 Mason, 455.

² *Jodrell v. Jodrell*, 9 Beav. 45; Story, Eq. Jur. § 1375 a.

³ Co. Litt. 248 a; *Hearle v. Greenbank*, 1 Ves. 304; *Owens v. Owens*, 8 C. E. Green, 60; *Zouch v. Parsons*, 3 Burr. 1794; *Bool v. Mix*, 17 Wend. 119; *Eagle F. Ins. Co. v. Lent*, 6 Paige, 635; *Tucker v. Moreland*, 10 Pet. 71, 2 Kent, 234; *Gillett v. Stanley*, 1 Hill, 121.

⁴ 2 Kent, 235; *Tucker v. Moreland*, 10 Pet. 58, 71; *Irvine v. Irvine*, 9 Wall. 617.

⁵ *Zouch v. Parsons*, 3 Burr. 1794, 2 Kent, 234-236; *People v. Moores*, 4 Denio, 518; *McCall v. Parker*, 13 Met. 372.

⁶ 4 Cruise, Dig. by Greenleaf, p. 15, note, and authorities cited; *Eagle Fire Co. v. Lent*, 1 Edw. Ch. 301; 6 Paige, 635.

(a) The English Married Women's Property Act of 1882 did not have the effect of abolishing the common-law rule as to gifts of para-
phernalia. *Tasker v. Tasker*, [1895] P. 1. See 30 Am. Law Rev. 557.

will still investigate the transaction and see that no unfair advantage was taken.¹ But if the infant is still alive, no one but himself can object to his deed.²

§ 34. The effect of a marriage settlement by a female infant, by which her real and personal estate is conveyed to trustees, has been frequently mooted in courts. It has been decided that as infants may contract marriage, a settlement made by the consent of their parents and guardians in consideration of a marriage to be afterwards solemnized, should be binding, inasmuch as if the marriage afterwards takes place, the situation of the parties is altered, and the interests of third persons, or children born of the marriage, may be affected. Lord Macclesfield and Lord Hardwicke upon these considerations refused to disturb such settlements.³ But Lord Thurlow dissented from these opinions;⁴ and the law is now settled, that a deed, executed by a female infant in consideration of marriage, does not bind her real estate, unless, having come of age, she assents to it after the death of her husband.⁵ There is no reason why the marriage settlement of a male infant should not be governed by the same rule, except that he could confirm the same after he became of age, and before the death of his wife. The settlement will bind the husband if he is of full age.⁶ It has been

¹ Lewin on Trusts, p. 25; 4 Cruise, Dig. p. 130; *Starr v. Wright*, 20 Ohio St. 97.

² *Ingraham v. Baldwin*, 12 Barb. 9, 19.

³ *Cannel v. Buckle*, 2 P. Wms. 243; *Harvey v. Ashley*, 3 Atk. 607; *Tabb v. Archer*, 3 Hen. & M. 399; *Healy v. Rowan*, 5 Gratt. 414; *Lester v. Frazer*, Riley, Ch. 76; 2 Hill, Ch. 529.

⁴ *Durnford v. Lane*, 1 Bro. Ch. 106.

⁵ *Milner v. Lord Harewood*, 18 Ves. 259; *Trollope v. Linton*, 1 Sim. & Stu. 477; *Simson v. Jones*, 2 Russ. & My. 365; *Temple v. Hawley*, 1 Sand. Ch. 153; *Dominick v. Michael*, 4 Sand. 374; *Levering v. Levering*, 3 Md. Ch. 365; *Shaw v. Boyd*, 5 S. & R. 312; *Wilson v. McCullogh*, 19 Pa. St. 77; *Healy v. Rowan*, 5 Gratt. 414; *In re Waring*, 12 Eng. L. & Eq. 351; *Cave v. Cave*, 15 Beav. 227, 19 Eng. L. & Eq. 280; *Field v. Moore*, 7 De G., M. & G. 691; 35 Eng. L. & Eq. 498; *Lee v. Stuart*, 2 Leigh, 76.

⁶ *Whitchote v. Lyle's Ex'rs*, 28 Pa. St. 73; *Levering v. Heighe*, 2 Md. Ch. 81.

settled, however, after considerable conflict, that a female infant may bar herself of dower and of a distributive share in her husband's estate, by accepting a jointure before marriage.¹ And she may, before marriage, make a binding settlement of her personal estate, for such a settlement will be for her benefit, otherwise it would vest in the husband, and it would in effect be his settlement and not hers;² but such settlement is not good of chattels that would not go to the husband. It is now settled in England by statute that a male infant over twenty years of age and a female over seventeen may make a valid marriage settlement of their real and personal estates, under the sanction of the Court of Chancery.³

§ 35. It was a maxim of the common law, that no man of full age could be allowed to stultify himself; hence the acts, deeds, and feoffments of idiots and lunatics were held to be binding, and not voidable by the party himself, though they could be avoided by his heirs, executors, or administrators.⁴ This maxim never prevailed in the United States, and is not now the law of England. The conveyance of a lunatic is not, however, absolutely void, but only voidable by himself as well as by his friends and representatives.⁵ But after inquisition declaring him incompetent, all contracts made

¹ *Drury v. Drury*, 2 Eden. 39; *Buckinghamshire v. Drury*, 2 Eden, 60-75; *McCartee v. Teller*, 2 Paige, 511.

² *Durnford v. Lane*, 1 Bro. Ch. 111; *Levering v. Levering*, 3 Md. Ch. 365; *Field v. Moore*, 7 De G., M. & G. 691; *Ainslie v. Medycott*, 9 Ves. 19; *Stamper v. Barker*, 5 Mad. 134; *Williams v. Chitty*, 3 Ves. 551; *Johnson v. Smith*, 1 Ves. 315; *Simson v. Jones*, 2 Russ. & My. 365; *Succession of Wilder*, 22 La. An. 219.

³ 18 & 19 Vict. c. 43. 1855. See *Edwards v. Carter*, [1893] A. C. 360.

⁴ Co. Litt. 247 b.

⁵ *Allis v. Billings*, 6 Met. 415; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 239; *Price v. Barrington*, 3 Mac. & G. 486; *Moulton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *Milner v. Turner*, 4 Monr. 245; *Ballew v. Clark*, 2 Ired. 23; *Owing's Case*, 1 Bland. 370; *Elliot v. Ince*, 7 De G., M. & G. 488; *Campbell v. Hooper*, 3 Sm. & Giff. 153; *Wait v. Maxwell*, 5 Pick. 217; *Mitchell v. Kingman*, id. 431; *Snowden v. Dunlavey*, 11 Penn. St. 522.

by him, until restored to the control of his property, are void.¹ It follows that a conveyance by a lunatic upon a trust will be good until it is avoided, and a court of equity would not set it aside, if it was fair and reasonable,² and if the parties could not be restored to their original condition; nor would the court interfere against *bona fide* purchasers without notice of the lunacy.³

§ 36. An alien may take real estate by devise or purchase, though he cannot take by operation of law, as by descent, or as tenant by curtesy. If an alien takes land by purchase, he may hold it until office found; and if he conveys it in trust or otherwise, his grantee will hold it until office found. An alien can therefore create a trust of real estate only until the State interposes. An alien may exercise all rights of ownership over personal property, consequently he can create a valid trust in it.⁴

§ 37. By the bankrupt law of England all the property which the bankrupt is entitled to up to the date of the certificate of his discharge vests in his assignees;⁵ and he can create no trust in it, except in the surplus that may remain after the payment of all his debts.⁶ Under the bankrupt laws of the United States and the insolvent laws of the various States, only the interests of the bankrupt existing at the date of the assignments vest in his assignees;⁷ he may, therefore, create a valid trust in property acquired after the assignment and before the certificate.

¹ *L'Amoureux v. Crosby*, 2 Paige, 422; *Pearl v. McDowell*, 3 J. J. Marsh. 658.

² *Niell v. Morley*, 9 Ves. 478; Story, Eq. Jur. § 228.

³ *Carr v. Halliday*, 1 Dev. & Batt. 344; *Price v. Berrington*, 3 Mac. & G. 486; *Greenslade v. Dare*, 20 Beav. 285.

⁴ 2 Kent, pp. 1-36; Lewin on Trusts, p. 25; Hill on Trustees, p. 47.

⁵ 12 & 13 Vict. c. 106, §§ 141, 142.

⁶ Lewin on Trusts, p. 26; Hill on Trustees, p. 47.

⁷ In *Matter of Grant*, 2 Story, 312; *Mosby v. Steele*, 7 Ala. 299; *Ex parte Newhall*, 2 Story, 360.

II. *Who may be a Trustee.*

§ 38. It is a rule that admits of no exception, that equity never wants a trustee, or, in other words, that if a trust is once properly created, the incompetency, disability, death, or non-appointment of a trustee shall not defeat it.¹ Thus, if property has been bequeathed in trust, and no trustee, or a trustee disabled from taking, or one who is dead, or refuses to take, is appointed, the court will decree the execution of the trust by the personal representatives, if it is personal property, and by the heirs or devisees, if it is real estate.² Property once charged with a valid trust will be followed in equity into whosoever hands it comes, and he will be charged with the execution of the trust, unless he is a purchaser for value, and without notice.³ The holder of the legal title and the absolute interest in property may convert himself into a trustee by making a valid declaration of trust upon good consideration;⁴ or if he conveyed the property by some conveyance which was inoperative in law, equity would hold him to be a trustee;⁵ as if a man convey property

¹ Co. Litt. 290 b, 113 a, Butler's note (1); Story, Eq. Jur. §§ 98, 976; *McCartee v. Orph. Asy. Soc.*, 9 Cow. 437; *Crocheron v. Jaques*, 3 Edw. 207; *Bundy v. Bundy*, 28 N. Y. 410; *Dodkin v. Brunt*, L. R. 6 Eq. 580.

² *Piatt v. Vattier*, 9 Pet. 405; *Gibbs v. Marsh*, 2 Met. 213; *Withers v. Yeadon*, 1 Rich. Eq. 325; *King v. Donnelly*, 5 Paige, 46; *Dawson v. Dawson*, Rice, Eq. 243; *Cushney v. Henry*, 4 Paige, 345; *De Barante v. Gott*, 6 Barb. 492; *Malin v. Malin*, 1 Wend. 625; *McIntire v. Zanesville C. & M. Co.*, 9 Ham. 203; *Kerr v. Day*, 14 Pa. St. 114; *Att. Gen. v. Downing*, Amb. 550; *Bennet v. Davis*, 2 P. Wms. 316; *Sonley v. Clockmakers' Co.*, 1 Bro. Ch. 81; *Treat's App.*, 30 Conn. 43; *White v. Hampton*, 13 Iowa, 259.

³ *Ibid.*; *Shepherd v. McEvers*, 4 John. Ch. 136.

⁴ See notes to *Woollam v. Hearne*, 2 Lead. Cas. Eq. 404; *Mackreth v. Simmons*, 1 Lead. Cas. Eq. 235; *Adams v. Adams*, 21 Wall. 186.

⁵ *McKay v. Carrington*, 1 McLean, 50; *Kerr v. Day*, 14 Penn. St. 114; *Crawford v. Bertholf*, Saxt. Ch. 458; *Malin v. Malin*, 1 Wend. 625; *Tyson v. Passmore*, 2 Barr, 122; *Ten Eick v. Simpson*, 1 Sand. Ch. 244; *Waddington v. Banks*, 1 Brock. 97; *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Ch. Cas. 39; *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 272; *Wall v. Bright*, 1 J. & W. 474.

directly to his wife, a transaction inoperative in most of the States, equity would uphold the act, and decree the husband to be a trustee.¹

§ 39. It may be stated, in general terms, that whoever is capable of taking the legal title or beneficial interest in property, may take the same in trust for others.² Whatever persons or corporations are capable of having the legal title or beneficial interest cast upon them by gift, grant, bequest, descent, or operation of law, may take the same subject to a trust, and they will become trustees. But it does not follow that whoever is capable of taking in trust, is capable of performing or executing it. The inquiry, then, is not so much who may take in trust, as it is who may execute and perform a trust. Sometimes the law provides against the appointment of non-residents as trustees.³ If a trust is cast upon a person incapable of taking and executing it, courts of equity will execute the trust by decree, or they will appoint some person capable of performing the requirements of the trust. Mr. Lewin says that "in general terms, a person to be appointed trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of the court."⁴ Sir George J. Turner, L. J., laid down the general rules which govern courts in making appointments of trustees as follows:—

"First, the court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character,

¹ *Huntly v. Huntly*, 8 Ired. Eq. 250; *Livingston v. Livingston*, 2 John. Ch. 537; *Garner v. Garner*, 1 Busb. Eq. 1.

² *Fonb. Eq.* 139, n.; *Hill on Trustees*, 48; *Commissioners v. Walker*, 6 How. (Miss.) 146.

³ *Rinker v. Bissell*, 90 Ind. 375; *Meikel v. Greene*, 94 Ind. 344.

⁴ *Lewin on Trusts*, 27.

should not be trustee of the instrument, there cannot, as I apprehend, be the least doubt that the court would not appoint to the office a person whose appointment was so prohibited; and I do not think that upon a question of this description any distinction can be drawn between express declaration and demonstrated intention. The analogy of the course which the court pursues in the appointment of guardians affords, I think, some support to this rule. The court in those cases attends to the wishes of the parents, however informally they may be expressed.

“Another rule which may, I think, safely be laid down, is this, — that the court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator, or to the interests of other of the *cestuis que trust*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested in the trust. Every trustee is in duty bound to look after the interests of all, and not of any particular member or class of members of his *cestuis que trust*.

“A third rule which may be safely laid down is that the court, in appointing a trustee, will have regard to the question whether his appointment will promote or impede the execution of the trust; for the very purpose of the appointment is that the trust may be better carried into execution.”¹

§ 40. The sovereign may sustain the character of a trustee. He has a legal capacity to take and hold the estate, and to execute the trust;² but there is a difficulty in every country in executing the judgments and decrees of a court against the sovereign power of the country. In England, it is said that the Court of Chancery has no jurisdiction over the king's conscience, for the Lord Chancellor only exercises the equitable authority of the king himself in

¹ *In re Tempest*, L. R. 1 Ch. 487.

² *Lewin on Trusts*, 27.

judging between his subjects. But the greater difficulty is in enforcing the decrees of a court against the sovereign power; for "the arms of equity are very short against the prerogative."¹ The subject may have a clear right, but no remedy either at law or equity against the Crown; in such case his only resource is an appeal to the king by a petition of right, and it cannot be supposed that he would be refused. The question is now of less importance; for by statute, if trust property vests in the Crown by escheat, the king is enabled to grant it to trustees for the purpose of executing the trust.² And by an amendment it is further provided that property held in trust shall not escheat or be forfeited to the Crown by the failure or forfeiture of the trustee;³ and it is still further provided, that in such cases trust property shall be under the control of the Court of Chancery for the use of the parties beneficially interested, and that new trustees shall be appointed.⁴ Under these statutes it is said that an equity will be enforced against the Crown.⁵ The only cases where the question is still open, whether a trust can be enforced against the Crown, is where the person of the sovereign takes by descent as heir, or by representation, or where he may have held as trustee previously to his acquiring the crown, or where a grant or bequest is made to him as a trustee.⁶

§ 41. The United States, and each one of the separate States, may sustain the character of trustee. They have legal capacities to take and execute trusts for every pur-

¹ *Pawlett v. Att. Gen.*, Hard. 467; *Burgess v. Wheate*, 1 Eden, 255; *Kildare v. Eustace*, 1 Vern. 439; *Wike's Case*, Lane, 54; *Penn. v. Lord Baltimore*, 1 Ves. 453; *Reeve v. Att. Gen.*, 2 Atk. 224; *Hovenden v. Lord Annesley*, 2 Sch. & L. 617; *Hodge v. Att. Gen.*, 3 Yo. & Col. 342; *Briggs v. Light-boats*, 11 Allen (Mass.), 157, where all the authorities are commented on.

² 39 & 40 Geo. III. c. 88.

³ 4 & 5 Wm. IV. 23.

⁴ 13 & 14 Vict. c. 60, §§ 15, 46, 47.

⁵ *Hughes v. Wells*, 9 Hare, 749; 13 Eng. L. & Eq. 389.

⁶ *Hill on Trustees*, 50.

pose.¹(a) But a court cannot execute its judgments and decrees against a sovereign State with any more effect than the courts of England can enforce their orders against the king. The arms of equity in America are as short against the sovereign power as they are in England against the prerogative. Mr. Justice Gray has clearly shown that a State cannot be sued in law or equity against its consent, or unless there is some general or special statute authorizing the suit.² A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused. If a State accepts a trust by grant or bequest, it must act through its legislative powers in administering the trust, or in creating and appointing agents or officers to perform the duties which it assumes; as the United States acted in relation to the bequest of James Smithson in trust for the establishment of the Smithsonian Institution for the increase and diffusion of knowledge among men.³ A limitation over of a charitable devise to the States of Maryland and Louisiana in case of forfeiture by the first takers was held not to vitiate the bequest.⁴

¹ See *Mitford v. Reynolds*, 1 Phill. 185; *Nightingale v. Gouldbourn*, 2 Phill. 594; 5 Hare. 484. It was denied, however, that the United States could take in trust in *Levy v. Levy*, 33 N. Y. 97; *Shoemaker v. Comm'rs*, 36 Ind. 176.

² *Briggs v. Light-boats*, 11 Allen, 157.

³ U. S. Stat. 1836, c. 252, Vol. V. p. 64 (L. & Bro. ed.); also, Stat. 1846, c. 178, Vol. IX. p. 102.

⁴ *McDonogh's Ex'rs v. Murdoch*, 15 How. 367.

(a) A public corporation may be a trustee. A State is a trustee of the rights of its people in navigable waters. *Allen v. Allen*, 19 R. I. 114. Tide lands in a Territory are held in trust by the general government for the future State, but the United States may grant them to individuals for appropriate purposes,

such as the erection of wharves or other aids to commerce. *Shively v. Bowlby*, 152 U. S. 1.

Public officers, such as State commissioners, authorized to superintend the building of a State-house, are not properly trustees, but State agents. *In re New State-house* (R. I.), 37 Atl. 2.

§ 42. It was formerly laid down that corporations could not be seized of lands to the use of another, and could not be trustees.¹ The reason assigned for this rule was that no trust or confidence could be reposed in them; that they could not be compelled to execute a use or perform a trust, for courts of equity, in decreeing the execution of a trust, lay hold upon the conscience;² and it is impossible to attach any demand upon the conscience of a body so artificially created that it cannot in the nature of things have a conscience. Again, it was said that they could not be imprisoned if they refuse to obey the decrees of the court. But the technical rules upon which it was held that corporations could not be trustees have ceased to operate; and at the present day corporations of every description may take and hold estates, as trustees, for purposes not foreign to the purposes of their own existence; and they may be compelled by courts of equity to carry the trusts into execution.³ If they misapply the trust fund, or refuse to obey the decrees of the court, the proper remedy is by distringas, sequestration, or injunction, or by removal and appointment of new trustees.⁴

§ 43. It must be understood, however, that corporations are the creatures of the law, and that as a general rule they cannot exercise powers not given to them by their charters or acts of incorporation.⁵ For this reason they cannot act as

¹ Bacon on Uses, 57; 1 Cruise, Dig. p. 340.

² Sugd. V. & P. p. 417.

³ Att. Gen. v. St. John's Hosp., 2 De G., J. & Sm. 621; Att. Gen. v. Landerfield, 9 Mod. 286; Dummer v. Chippenham, 14 Ves. 252; Green v. Rutherford, 1 Ves. 468; Att. Gen. v. Whorwood, 1 Ves. 536; Att. Gen. v. Stafford, Barn. 33; Att. Gen. v. Found. Hosp. 2 Ves. Jr. 46; Att. Gen. v. Clarendon, 17 Ves. 499; Att. Gen. v. Caius College, 2 Keen, 165; Att. Gen. v. Ironmongers' Co., 2 Beav. 313; Jackson v. Hartwell, 8 Johns. 422; Trustees Phillips Academy v. King, 12 Mass. 546; Att. Gen. v. Utica Ins. Co., 2 Johns. Ch. 384; Vidal v. Girard, 2 How. 187; Miller v. Lerch, 1 Wall. Jr. 210; Columbia Bridge Co. v. Kline, Bright, N. P. 320; Greenville Acad., 7 Rich. Eq. 476; McDonogh v. Murdoch, 15 How. 367; Green v. Dennis, 6 Cow. 304; Dublin Case, 38 N. H. 577.

⁴ Mayor of Coventry v. Att. Gen., 7 Bro. P. C. 235; 3 Mad. Ch. 77, 209.

⁵ In Matter of Howe, 1 Paige, 214.

trustees in a matter in which they have no interest, or in a matter that is inconsistent with, or repugnant to, the purposes for which they were created.¹ Nor can they act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them,² if it accepts them. Thus towns, cities, and parishes may take and hold property in trust for the establishment of colleges,³ for the purpose of educating the poor,⁴ for the relief of the poor, though not paupers, by furnishing them fuel at a low price,⁵ and for the support of schools,⁶ or for any educational or charitable purposes within the scope of its charter.⁷ So also overseers of the poor, supervisors of a county,⁸ commissioners of roads in South Carolina,⁹ trustees of the poor in Mississippi, and also trustees of the school fund,¹⁰ are corporations *sub modo*; and they may take and execute trusts within the scope of their official duties (*a*).

¹ In *Matter of Howe*, 1 Paige, 214; *Jackson v. Hartwell*, 8 Johns. 422.

² *Story, J., Vidal v. Girard*, 2 How. 188-190; *McDonogh v. Murdoch*, 15 How. 367; *First Cong. Soc. of Southington v. Atwater*, 23 Conn. 34; *Wetmore v. Parker*, 7 Lans. 121.

³ *Vidal v. Girard*, *ut supra*. But see *Perin v. McMicken*, 15 La. An. 154.

⁴ *McDonogh v. Murdoch*, *ut supra*.

⁵ *Webb v. Neal*, 5 Allen, 575; *McIntire Poor School v. Zanesville Canal Co.*, 9 Ohio, 217.

⁶ *First Parish in Sutton v. Cole*, 3 Pick. 232.

⁷ *Barnum v. Baltimore*, 62 Md. 275.

⁸ *North Hempstead v. Hempstead*, 2 Wend. 109; *Jansen v. Ostrander*, 1 Cow. 670.

⁹ *Com. Roads v. McPherson*, 1 Spear, 218.

¹⁰ *Governor v. Gridley*, Walk. 328; *Carmichael v. Trustees, &c.*, 3 How. (Miss.) 84.

(*a*) A municipal corporation may be a trustee, at least of charities consistent with its organization. See *Sargent v. Cornish*, 54 N. H. 18;

§ 44. A bank may receive a deed, and hold land in trust to receive a debt due to it.¹ (a) One corporation may take and hold in trust for another, or for a stranger,² or for an individual; as where one gave a legacy to a church corporation in trust to pay the income to his housekeeper for life, and after her death to apply it to church purposes, it was held that the corporation might well execute the trust, on the principle that when property is given to a corporation partly for its own use and partly for the use of another, the power of the corporation to take and hold for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.³ The supervisors of a county cannot take in trust for a town or village or

¹ *Morris v. Way*, 16 Ohio, 478.

² *Phillips Academy v. King*, 12 Mass. 546.

³ In *Matter of Howe*, 1 Paige, 214.

Dailey v. New Haven, 60 Conn. 314; 14 L. R. Ann. 69, and note; *Higginson v. Turner*, 171 Mass. 586; *Ayer v. Bangor*, 85 Maine, 511; *Handley v. Palmer*, 91 F. R. 948. So swamp lands may be received by a county in trust for the public schools, and in such case they cannot be sold on execution as the property of the county. *Stone v. Perkins*, 85 F. R. 616.

(a) A bank does not become a trustee by issuing a draft upon another bank at the request of a depositor who pays therefor by his own check. *Jewett v. Yardley*, 81 F. R. 920. But when one bank sends a note to another bank for collection, and it is collected by the latter, or when an indorser pays a note at a bank, which retains possession of the note, but does not apply the payment thereto, the funds so paid have, in some cases, been regarded as held in trust, though mingled with other money, and as

recoverable in full if the collecting bank becomes insolvent. See *Massey v. Fisher*, 62 F. R. 958; *People v. Rochester*, 96 N. Y. 32; *Cavin v. Gleason*, 105 N. Y. 256, 263; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101; *German Nat. Bank v. Burns*, 12 Col. 539; *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786; *State Nat. Bank v. Thomas Manuf. Co. (Texas)*, 42 S.W. 1016; *Mechem on Agency*, § 514; 1 *Ames on Trusts* (2d ed.), 18, 43; *infra*, § 122, n.

The relation of safe-deposit companies to those who hire boxes from them, and have keys thereto, is that of bailment, and not one of trust or tenancy. *Roberts v. Stuyvesant, S. D. Co.*, 123 N. Y. 57. Property so deposited cannot be reached by trustee process, but may, it seems, be directly attached or reached through a court of equity. See 9 *Harv. L. Rev.* 131, 135.

for individuals, but only for the body which they represent.¹ Whether a particular corporation can hold as trustee for any specific purpose must generally be determined by the construction of its charter and of the laws of the State in which it acts.²

§ 45. If a corporation takes land by grant or bequest in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the State only can interfere.³ A corporation cannot be compelled to execute a trust in property, the legal title to which it has no power to take and hold;⁴ but the trust, if otherwise valid, is not for that reason void, and the court will appoint a competent trustee, and direct a conveyance of the property to him; as where a testator gave land to a corporation that could not take by reason of the statute of mortmain, in trust to sell and apply the proceeds to persons competent to take, it was held that though the devise was void at law, yet in equity it was a valid trust, and that the heir was a trustee to the uses declared in the will.⁵

¹ *Jackson v. Hartwell*, 8 Johns. 422.

² *Dartmouth Coll. v. Woodward*, 4 Wheat. 636; *Head v. Providence Ins. Co.*, 2 Cranch, 127; *State v. Stebbins*, 1 Stew. 299; *Beaty v. Knowler*, 4 Pet. 152; *Beaty v. Marine Ins. Co.*, 2 Johns. 109; *People v. Utica Ins. Co.*, 15 Johns. 358; *New York Fire Ins. Co. v. Ely*, 2 Cow. 678; *State v. Mayor of Mobile*, 5 Porter, 279.

³ *Runyan v. Coster's Lessee*, 14 Pet. 122; *Miller v. Lerch*, 1 Wall. Jr. 210; *Leazure v. Hillegas*, 7 S. & R. 321; *Perin v. Cary*, 24 How. 465; *Chapin v. School Dist.*, 35 N. H. 445; *Troy v. Haskell*, 33 N. H. 533; *Philadelphia v. Girard*, 45 Penn. St. 9; *Humbert v. Trinity Church*, 24 Wend. 587; *Harpending v. Dutch Church*, 16 Pet. 492; *Bogardus v. Trinity Church*, 4 Sand. Ch. 758; *Angell v. Ames, Corp.* §§ 151-155.

⁴ *Sonley v. Clockmaker's Co.*, 1 Bro. Ch. 81; *Vidal v. Girard*, 2 How. 188.

⁵ *Ibid.*; *Winslow v. Cummings*, 3 Cush. 358. This is denied to be the law in the courts of New York, in relation to charitable bequests. See *Ayres v. Methodist Church*, 3 Sand. 351; *Andrew v. Bible Soc.* 4 Sand. 156; *Levy v. Levy*, 40 Barb. 585; 33 N. Y. 97. These cases are governed by a statute, as is said, and would not probably be followed outside of that State; nor are they fully concurred in by their own courts, as there was a strong dissent in the Court of Appeals, the court of last resort.

§ 46. Grants or gifts to an unincorporated association in trust for a charitable purpose are sustained in equity, as a legacy to the Seamen's Aid Society, to go to their treasurer for the time being for the purposes of such society;¹ a bequest over to several unincorporated societies, some of them not in the State, was held good,² and if the members are too numerous to administer the trust, the court will appoint a trustee.³ So a bequest to "The Marine Bible Society," for certain purposes, was held to establish a charitable trust, although the society was a voluntary association, and had been disbanded, and the court appointed a trustee to carry the trust into effect.⁴ In Pennsylvania, substantially the same doctrine has been held.⁵ A different doctrine was held in the Supreme Court of the United States;⁶ but the case was decided upon the law of Virginia, and may be considered as settling a local rather than a general question.⁷ The later cases in the same court hold the general rule to be otherwise.⁸

§ 47. A trust to a board of officers in their official capacity for purposes within the scope of their official duties may be executed by them.⁹ Where a bequest was to the chancellor of the State of New York, the mayor and recorder of the city of New York, and several other persons by their official description only, and their successors in office, to build and

¹ *Tucker v. Seamen's Aid Soc.*, 7 Met. 188; *First Cong. Soc. of South-ington v. Atwater*, 23 Conn. 56.

² *Burbank v. Whitney*, 24 Pick. 146; *Washburn v. Sewall*, 9 Met. 280. But see *Methodist Church v. Remmington*, 1 Watts, 218.

³ *Burbank v. Whitney*, 24 Pick. 146; *Washburn v. Sewall*, 9 Met. 280. But see *Methodist Church v. Remmington*, 1 Watts, 218.

⁴ *Winslow v. Cummings*, 3 Cush. 358.

⁵ *Pickering v. Shotwell*, 10 Barr, 27; and see the able opinion of Baldwin, J., in *Magill v. Brown*, Bright, N. P. 350. See also *Methodist Church v. Remmington*, 1 Watts, 218.

⁶ *Baptist Asso. v. Hart*, 4 Wheat. 1; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 114.

⁷ Baldwin, J., in *Magill v. Brown*, Bright, N. P. 354.

⁸ *Vidal v. Girard*, 2 How. 187. See chapter on Charitable Trusts, *post*.

⁹ *Ante*, § 30.

maintain a hospital, and if this could not be done legally, they were to apply for an act of incorporation, and at all events the estate should be held by an heir charged with the trusts, it was held that the designation of the trustees by their official character was equivalent to naming them by their proper names; that the trust was not to be executed by them in their official character, but in their private and individual capacity; and that if the trust had been to the officers named and their successors to execute, and no other provisions had been made, it would have fallen within the case of *Baptist Association v. Hart's Executors*, and would have been void. It was further held that it was a good executory devise to a corporation to be created *in futuro*, and in the mean time that the estates in the hands of the heir would be held charged with the trusts.¹ A bequest to the chancellor of the Exchequer for the time being for the benefit of Great Britain was held good;² and the Governor-General of India may take in trust for the benefit of the city of Decca.³ Where a British subject bequeathed funds to the President and Vice-President of the United States and the Governor of Pennsylvania for the time being, to establish a college in the State of Pennsylvania, and directed that moral philosophy should be taught, and that a professor should inculcate the rights of the black people of every clime, until they were restored to an equality of rights throughout the Union, the Court of Chancery directed an inquiry to be made whether the President, Vice-President, and Governor would accept the trust, and it appearing that they declined to act, it was held that the trust failed; and as it could not be carried into effect, *ex præ*, in a foreign country, that the gift fell into the residue.⁴ A bank comptroller is a trustee of the various securities held by him for the several banks; but the State itself is not liable as a trustee for his acts.⁵

¹ *Inglis v. Trustees of the Sailors' Snug Harbor*, 3 Pet. 99.

² *Nightingale v. Goulbourn*, 2 Phill. 594; 5 Hare, 484.

³ *Mitford v. Reynolds*, 1 Phill. 185.

⁴ *New v. Bonaker*, L. R. 4 Eq. 655.

⁵ *State v. Bush*, 20 Wis. 212.

§ 48. Married women may become trustees by deed, gift, bequest, appointment, or by operation of law.¹ If an estate comes to a married woman in any way, charged with a trust, her coverture cannot be pleaded in bar of the trust;² and a court of equity will enforce its execution; as when the legal title to land in trust was cast by descent upon a married woman, and the law required that a deed executed by her should be acknowledged, as executed voluntarily, and she refused so to acknowledge it, the court compelled her by decree.³ But specific performance will not be enforced against a *feme covert* trustee for sale upon her contract as trustee to convey.⁴ There is no less judgment and discretion in a woman after marriage than before. Sir John Trevor thought she rather improved by her husband's teaching.⁵ The reasons for her disabilities are founded upon her own interests, or her husband's, or both;⁶ or rather upon the broader policy of the law which, for the purpose of domestic peace and happiness, merges the proprietary interests of the wife during coverture in her husband, and will not permit her to hold interests separate from, and independent of, and possibly antagonistic to him. The policy of the law has, however, been very much modified by legislation in later years. But where such interests are not concerned, she possesses the same legal capacity as if she were *sui juris*. Thus, she may execute any kind of power, whether simply collateral, appendant, or in gross; and it is immaterial whether it is given to her while sole or married.⁷

¹ *Lake v. De Lambert*, 4 Ves. 595; *Compton v. Collinson*, 2 Bro. Ch. 377; *Hearle v. Greenbank*, 1 Ves. 305; *Bell v. Hyde*, Pr. Ch. 350; *Moore v. Hussey*, Hob. 95; *Needles v. Bish. of Winchester*, Hob. 225; *Clarke v. Saxon*, 1 Hill, Ch. 69; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Livingston v. Livingston*, 2 id. 541; *Dundas v. Biddle*, 2 Barr, 160; *Claussen v. La Franz*, 1 Clarke (Ia.), 226; *Harden v. Darwin & Pulley*, 66 Ala. 55.

² *Clarke v. Saxon*, 1 Hill, Ch. 69; *Berry v. Norris*, 1 Duv. 302.

³ *Dundas v. Biddle*, 2 Barr, 160.

⁴ *Berry v. Norris*, 1 Duv. 302; *Avery v. Griffin*, L. R. 6 Eq. 606.

⁵ *Bell v. Hyde*, Pr. Ch. 350.

⁶ *Compton v. Collinson*, 2 Bro. Ch. 377.

⁷ *Co. Litt.* 112 a, 187 b; *Lord Antrim v. Buckingham*, 2 Freeman, 168; *Blithe's Case*, id. 91; *Godolphin v. Godolphin*, 1 Ves. 23; *Sugden on*

§ 49. In equity, the absolute interest in the trust fund is vested in the *cestui que trust*, the trustee is a mere instrument, and any power or authority in the trustee must have the character of a power simply collateral ;¹ therefore there is nothing, as respects legal capacity, to prevent a married woman from administering a discretionary trust.² But she cannot create a trust in her absolute property except by joining her husband in conveying it, or in executing a declaration of trust.³

§ 50. At the same time a husband must always have a large influence over a *feme covert* trustee ; indeed, as he would be answerable for her acts, and liable for her breaches of trust, he must, for his own protection, look to the manner in which she administers the fund ; and she must join her husband in suits in relation to the trust property.⁴ Again, if land is conveyed to a married woman upon a declared trust without powers of sale, and it becomes necessary to sell and convey the land, is the husband to join or not in the conveyance ; and to whom is the purchase-money to be paid, and upon whose receipt ?⁵ Mr. Lewin thinks that the joint receipt of the husband and wife should be taken ; but that the safest way would be to pay the money into some bank upon their joint receipt, to remain until wanted for the purposes of the trust, and that if the husband took it out for any other purpose, he would be liable as for a breach of trust.⁶ Another inconvenience arises in probate and other trusts, where the trustee may be required to give bonds for the faithful administration of the trust. A court of equity may require the trustee to give security for the property, even though the trust arises by operation of

Powers, 144-155 ; 4 Kent, 324 ; Thompson v. Murray, 2 Hill, Ch. 214 ; Bradish v. Gibbs, 3 Johns. Ch. 523.

¹ Smith v. Smith, 21 Beav. 385 ; Drummond v. Tracy, 1 Johns. 608 ; Kingham v. Lee, 15 Sim. 401 ; People v. Webster, 10 Wend. 554.

² Ibid.

³ Graham v. Long, 65 Penn. St. 383.

⁴ Still v. Ruby, 35 Penn. St. 373.

⁵ See Daniel v. Uhley, Wm. Jones, 137 ; Co. Litt. 112 a, Hargrave's note (6) ; 1 Fonb. Eq. 92 ; McNeille v. Acton, 2 Eq. R. 25.

⁶ Lewin on Trusts, 24, 25 ; Drummond v. Tracy, 1 Johns. 611 ; 4 Cruise, Dig. 143 ; Co. Litt. 112 a, Hargrave's note (6).

law.¹ A married woman can enter into contracts only in relation to her sole and separate estate; and how far she can bind herself, or her estate, by a bond to execute a trust in property, the beneficial interests in which belong to another, would always be a perplexing question, although the sureties in such a bond might be liable.

§ 51. Subject to these inconveniences, a married woman can always be a trustee; and she may even be a trustee for her husband,² (a) as well as her husband for her,³ and courts will find means to enforce the trusts; but they will not appoint married women to such offices, nor will they appoint them to be guardians of minors;⁴ a woman, on the contrary, will be removed from the office if she is appointed while sole and afterwards marries.⁵ For the same reason it is undesirable to appoint a *feme sole* trustee; for should she marry, her husband, being liable for her breaches of trust, ought to have control of her acts, and the character of the trust is changed. On these grounds the courts at one time refused to appoint a *feme sole* trustee;⁶ but it is a matter of sound discretion in the court, and in a more recent case a *feme sole* was appointed.⁷

¹ Clarke v. Saxon, 1 Hill, Ch. 69.

² Livingston v. Livingston, 2 Johns. Ch. 541.

³ Bennet v. Davis, 2 P. Wms. 316; Shirley v. Shirley, 9 Paige, 363; Jamison v. Brady, 6 S. & R. 467; Boykin v. Ciples, 2 Hill, Ch. 200; Picquet v. Swan, 4 Mason, 455; Griffith v. Griffith, 5 B. Monr. 113.

⁴ Re Kaye, L. R. 1 Ch. 387. In Massachusetts, by statute, a married woman may be executrix, administratrix, guardian, or trustee, and may bind herself and the estate, without her husband joining, with the same effect as if she were sole; and a woman may continue to hold the trust to which she has been appointed, notwithstanding her subsequent marriage.

⁵ Lake v. De Lambert, 4 Ves. 595. The trustee in this case had married a foreigner, but Lord Chancellor Loughborough simply remarked "that it was very inconvenient for a married woman to be trustee."

⁶ Brooks v. Brooks, 1 Beav. 531.

⁷ Re Campbell's Trusts, 31 Beav. 176.

(a) See Schluter v. Bowery S. Banks, 117 N. Y. 125; *infra*, § 277, and note.

§ 52. Infants labor under still greater disabilities than married women, for a married woman has judgment, discretion, and capacity, though she cannot in all cases freely exercise them; but an infant wants judgment and capacity.¹ From this want of judgment and capacity an infant can do nothing that requires the exercise of discretion. It is true that his acts are voidable only and not void;² but every act, not simply ministerial, is at least voidable; but where he signs an acquittance without receipt of the money, it is an exercise of discretion, and is actually void.³ An infant is capable of executing a naked power unaccompanied with any interest, or not requiring any discretion.⁴ If a power is given to an infant relating to his own estate, it must be inserted in the deed that he may execute it during his infancy, or his execution of it will have no effect.⁵ As was shown before, trustees generally exercise powers over the trust fund simply collateral;⁶ but if the exercise of these powers requires the application of any prudence or discretion, an infant is incapable of executing them.⁷ (a)

¹ *Hearle v. Greenbank*, 3 Atk. 712; 1 Ves. 305; *Grange v. Tiving*, Bridg. O. 108; *Compton v. Collinson*, 2 Bro. Ch. 377; *Sockett v. Wray*, 4 Bro. Ch. 486. See Co. Litt. 3 b, 128 a, 88 b, 172 a, 261 b, Hargrave's note (4); 1 Watk. on Copyh. 24; *Eddleston v. Collins*, 3 De G., M. & G. 1; *Toller's Ex'rs*, 31; *Halliburton v. Leslie*, 2 Hog. 252.

² *Ante*, § 33; *Lewin on Trusts*, 32.

³ *Russell's Case*, 5 Rep. 27 a; Co. Litt. 172 a, 261 b; 1 Roll. Ab. 730, F. 2; *Cropster v. Griffith*, 2 Bland, 5.

⁴ 4 Kent, 321.

⁵ *Coventry v. Coventry*, 2 P. Wms. 229; 1 Sug. on Powers, 213-220 (6th ed.).

⁶ *Ante*, § 14.

⁷ *King v. Bellord*, 1 Hem. & M. 343; *Hearle v. Greenbank*, 3 Atk. 695; 1 Ves. 298; *Grange v. Tiving*, Bridg. O. 109.

(a) *In re D'Angibau*, 15 Ch. D. 223, 233; *Levin v. Ritz*, 41 N. Y. S. 405. An infant trustee, who possesses an interest in the trust estate, and also holds the legal title, is entitled to a day to show cause against the decree after he comes of age. *McClellan v. McClellan*, 65 Maine, 500; *contra*, when the infant is simply a trustee, although the trust arises by implication of law. *Walsh v. Walsh*, 116 Mass. 377. See Mel-

§ 53. From these inconveniences and incapacities attending the administration of a trust by an infant, he never would be appointed by a court to such an office. He could not give a valid security or bond for the safety of the trust fund, nor could a court decree him to make satisfaction for a breach of the trust.¹ But an infant has no privilege to cheat,² and he will not be protected in cunning and contrived frauds.³

§ 54. But an infant may still be a trustee; he may be actually named as trustee in any instrument, and the estate will pass to him; and if such an appointment is made, he cannot set up any claim to the beneficial interest in the estate;⁴ but a court of equity would direct the execution of

¹ *Whitmore v. Weld*, 1 Vern. 328; *Russell's Case*, 5 Rep. 27 a; *Hindmarsh v. Southgate*, 3 Russ. 324.

² *Evroy v. Nicholas*, 2 Eq. Cas. Ab. 489.

³ *Cory v. Gerteken*, 2 Mad. 40; *Buckingham v. Drury*, 2 Eden, 71, 72; *Clare v. Bedford*, 13 Vin. 536; *Watts v. Cresswell*, 9 Vin. 415; *Beckett v. Cordley*, 1 Bro. Ch. 358; *Savage v. Foster*, 9 Mod. 37; *Overton v. Banister*, 3 Hare, 503; *Stikeman v. Dawson*, 1 De G. & Sm. 503; *Wright v. Snowe*, 2 De G. & Sm. 321; *Davis v. Hodgson*, 25 Beav. 177; *Hillyer v. Bennett*, 3 Edw. Ch. 544; *Hill v. Anderson*, 5 S. & M. 216.

⁴ *King v. Denison*, 1 Ves. & B. 275; *Jevon v. Bush*, 1 Vern. 343; *Lake v. De Lambert*, 4 Ves. 596, n.

lor v. Porter, 25 Ch. D. 158; *Younge v. Cocker*, 32 W. R. 359; *Gray v. Bell*, 46 L. T. 521; *Perry v. Perry*, 65 Maine, 399; *Smith v. McDonald*, 42 Cal. 484; *Davidson v. Bowden*, 5 Sneed, 129; *Hurt v. Long*, 90 Tenn. 445; *Simmons v. Baynard*, 30 F. R. 532. In *Mellor v. Porter*, 25 Ch. D. 158, upon a review of the authorities, it was held that a direction to convey when the infant is twenty-one years of age would not warrant declaring him a trustee before that age; and in the case of an equitable mortgage, the following form of direction in the decree — that “the infant defendants upon their attaining twenty-one ex-

ecute a proper conveyance to the plaintiffs to be settled by the Judge in case the parties differ,” and giving them a day to show cause — was approved. The infant himself should be made a party to a bill affecting his title to real estate. *Tucker v. Bean*, 65 Maine, 352; *Wakefield v. Marr*, id. 341.

In the Federal Courts the citizenship of a minor, who sues by his guardian, determines the Court's jurisdiction, contrary to the case of a *cestui que trust*. *Dodd v. Ghiselin*, 27 F. R. 405; *Wiggins v. Bethune*, 29 id. 51; see *Re McClean*, 26 id. 49; *Woolridge v. McKenna*, 8 id. 650.

the trust by himself or guardian,¹ or would remove him and appoint some one competent to act. So an estate charged with a trust may be cast upon an infant by descent, or by operation of law; as where a father bought and paid for land, but took the conveyance in the name of a son five years old, the court held that the land in the hands of the son was charged with a resulting trust for the father.² In another case, where the father had purchased land in the name of an infant son, it was presumed to have been an advancement, rather than to make the infant a trustee.³ From the great inconvenience attending the appointment of an infant as trustee, a strong presumption arises that property conveyed to an infant is intended for his benefit, as an advancement or otherwise, and the court will not infer an intention that he is to take it in trust, unless it distinctly appears.⁴

§ 55. Aliens can take and hold real estate by grant in trust to the same extent as they can take and hold the legal title;⁵ that is, until office found; though it is said that they cannot take by act of law as by descent.⁶ There is a conflict of decisions, whether they can take by devise or not.⁷

¹ *Ex parte* Sergison, 4 Ves. 149, and n.; In Matter of Fallen, 1 McCarter, 147.

² *Binion v. Stone*, 2 Freem. 169. See *Bowra v. Wright*, 4 De G. & Sm. 265.

³ *Lamplugh v. Lamplugh*, 1 P. Wms 112; *Matter of Rindle*, 2 Edw. 585.

⁴ *Ibid.*; *Blinkhorne v. Feast*, 2 Ves. 30; *Mumma v. Mumma*, 2 Vern. 19; *Taylor v. Taylor*, 1 Atk. 386; *Smith v. King*, 16 East, 283. See also *Grey v. Grey*, Finch, 338; 1 Ch. Cas. 296; *Elliott v. Elliott*, 2 id. 231; *Ebrand v. Dancer*, id. 26; *Scroope v. Scroope*, 1 Ch. Cas. 27; *Stileman v. Ashdown*, 2 Atk. 480; *Pole v. Pole*, 1 Ves. 76.

⁵ *Ante*, § 36; *Marshall v. Lovell*, Cam. & Nor. 217.

⁶ *Orr v. Hodgson*, 4 Wheat. 453; *Wright v. Trust Meth. Ep. Church*, 1 Hoff. Ch. 202; *Buchanan v. Deshon*, 1 Har. & G. 280; *Ex parte Dupont*, 1 Harp. Ch. 5; *Trembles v. Harrison*, 1 B. Mour. 140; *Montgomery v. Dorion*, 7 N. H. 475; *Foss v. Crisp*, 20 Pick. 121; *Smith v. Zaner*, 4 Ala. 99.

⁷ In *Craig v. Radford*, 3 Wheat. 594; *Atkins v. Kron*, 2 Ired. Ch. 58, it was held that a devise to an alien would not vest the title in him; but in *Vaux v. Nesbit*, 1 McCord, Ch. 352; *Clifton v. Haig*, 4 Des. 330;

But an alien cannot plead his alienage to defeat any trust that may be charged upon the lands that come to him, nor in bar of any contract made by him in relation to the purchase of lands.¹ If lands in the hands of an alien charged with a trust escheat to the State, the State as a general rule takes only the title that the alien had; and there are statutes in many States that provide for carrying the trust into execution. It has been held that an alien may be a corporator and trustee for a corporation;² and that if an alien trustee sold and conveyed the trust estate, equity would not set the sale aside.³ As to personal property aliens have the same rights and privileges as citizens, and they can execute trusts of personal chattels to the same extent as citizens. An alien may take a mortgage of land as security for debt, and he may have a decree of foreclosure or sale of the land for the payment of the debt.⁴ But if the alien is domiciled abroad, it is an objection to his fitness for the office, as he is not within the jurisdiction of the court.⁵ (a)

§ 56. Lunatics can take a legal title by descent or by devise, and they can take by purchase or grant, although they have not mind enough to accept the conveyance. A valid acceptance will be presumed after long acquiescence

Stephen v. Swann, 9 Leigh, 404, it was held that a devise would vest the title in him subject to escheat on office found.

¹ *Dunlop v. Hepburn*, 1 Wheat. 179; 3 id. 231; *Scott v. Thorpe*, 1 Edw. Ch. 512; *Waugh v. Riley*, 8 Met. 290.

² *Commey v. United German Churches*, 2 Sand. Ch. 186.

³ *Ferguson v. Franklin*, 6 Munf. 305; *Escheator v. Smith*, 4 McCord, 452.

⁴ *Hughes v. Edwards*, 9 Wheat. 489.

⁵ *Meinertzhager v. Davis*, 1 Coll. C. C. 335; *In re Tempest*, L. R. 1 Ch. 485.

(a) In Indiana, a State statute providing that a trustee under a written instrument shall be a *bona fide* resident of the State, has been held invalid under that clause of the Federal Constitution which accords to the citizens of each State all the privileges and immunities of the citizens in the several States. *Roby v. Smith*, 131 Ind. 342. See 1 Ames on Trusts (2d ed.), 250; *Shirk v. La Fayette*, 52 F. R. 857.

by all parties, or if the *cestui que trust* accept the deed, it will be sufficient.¹ But lunatics cannot execute a trust that requires judgment and discretion, as they are incapable of giving a valid assent that will bind themselves, the estate, or the *cestui que trust*.² Whenever a trust estate is vested in a lunatic, it must be administered by his guardian, or by the court, or he will be removed and a competent person appointed. (a) An habitual or common drunkard may be a trustee, but he may be removed.³

§ 57. A religious person, who by vows has renounced the world, as a nun or monk, may be a trustee or guardian. It is a matter for their own consciences, whether they will take such an office, and courts cannot regard their religious associations.⁴

§ 58. A bankrupt or insolvent is competent to take, hold, and execute a trust. The trust estate does not pass to his assignees, nor does his certificate discharge him from any fiduciary debts or obligations. (b) As he holds only for the

¹ *Eyrick v. Eetrick*, 13 Penn. St. 494; *Re Bloomar*, 2 De G. & Jon. 88.

² *Loomis v. Spencer*, 2 Paige, 153; *Swartwout v. Burr*, 1 Barb. 495; *Person v. Warren*, 14 Barb. 488.

³ *Webb v. Dietrich*, 7 W. & S. 401.

⁴ *Smith v. Young*, 5 Gill, 197.

(a) See *In re Leon*, (1892) 1 Ch. 348; *In re Batho*. 39 Ch. D. 189. A lunatic was declared a trustee of his interest in land to be partitioned, in *Caswell v. Sheen*, 69 L. T. 854. A dumb paralytic is not necessarily a person of unsound mind under the English Trustee Act of 1850. *In re Barber*, 39 Ch. D. 187.

In England, under the Trustee Acts of 1850 and 1852, the general rule was that where a vesting order was required by reason of a trustee being of unsound mind, the Lunacy jurisdiction must be resorted to;

under the Trustee Act of 1893, the Chancery Court may appoint a new trustee in place of a sole trustee who is a lunatic not so found, but cannot in such case make a vesting order. *In re M.*, [1899] 1 Ch. 79. See *Plomley v. Richardson*, [1894] A. C. 632.

(b) A person who receives personal property in trust, is bound to repay the proceeds thereof, if sold, even after he has been discharged in insolvency. *Raphael v. Mullen*, 171 Mass. 111.

Under the Bankruptcy Act of

cestui que trust, he cannot charge or incumber the estate otherwise than for the beneficiary.¹ A witness to a will who is incapable of taking a legacy to himself may yet take a legacy in trust in which he has no interest.²

§ 59. *Cestuis que trust* are not incapable of taking in trust for themselves and others, but they are not altogether fit persons to be appointed, by reason of a possible conflict between their duty and interest. Near relatives and connections, like husband and wife, are also objectionable as trustees, as by reason of affection and influence frequent breaches of trust may happen, and other irregular proceedings are always to be feared; but there is no absolute rule of law that forbids such appointments, and they are sometimes inevitable³ or necessary.

III. *Who may be Cestuis que trust.*

§ 60. As a general rule, equity follows the law, and all persons who are capable of taking the legal title to property may take the equitable title as *cestuis que trust*, through the medium of a trustee.⁴ (a)

¹ Scott v. Surnam, Willes, 402; Carpenter v. Marnell, 3 B. & P. 41; Gladstone v. Hadwen, 1 M. & S. 526; *Ex parte Glanys*, 1 Mont. & Mac. 258; *Ex parte Painter*, 2 Deac. & Ch. 584; Butler v. Merchants Ins. Co. 14 Ala. 798; Shryock v. Waggoner, 28 Penn. St. 431; Harris v. Harris, 29 Beav. 107; Copeman v. Gallant, 1 P. Wms. 314; Gardner v. Rowe, 2 Sim. & St. 346; Lounsbury v. Purdy, 11 Barb. 490; Ludwig v. Highley, 5 Barr, 132; Welhelm v. Falmer, 6 Barr, 296; Kep v. Bank of N. Y., 10 Johns. 63; Bliss v. Pierce, 20 Vt. 25; Ontario Bank v. Mumford, 2 Barb. Ch. 596.

² Hogan v. Wyman, 2 Oregon, 302.

³ Wilding v. Bolder, 21 Beav. 222; *Ex parte Clutton*, 17 Jur. 988. See also *In re Tempest*, L. R. 1 Ch. 485.

⁴ Sand on Uses, 370; Lewin on Trusts, 35; Hill on Trustees, 52; Trotter v. Blocker, Porter, 269.

1867, a debt was not created by a person while acting in a "fiduciary character," merely because it was created under circumstances in which trust or confidence was re-

posed in the debtor, in the popular sense of those terms. Upshur v. Briscoe, 138 U. S. 365, 375.

(a) A tribal Indian, who cannot sue in the Federal courts, but can

§ 61. A trust may be declared in favor of the Crown. By the old law the king could take the use of real estate only by matter found of record;¹ but Mr. Hill says that it has never been decided that a court of chancery would refuse to execute a trust in land in favor of the Crown, if found otherwise than by matter of record.² The king can take personal property as *cestui que trust*, in the same manner as a private person.³

§ 62. The State may be a *cestui que trust*, and when there are no statutes to forbid it, property may be given to trustees for the use of the State or the United States in the same manner as for the use of individuals. A deed to a trustee and his heirs in trust for the State of South Carolina was held to vest, by the statute of uses, the whole legal title in the State.⁴ And a deed to trustees in trust to sell and apply the proceeds to pay a debt due to the United States from the

¹ Bacon on Uses, 60; Gilbert on Uses, 44, 204.

² Hill on Trustees, 52; Rogers v. Rogers, 18 Hun (N. Y.), 409; Moke v. Norrie, 21 id. 128.

³ Middleton v. Spicer, 1 Bro. Ch. 201; Brummel v. McPherson, 5 Russ. 264; Nightingale v. Goulbourne, 5 Hare, 484; 2 Phill. 594; Mitford v. Reynolds, 1 Phill. 185; Ashton v. Langdale, 4 Eng. L. & Eq. 80.

⁴ Lamar v. Simpson, 1 Rich. Ch. 71.

sue in the courts of the State, may be a *cestui que trust*. Felix v. Patrick, 145 U. S. 317. A slave could not be a *cestui que trust*. See 1 Ames on Trusts (2d ed.), 214.

A third person, who is not a mere volunteer, but is compelled by judgment to pay the debt, secured by trust deed, of the *cestui que trust*, is subrogated to the *cestui's* right to collect his claim from the land. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534; *Holden v. Strickland*, 116 N. C. 185; *Glover, Appellant*, 167 Mass. 280. No trust, or right of subrogation, or charge

upon the land, arises when the money with which land is purchased is loaned to the purchaser. *Hitt v. Applewhite* (Miss.), 20 So. 161, 162. See *Dorrah v. Hill*, 73 Miss. 787; *Loftis v. Loftis*, 94 Tenn. 232; *Akin v. Jones*, 93 id. 353; *Lewis v. Duane*, 141 N. Y. 302. A loan may, however, create a resulting trust in land by way of mortgage. *Scott v. Beach*, 172 Ill. 273. Subrogation is not a matter of strict right in equity, but is subject to the court's discretion. *Aultman v. Bishop*, 53 Neb. 542, 552.

grantor is valid, notwithstanding the statute which forbids the purchase of any land on account of the United States, unless authorized by act of Congress.¹

§ 63. If there are statutes, like the statutes of mortmain, which prevent corporations from taking the legal title to lands, they cannot evade the statutes by taking the legal title to trustees and the beneficial interest to themselves; thus they cannot be *cestuis que trust* in lands the legal title to which they are not licensed or enabled to take.² They can be the *cestuis que trust* of personal property, to the same extent as individuals.³ So voluntary associations may be *cestuis que trust* of personal property, and if such associations have an authorized agent, treasurer, or secretary, the trustees may act under his directions in performing the trust.⁴ (a)

§ 64. If an alien is made the *cestui que trust* of land he may enjoy it as against all but the State; but the State can at any time claim the equitable interest.⁵ This rule applies where a mere naked trust is created in a trustee for the benefit of an alien. But if the trustee is to do anything with the land, that is, if the trust is executory, the court will do nothing to transfer the right of the alien to the State. As where a testator directed lands to be sold and the proceeds divided among certain persons, some of whom were aliens, the court considered that as done at the time of the death

¹ Neilson v. Lagow, 12 How. 107; 3 Stat. at Large, 568, May 1, 1820.

² Hill on Trustees, 52; Lewin on Trusts, 36.

³ Ibid.

⁴ Sangston v. Gordon, 22 Gratt. 755.

⁵ Dumoncel v. Dumoncel, 13 Ir. Eq. 92; Vin. Ab. Alien, A. 8; Godfrey v. Dixon, Godb. 275; Barrow v. Wadkin, 24 Beav. 1; King v. Holland, Al. 16; Styl. 21; Burney v. MacDonald, 15 Sim. 6; Rittson v. Stordy, 3 Sm. & Gif. 230; Att.-Gen. v. Sands, Hard. 495; Fourdrin v. Gowdy, 3 M. & K. 383; Burgess v. Wheate, 1 Eden, 188; Du Hourmelin v. Shelton, 1 Beav. 79; 4 My. & Cr. 525; Master v. De Croismar, 11 Beav. 184.

(a) White v. Rice, 112 Mich. 403.

which was ordered to be done, and that it was a devise of mere personalty, and it refused to allow the Crown to elect to keep the funds in land in order to work a forfeiture.¹ So where an agent to collect a debt for an alien took a deed of real estate in trust to sell and pay the proceeds to the alien creditor, the heirs of the agent were ordered, having sold the land, to pay the proceeds to the principal.² But where an alien paid the money for lands, and took the deed in the name of a citizen as trustee, the trustee was adjudged to hold the land in trust for the commonwealth.³ Equity will not raise a resulting trust in favor of an alien.⁴ Nor will it allow a legacy given to an alien to be charged upon real estate,⁵ nor lands liable to escheat to be sold for the payment of debts in order that aliens may take their legacies out of the personalty.⁶ Aliens may be the *cestuis que trust* of personal property without objection;⁷ and trustees for aliens, and alien *cestuis que trust* may maintain actions in our courts to maintain their rights in the trust property.⁸

§ 65. There is another class of cases that illustrates the principle that the beneficial donee of property cannot take as *cestuis que trust*, if he is prohibited from taking the legal title to that property; as where a slave is prohibited from holding property, he cannot be made a *cestui que trust* of

¹ Burney v. MacDonald, 15 Sim. 14; Rittson v. Stordy, 3 Sm. & Gif. 240; Du Hourmelin v. Sheldon, 1 Beav. 79; 4 My. & Cr. 525. And see Master v. De Croismar, 11 Beav. 184; Barrow v. Wadkin, 24 Beav. 1; Craig v. Leslie, 3 Wheat. 563; Austin v. Brown, 6 Paige, 448; Neilson v. Lagow, 12 How. 107; Com'th v. Martin, 5 Munf. 117; Meakings v. Cromwell, 1 Selden, 136.

² Austin v. Brown, 6 Paige, 448; McCaw v. Galbrath, 7 Rich. Law, 74.

³ Hubbard v. Goodwin, 3 Leigh, 492.

⁴ Leggett v. Dubois, 5 Paige, Ch. 114; Phillips v. Crammond, 2 Wash. C. C. 441. See Taylor v. Benham, 5 How. 270, and Farley v. Shippen, Wythe, 135.

⁵ Atkins v. Kron, 2 Ired. Eq. 423.

⁶ Trezavant v. Howard, 5 Des. 87.

⁷ Bradwell v. Weeks, 1 Johns. Ch. 206.

⁸ Hamersley v. Lambert, 2 Johns. Ch. 508.

property.¹ In Virginia, a free negro was prohibited from holding slaves, and it was held that he could not be a *cestui que trust* of slaves.² So where emancipation was forbidden, a slave could not be the *cestui que trust* of his own freedom.³ But in Mississippi it was held that land purchased with money furnished by a slave with the acquiescence of her master, and the title taken in the name of a freeman, was held in trust for the slave after her actual emancipation by living in Ohio, and that the trust could be enforced against all persons who took the land with notice of the facts.⁴ So where an individual took stock in trust for a corporation that had no right to hold shares in another corporation, it was held that such shares did not go to the assignees upon the bankruptcy of the individual, but that they must be disposed of as the corporation, as *cestui que trust*, should direct.⁵

§ 66. But in charitable trusts the *cestuis que trust* are not, and need not be, capable of taking the legal title, as when property is given in trust for the poor of a parish, or for the education of youth, or for pious uses, or for any charitable purpose, the beneficiaries are generally unknown, uncertain, changing, and incapable of taking or dealing with the legal title; but such trusts are valid in equity, and courts of equity will administer them and protect the rights of the *cestuis que trust*.⁶ And in trusts not charitable it is not always necessary that the *cestui que trust* should be in existence at the time of the creation of the trust; as a devise to a father in trust for accumulation for his children lawfully begotten at the time of his death was held to be good,

¹ Skrine v. Walker, 3 Rich. Eq. 262; Pool v. Harrison, 18 Ala. 514.

² Dunlap v. Harrison, 14 Gratt. 251.

³ Trotter v. Blocker, Porter, 269; Graves v. Allen, 13 B. Monr. 190.

⁴ Leiper v. Hoffman, 26 Miss. 615; and see Frazier v. Frazier, 2 Hill, Ch. 305; Ross v. Duncan, Freem. Ch. 603; Osterman v. Baldwin, 6 Wall. 116.

⁵ Great Eastern Ry. Co. v. Turner, L. R. 8 Ch. 149; *Ex parte Watkins*, 2 Mont. & A. 348.

⁶ *Post*, chapter on Charitable Trusts.

although the father had no children at the time of the vesting of the funds in him as trustee.¹ So an illegitimate child born, or in *ventre sa mère*, may be a *cestui que trust (a)*;² but a trust for illegitimate children to be thereafter begotten will not be enforced, as being against good morals.³ Nor will a court of equity establish or execute a trust that is founded upon a consideration that is fraudulent, or *malum in se*, or *malum prohibitum*, or immoral, or corrupt, or contrary to public policy.⁴ But a trust not charitable created *in præsentis* for *cestuis que trust* does not take effect until the *cestuis que trust* are identified; as where land was conveyed under articles of agreement in trust for the subscribers thereto, the title of the grantor was not divested until there were subscribers.⁵ In some cases a person is capable of taking an equitable interest, in a manner in which the legal interest could not be limited. Thus at law no property can be so limited to a married woman as to exclude the legal

¹ *Ashurst v. Given*, 5 Watts & S. 329; *Carson v. Carson*, 1 Wins. (N. C.) 24.

² *Gabb v. Prendergast*, 3 Eq. R. 648; *Pratt v. Flamer*, 7 Har. & J. 10; *Gardner v. Heyer*, 2 Paige, 11; *Collins v. Hoxie*, 9 Paige, 81; *In re Connor*, 2 Jones & Lat. 456; *Evans v. Davies*, 7 Hare, 498; *Owen v. Bryant*, 21 L. J. Ch. 860.

³ *Medworth v. Pope*, 27 Beav. 21; *Wilkinson v. Wilkinson*, 1 Younge & C. Ch. 657; *Pratt v. Mathew*, 22 Beav. 528; *Howarth v. Mills*, L. R. 2 Eq. 389.

⁴ *Ownes v. Ownes*, 23 N. J. Eq. 60; *Battinger v. Budenbecker*, 63 Barb. 404; 69 Barb. 395.

⁵ *Urkett v. Coryell*, 5 W. & S. 61.

(a) *Thompson v. Thomas*, 27 L. R. Ir. 457. As the law fixes no limit to the age of child-bearing, a trust for a woman's "children now living, or that may hereafter be born," continues through the woman's life. *Forrest v. Porch*, 100 Tenn. 391; *Bearden v. White* (Tenn. Ch.), 42 S. W. 476. See *In re Hocking*, [1898] 2 Ch. 567; 1 Ames on Trusts (2d ed.), 455, n.

Children born after their par-

ents' marriage are presumed legitimate, but the presumption of legitimacy is now held rebuttable. See *Burnaby v. Baillie*, 42 id. 282; *Orthwein v. Thomas*, 127 Ill. 554; *Shuman v. Shuman*, 83 Wis. 250; 2 Kent Com. (14th ed.), 209 n.

A deed of the father for his illegitimate child's benefit has a good consideration. *Conley v. Nailor*, 118 U. S. 127.

rights of the husband; but, by way of trust, property can be so given to her use as to place it entirely beyond the right of enjoyment by the husband.¹ A trust for the heirs of A. is valid as a trust for the children of A.²

IV. *What Property may be the Subject of a Trust.*

§ 67. Every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust, as a receipt for a medicine,³ the copyright of a book,⁴ a patent right,⁵ (a) a trade secret,⁶ or growing crops.⁷

§ 68. At common law no possibility, right, title, nor *chose in action* could be granted or assigned to strangers.⁸ But in equity the rule is different, and *choses in action*,⁹ expectancies,¹⁰ contingent interests,¹¹ and even possibilities¹² may

¹ Lewin on Trusts, 37.

² Flint v. Steadman, 36 Vt. 210.

³ Green v. Folgham, 1 Sim. & St. 398.

⁴ Sims v. Marryal, 17 Q. B. 281.

⁵ Russell's Patent, 2 De G. & Jon. 130.

⁶ Morrison v. Moat, 6 Eng. L. & Eq. 14; 9 Hare, 241.

⁷ Robinson v. Maulden, 11 Ala. 908; Grantham v. Hawley, Hob. 132; Petch v. Tutin, 15 M. & W. 110; McCarty v. Blevins, 5 Yerg. 195.

⁸ Lampet's Case, 10 Coke, 48; Thallhimer v. Brinckerhoff, 3 Cow. 623.

⁹ Row v. Dawson, 1 Ves. 322; Ryall v. Rolles, 1 Ves. 348; Townsend v. Windham, 2 Ves. 6; *Ex parte* Alderson, 1 Mad. 53; Burn v. Carvalho, 4 My. & Cr. 690; Yeates v. Grover, 1 Ves. Jr. 280; *Ex parte* South, 3 Swans. 393; Morton v. Naylor, 1 Hill, 583; Clemson v. Davidson, 5 Binn. 392.

¹⁰ Fitzgerald v. Vestal, 4 Sneed, 258; Hobson v. Trevor, 2 P. Wms. 191; Beckley v. Newland, id. 182; Wetherhed v. Wetherhed, 2 Sim. 183; Douglass v. Russell, 4 Sim. 184; Langton v. Horton, 1 Hare, 549.

¹¹ Ibid.; Varish v. Edwards, 1 Hoff. Ch. 382.

¹² Ibid.

(a) See 1 Ames on Trust (2d Shipping Acts now distinguish between legal and beneficial interests therein. See *Chasteauneuf v. Cap-British ship*; but the Merchant *eyron*, 7 A. C. 127.

be assigned, and a valid trust created in them. Equitable reversionary interests stand upon the same ground.¹ Property not owned by the assignor at the time, and not even *in esse*, may be assigned in equity;² and a valid trust may be created in a naked power or authority.³

§ 69. But there are some *choses in action*, rights, claims, and interests that cannot be assigned in equity; either because some statute prohibits, or because it is against public policy to allow assignments of them to strangers. Thus an officer in the army cannot assign or pledge his commission,⁴ nor his full or half pay.⁵ A judge cannot assign his salary;⁶ nor can a pension given for the honorable support of the dignity of a title be assigned.⁷ The principle seems to be that when a salary, annuity, or pension is given by the State for the support of its own dignity and the

¹ *Voyle v. Hughes*, 2 Sm. & Gif. 18; *Kekewich v. Manning*, 1 De G., M. & G. 187; and cases *supra*.

² *Pennock v. Coe*, 23 How. 117; *Mitchell v. Winslow*, 2 Story, 630; 6 Law Rep. 347; *Holroyd v. Marshall*, 2 Gif. 382; 2 De G., F. & J. 596; 9 Jur. n. s. 213; 33 L. J. Ch. 193; *Hope v. Hayley*, 5 El. & Bl. 845; *Calkins v. Lockwood*, 17 Conn. 154; *Langton v. Horton*, 1 Hare, 549; *Brooks v. Hatch*, 6 Leigh, 534; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *Field v. Mayor of N. Y.*, 2 Selden, 179; *Robinson v. Macdonald*, 5 M. & S. 228; *In re Ship Warre*, 8 Price, 269; *Stewart v. Kirkland*, 19 Ala. 162; *Hinkle v. Wanzer*, 17 How. 353; *McWilliams v. Nisby*, 2 S. & R. 509; *Wilson's Estate*, 2 Barr, 325.

³ *Brown v. Higgs*, 8 Ves. 570.

⁴ *Collier v. Fallon*, 1 Turn. & Rus. 459; and see *L'Estrange v. L'Estrange*, 1 Eng. L. & Eq. 153.

⁵ *Stone v. Lidderdale*, 2 Anst. 533; *Priddy v. Rose*, 3 Mer. 102; *Tunstall v. Boothby*, 10 Sim. 540; *Flarty v. Odum*, 3 Tr. 681; *Lidderdale v. Montrose*, 4 T. R. 248.

⁶ *Arbuthnot v. Norton*, 5 Moore, P. C. C. 219; *Cooper v. Reilly*, 2 Sim. 560; *Palmer v. Bate*, 6 Moore, 28; 2 Brod. & Bing. 673; *Hill v. Paul*, 8 Cl. & Fin. 295. But in *State Bank v. Hastings*, 15 Wis. 75, it was held that a judge could assign his salary.

⁷ *Davis v. Marlborough*, 1 Swanst. 79; *McCarthy v. Gould*, 1 Ball & Beatt. 387; *Price v. Lovett*, 4 Eng. L. & Eq. 110; *Grenfell v. Dean, &c.*, 2 Beav. 550. See also *Wells v. Foster*, 8 M. & W. 149; *Spooner v. Payne*, 10 Eng. L. & Eq. 207.

administration of its affairs, it is not becoming that its officers should deprive themselves of the means of support which it gives to them; but a pension or annuity for past services may be assigned.¹ The mere right to file a bill in equity for a fraud committed upon the assignor, or to sue for a tort, cannot be assigned and a trust created in such rights.² A mere naked expectancy arising from a peculiar position, such a position as that a person expects to make a favorable bargain and purchase (and he employs an agent to negotiate the purchase, and such agent purchases for another), is not such property that a trust can be created in it.³

§ 70. The question has been frequently mooted in courts, how far a trust could be engrafted and enforced upon foreign property, or property beyond the limits of the jurisdiction of the court where the suit is pending. In regard to personal property there is no difficulty, for it follows the person; and if the court has jurisdiction over the parties, it has jurisdiction over the subject-matter, and can enforce a trust or any other equity.⁴ If the personal property is, however, in fact beyond the jurisdiction of the court, there may arise some practical obstructions to the execution of the decrees of the court.⁵ Where the trust is created by a judicial decree in another State, as by probate of a will in New York State, the trustee is accountable in the courts of that State; and

¹ *Alexander v. Wellington*, 2 Russ. & My. 35; *Tunstall v. Boothby*, 10 Sim. 452; *Feistal v. King's College*, 10 Beav. 491; and see *Berkley v. King's College*, 10 Beav. 499, and *Butcher v. Musgrove*, 2 Beav. 550; *Stevens v. Bagwell*, 15 Ves. 139.

² *Prosser v. Edmonds*, 1 Yo. & Col. 481; *Gardner v. Adams*, 12 Wend. 297; *Dunklin v. Wilkins*, 5 Ala. 199; *McKee v. Judd*, 2 Ker. 622. It is not intended to enter into all the niceties of the law of assignments. An exhaustive statement of the law and a collection of all the cases will be found in *Story's Eq. Jur.* §§ 1040-1055, and 3 Lead. Cas. in Eq. pp. 279-380 (3d Am. ed.).

³ *Garrow v. Davis*, 15 How. 277.

⁴ *Hill v. Reardon*, 2 Russ. 608; *Hill on Trustees*, 44; *Lewin on Trusts*, 39; *Chase v. Chase*, 2 Allen, 101; *Mason v. Chambers*, 4 J. J. Marsh. 401.

⁵ *Booth v. Clark*, 17 How. 327.

where the will has not been proved or recorded in the State of the former, nor any letters testamentary or of administration or trusteeship have been issued there, the trustee cannot be compelled to execute the trust, though residing in the State of the former; such is the settled law of Massachusetts.¹ Such a case differs entirely from one in which the trust is created by instrument *inter partes* without judicial decree.²

§ 71. As to lands lying in a foreign jurisdiction, the court will enforce natural equities and compel the specific performance of contracts, if the parties are within its jurisdiction. Thus Lord Eldon allowed a lien to a consignor for advances upon estates in the West Indies;³ and a specific performance of articles between parties for the settlement of their boundaries was enforced;⁴ effect was given to an equitable mortgage by deposit of the title-deeds to land in Scotland, though by the law of Scotland such deposit created no lien;⁵ an account was ordered of the rents and profits of lands abroad;⁶ and an absolute sale⁷ or a foreclosure of a mortgage⁸ decreed; a fraudulent conveyance was relieved against,⁹ and injunction granted against taking possession.¹⁰ Chief-Justice Marshall said: "Upon the authority of these cases and others which are to be found in the books, as well as upon general principles, this court is of opinion that

¹ *Jenkins v. Lester*, 131 Mass. 357, and cases there cited.

² *Massie v. Watts*, 6 Cranch, 148, 160.

³ *Scott v. Nesbitt*, 14 Ves. 438.

⁴ *Penn v. Lord Baltimore*, 1 Ves. 444 and Belt's Sup.; *Roberdeau v. Rous*, 1 Atk. 543, West. 23; *Tullock v. Hartley*, 1 Yo. & Col. 114; *Cood v. Cood*, 33 Beav. 314; *Portarlington v. Soulby*, 3 My. & K. 104; *Athol v. Derby*, 1 Ch. Cas. 221.

⁵ *Ex parte Pollard*, 3 Mont. & Ayr. 340; Mont. & Chit. 239; *Norris v. Chambers*, 29 Beav. 246; *Martin v. Martin*, 2 R. & M. 507.

⁶ *Roberdeau v. Rous*, 1 Atk. 543.

⁷ *Ibid.*

⁸ *Toller v. Carteret*, 2 Vern. 494.

⁹ *Arglasse v. Muschamp*, 1 Vern. 75; *Archer v. Preston*, 1 Vern. 77; 1 Eq. Abr. 133.

¹⁰ *Cranstown v. Johnston*, 5 Ves. 278; *Bunbury v. Bunbury*, 1 Beav. 318; *Hope v. Carnegie*, L. R. 1 Ch. 320.

in case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.”¹ But if the person is not within the jurisdiction of the court, and the land is, the court cannot decree a specific performance of an agreement for a sale.² If a trust is created by the will of a citizen of a particular State, and his will is allowed by the Probate Court of that State, and a trustee is appointed by the Probate Court, courts of equity will have jurisdiction over the trust, although both the trustee and the property are beyond the jurisdiction of the court. Chief-Justice Bigelow, in determining this point, said: “The residence of the trustee and *cestui que trust* out of the commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills of citizens of this State, and which have been proved and established by the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the Probate Court. If the trustee is unfaithful or abuses his trust, that court has jurisdiction to remove him in concurrence with this court on the application of those beneficially interested in the estate.”³ And where A. had fraudulently obtained a deed of land, in a foreign State, from B., and had conveyed it to C. without consideration, it was held that although the

¹ *Massie v. Watts*, 6 Cranch, 160; *Farley v. Shippen*, Wythe, 135; *Kildare v. Eustace*, 1 Vern. 419; *Ward v. Arredondo*, Hopk. 213; *DeKlyn v. Watkins*, 3 Sand. Ch. 185; *Guerrant v. Fowler*, 1 Hen. & M. 4; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Newton v. Bronson*, 3 Ker. 587; *Sutphen v. Fowler*, 9 Paige, 280; *Epis. Church v. Wiley*, 2 Hill. Ch. 584; *Dickinson v. Hoopes*, 8 Gratt. 353; *Hughes v. Hall*, 5 Munf. 431; *Vaughn v. Barclay*, 6 Whar. 392; *Watkins v. Holman*, 16 Pet. 25; *Guild v. Guild*, 16 Ala. 121; *White v. White*, 7 Gill. & J. 208. But see *Lewis v. Nelson*, 1 McCarter, 94.

² *Spurr v. Scoville*, 3 Cush. 578; *Meux v. Maltby*, 2 Swanst. 277; *Fell v. Brown*, 2 Bro. Ch. 276.

³ *Chase v. Chase*, 2 Allen, 101; *Curtis v. Smith*, 60 Barb. 9.

courts of other States would not declare such deeds to be nullities, yet they would order reconveyances from the parties before the court; and if such parties went beyond the jurisdiction, the court could appoint special commissioners to execute such reconveyances.¹ And so trustees to whom property has been conveyed by the owner by a direct conveyance can sue in any and all courts which have jurisdiction over the parties or the subject-matter of the suit; but if the trustee depends upon some court to clothe him with the office and title of trustee, he, like an administrator or executor, can only sue within the country or State over which the jurisdiction of the court appointing him extends.²

§ 72. The foundation of this doctrine is the jurisdiction of the court over the person, which was originally the only jurisdiction of courts of equity.³ They cannot, when the property is in a foreign jurisdiction, make a decree *in rem*, binding upon the land; but they can enter a decree *in personam* and compel its performance by process in contempt;⁴ hence if the parties are not before the court, or the court has no jurisdiction over them, the specific performance of a contract cannot be decreed;⁵ and if the court cannot give relief by a decree against the person, but must go further and make a decree to be executed by its own officers against the land, it must, of course, if the land is beyond its jurisdiction, refuse to act.⁶(a) It is not necessary that the person

¹ Cooley v. Scarlett, 38 Ill. 316.

² Curtis v. Smith, 6 Blatch. 537.

³ Penn v. Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch, 160.

⁴ Ibid.; White v. White, 7 Gill & J. 208; Mead v. Merritt, 2 Paige, 404.

⁵ Spurr v. Scoville, 3 Cush. 578; Meux v. Maltby, 2 Swanst. 277; Fell v. Brown, 2 Bro. Ch. 276.

⁶ Morris v. Remington, 1 Pars. Eq. 387; Bank of Virginia v. Adams, 1 Pars. Eq. 547; Blunt v. Blunt, 1 Hawks, 365; White v. White, 7 Gill

(a) See Cole v. Cunningham, 133 U. S. 107; Cloud v. Greasley, 125 Ill. 313; Potter v. Hollister, 45 N. J. Eq. 508; Gibson v. Burgess, 82 Va. H. 527; Jenney v. Mackintosh, 33

to be bound by a decree should be domiciled within the jurisdiction of the court. It will be sufficient if the person is found and served with process within the jurisdiction, and a *ne exeat* may be obtained to prevent his departing until the decree of the court is performed;¹ or if a person is prosecuting a suit at law within a jurisdiction, a suit in equity may be maintained, and an injunction may be decreed against him, and service on his attorney in the suit at law would be a good service to bring him within the jurisdiction.² So if courts of equity have jurisdiction over the parties to a controversy, they can enjoin them from proceeding in the courts of foreign States or countries. This power does not depend upon any superintending power of the courts

& J. 208; Cartwright v. Pettus, 2 Ch. Cas. 214; 2 Swanst. 323 n.; Waterhouse v. Stansfield, 9 Hare, 234, 10 Hare, 254; Martin v. Martin, 2 R. & My. 507; Nelson v. Bridport, 8 Beav. 547; Walker v. Ogden, 1 Dana, 252; Williams v. Mans, 6 Watts, 278; Booth v. Clark, 17 How. 322; Hawley v. James, 7 Paige, 213; White v. White, 7 Gill & J. 208.

¹ Mitchell v. Bunch, 2 Paige, 606; Baker v. Dumaresque, 2 Atk. 66; Howden v. Rogers, 1 Ves. & B. 129; Flack v. Holm, 1 Jac. & W. 406; Grant v. Grant, 3 Russ. 598; Woodward v. Schatzell, 3 Johns. Ch. 412; Gilbert v. Colt, 1 Hopk. 496.

² Chalmers v. Hack, 19 Maine, 124.

Ch. D. 595. In British South Africa Co. v. Companhia de Moçambique, [1893] A. C. 602, the Supreme Court of Judicature was held to have no jurisdiction of an action to recover damages for trespass to land abroad. See 19 Law Mag. & Rev. 115; 49 Alb. L. J. 125.

As to conflict of laws in regard to trusts, it is now considered imperative, as to real estate, that jurisdiction of the *res* shall be sufficient to enable adequate relief to be given in all matters where equitable interests have attached, care being taken that absent parties have notice and ample opportunity to protect their rights, while trusts in personal property are to be determined by the

law of the creator's domicil. Nelson v. Bridport, 8 Beav. 527, 547; *In re Piercy* [1895], 1 Ch. 83; De Puy v. Standard M. Co., 88 Maine, 202; Penfield v. Tower, 1 N. D. 216; see Spindle v. Shreve, 111 U. S. 542, 547; Codman v. Krell, 152 Mass. 214; Proctor v. Clark, 154 Mass. 45; Rosenbaum v. Garrett (N. J.), 41 Atl. 252; Fowler's Appeal, 125 Penn. St. 388; Ilope v. Brewer, 136 N. Y. 126; Cross v. U. S. Trust Co., 25 Abb. N. C. 166; First Nat'l Bank v. Nat'l Broadway Bank, 156 N. Y. 459; English v. McIntyre, 51 N. Y. S. 697; Yore v. Cook, 67 Ill. App. 586; Purdom v. Pavey, 26 Can. Sup. 412.

of one country over those of another, which does not exist; but it is founded wholly upon the power which courts of equity have over all litigants within its actual jurisdiction. This jurisdiction is *in personam*, and the decrees are directed against the persons or parties. If the decree should be disregarded, and a litigant should prosecute a suit in a foreign tribunal, no action could be taken against the agents, officers, or judges of such foreign tribunal, but the remedy would be confined to proceeding against the party who has proceeded in contempt of the injunction.¹ There is, however, an exception to this practice in the case of the courts of the several States and of the courts of the United States. These courts have concurrent jurisdiction over many causes; and to prevent unpleasant conflicts of jurisdiction, it has been held, upon grounds of public policy, that they have no power to restrain or enjoin suitors from pursuing their rights in the courts of their choice, whether of the State or of the United States.²

¹ Story, Eq. Jur. §§ 899, 900; *Dehon v. Foster*, 4 Allen, 545; *Great Falls v. Worster*, 23 N. H. 470; *Bank v. Rutland*, 28 Vt. 470; *Hays v. Ward*, 4 Johns. Ch. 123; *Vail v. Knapp*, 49 Barb. 299; *Massie v. Watts*, 6 Cranch, 158, 166; *Angus v. Angus*, West Ch. 23; *Moody v. Gay*, 15 Gray, 457; *Sutphen v. Fowler*, 9 Paige, 282; *Mitchell v. Bunch*, 2 Paige, 615; *Mackintosh v. Ogilvie*, 4 T. R. 193 n., 3 Swanst. 365 n.; *Cranstown v. Johnston*, 3 Ves. 179, 5 Ves. 277; *Bunbury v. Bunbury*, 1 Beav. 318; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416; *Beckford v. Kemble*, 1 S. & S. 7; *Harrison v. Gurney*, 2 Jac. & W. 563; *Bowles v. Orr*, 1 Y. & C. 464; *Portarlington v. Soulby*, 3 My. & K. 104; *Duncan v. McCalmont*, 3 Beav. 409; *Graham v. Maxwell*, 1 Mac. & Gord. 71; *Briggs v. French*, 1 Sumn. 504; *Dobson v. Pearce*, 1 Duer, 142, 2 Kern. 156; *Pearce v. Olney*, 20 Conn. 544; *Cage v. Cassidy*, 23 How. 109, 117; *Marsh v. Putnam*, 3 Gray, 566; *Brigham v. Henderson*, 1 Cush. 430; *Beal v. Burchstead*, 10 Cush. 523; *Maclaren v. Stainton*, 16 Beav. 286. The case of *Carroll v. Farmers' Bank*, Harrington, 197, is not followed.

² *Diggs v. Walcott*, 4 Cranch, 179; *McKim v. Voorhies*, 7 Cranch, 279; *Sumner v. Marcy*, 3 W. & M. 119; *Coster v. Griswold*, 4 Edw. Ch. 377; *English v. Miller*, 3 Rich. Eq. 320. See also *Mead v. Merritt*, 2 Paige, 402; *Bicknell v. Field*, 8 Paige, 440; *Burgess v. Smith*, 2 Barb. Ch. 276; *Grant v. Quick*, 2 Sandf. 612; *Croft v. Lathrop*, 2 Wall. Jr. 103; *Cruikshanks v. Roberts*, 6 Madd. 104; *Bushby v. Munday*, 5 Madd. 307; *Jones v. Geddes*, 1 Phillips Ch. 725.

CHAPTER III.

EXPRESS TRUSTS, AND HOW EXPRESS TRUSTS ARE CREATED AT COMMON LAW, SINCE THE STATUTE OF FRAUDS, AND IN PERSONAL PROPERTY, AND HEREIN OF VOLUNTARY CONVEYANCES OR SETTLEMENTS IN TRUSTS.

§ 73. Division of trusts, according to the manner of their creation.

§§ 74-77. Trusts at common law.

§ 74. At common law, a writing not necessary to convey land.

§ 75. Uses might also be created without writing, and so may trusts, in States where the statute of frauds is not in force.

§ 76. Parol cannot control a written trust nor engraft an express trust on an absolute conveyance.

§ 77. Same rule as to trusts created by parol.

§ 78. The statute of frauds, and its form in various States.

§ 79. Effect of the statute upon the creation of express trusts.

§§ 80, 81. Effect of the different forms of the words of the statutes in the several States.

§ 82. How express trusts may be proved or manifested under the statute.

§ 83. Certainty of the terms of the trust, and the person by whom it is to be declared.

§§ 84, 85. Trusts declared or proved by answers in chancery.

§ 86. Trust in personal property may be created by parol.

§§ 87, 88. Trusts arising from gifts *mortis causa* and for charitable uses.

§ 89. Statute of wills, and the execution of wills.

§ 90. Trust cannot be *created in* a will, unless it is properly executed, to pass the property.

§§ 91, 92. But might be manifested by a recital in a will not properly executed.

§ 93. The effect of the necessity of probate of wills.

§ 94. Parol evidence cannot convert a bequest in a will into a trust. An executor is a trustee of the surplus.

§ 95. When a trust is completely created.

An agreement upon a valuable and legal consideration will be carried into effect as a trust or a contract.

§§ 96-98. If a complete trust is created without consideration, it will be carried into effect.

§ 97. But if anything remains to be done to complete the trust, it will not be carried into effect, if without consideration.

§ 99. Whether a lawful trust is completely created or not a question of fact in each case.

- § 100. Trust for a stranger without consideration not completed without transfer of the legal title.
- § 101. But if the legal title cannot be transferred, a different rule will apply.
- § 102. If the subject of the proposed trust is an equitable interest, the legal title need not be transferred.
- § 103. The instrument of trust need not be delivered.
- § 104. If once perfected cannot be destroyed, though voluntary.
- § 105. Notice not necessary to trustee or *cestui que trust*.
- §§ 106, 107. Voluntary settlements upon wife and children.
- § 108. When they will not be enforced.
- § 109. Tendency of the rule in the United States.
- § 110. Marriage a valuable as well as meritorious consideration.
- § 111. Effect of a seal.
- § 111 a. New York Statute Law.

§ 73. HAVING considered who may be the parties to a trust, and what may be the subject-matter of it, it is now to be considered in what manner a trust may be created, or how it may arise. Trusts are divided in this respect into direct or express trusts, implied, resulting, and constructive trusts. Direct or express trusts are created by the direct or express words of a grantor or settlor. Implied, resulting, and constructive trusts arise by operation of law upon the transactions of the parties, and they will be hereafter discussed. This chapter will treat of the creation of direct or express trusts. In this connection it will be necessary to inquire: (1) how trusts were created in lands at common law prior to the statutes of frauds and of wills; (2) how trusts are created in lands since the statutes; (3) how trusts may be created in personal property; and (4) the effect of a voluntary conveyance or declaration of trust.

§ 74. At common law a deed in writing was not necessary to transfer land. What was called a feoffment was the common and earliest mode of conveyance. The feoffment was a short and simple charter, and was accompanied by livery of seizin; the feoffor went upon the land in the presence of the freeholders of the neighborhood with the charter, and made a manual delivery to the feoffee of some symbolical thing in the name of delivering seizin, or ownership and possession of all the lands named in the charter. But not even this deed or charter was necessary. The land

could be conveyed by mere livery of seizin in the presence of the freeholders of the neighborhood, who might be called upon to witness the act. The feoffment and livery of seizin operated upon and transferred the possession, and it barred the feoffor from all future right or possibility of right in the land, and vested an estate in freehold in the feoffee.¹

§ 75. It has been a mooted question whether at common law uses could be raised by parol, or even by deed without seal, upon a conveyance of lands.² But there seems to be no good reason for the doubt. As the estate itself could be transferred without writing, it would seem to follow that uses declared at the time in the presence of witnesses might be effectually established. Mr. Sanders says that in their commencement uses were of a secret nature, and were usually created by a parol declaration.³ Mr. Lewin says that trusts like uses are in their own nature *averrable*, i. e., may be declared by word of mouth without writing, in the absence of a statute requiring it; as if an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favor of B.⁴ Lord Chief-Baron Gilbert reconciled most of the conflicting cases by stating the law thus: "At common law a use might have been raised by words upon a conveyance that passed the possession by some solemn act, as a feoffment; but where there was no such act, then it seems a deed declaratory of the use was necessary; for as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seized to uses without a deed; but a bargain and sale by parol has

¹ 4 Kent, 480, 481; 2 Sand. Uses and Trusts, 1-8.

² 2 Story, Eq. Jur. § 971; Hill on Trustees, 55.

³ 1 Sand. on Uses, 14, 218 (2d Am. ed.).

⁴ Lewin on Trusts, 41. See *Fordyce v. Willis*, 2 Bro. Ch. 587; *Benbow v. Townsend*, 1 My. & K. 506; *Bayley v. Boulcott*, 4 Russ. 347; *Crabb v. Crabb*, 1 My. & K. 511; *Kilpin v. Kilpin*, id. 520; *Bellasis v. Compton*, 2 Vern. 294; *Thruvton v. Att. Gen.*, 1 Vern. 341.

raised a use without.”¹ Lord Thurlow observed that “he had been accustomed to consider uses as averrable; but perhaps when looked into, the cases may relate to feoffment, and not to conveyances by bargain and sale or lease and release.”² And Duke says expressly, “that when the things given may pass without deed, then a charitable use may be averred by witnesses; but where the things cannot pass without deed, there charitable uses cannot be averred without a deed proving the uses.”³ This question is almost purely speculative in the United States, where the statute of frauds is perhaps universally adopted, and all conveyances of land and of interests in land must be by deed acknowledged and recorded; but it may arise when questions arise upon transactions prior to the passage of the statute, as it arose in Ohio upon a conveyance before 1810, the time when the statute of frauds was adopted in that State; and it was determined that a trust in land could be created, at common law, by parol,⁴ and as the seventh, eighth, and ninth sections were omitted from the Ohio statute, a trust in real estate may still be created by parol.⁵ The same question arose in Connecticut, and it was denied that at common law a trust in lands could be raised by parol. The court said that the rules of evidence as well as the statute prevented it.⁶ In some other States the statute, or at least the seventh section of the statute, has not been adopted; and in those States it has been determined that trusts in land can be proved by parol, as in Texas,⁷ North Carolina,⁸ Tennes-

¹ Gilbert on Uses, 270; *Adlington v. Cann*, 3 Atk. 141.

² *Fordyce v. Willis*, 3 Bro. Ch. 587.

³ Duke on Char. 141; *Adlington v. Cann*, 3 Atk. 141.

⁴ *Fleming v. Donohoe*, 5 Ohio, 250; but see *Starr v. Starr*, 1 Ohio, 321; *Ready v. Kearsley*, 14 Mich. 215; *McIntire v. Skinner*, 4 Greene, 89.

⁵ *Harvey v. Gardner*, 41 Ohio St. 646.

⁶ *Dean v. Dean*, 6 Conn. 287. *Contra*, *Ready v. Kearsley*, 14 Mich. 215.

⁷ *Miller v. Thatcher*, 9 Tex. 482; *Hale v. Layton*, 16 Tex. 262; *Bailey*

⁸ *Fay v. Fay*, 2 Hayw. 131; *Shelton v. Shelton*, 5 Jones, Eq. 292; *Riggs v. Swann*, 6 id. 118; *McLaurin v. Fairly*, id. 375; *Wright v. Cain*, 93 N. C. 301; *Link v. Link*, 90 N. C. 235.

see,¹ and Virginia.² In Pennsylvania, under the act of 1799, it was determined that trusts in land might be created by parol.³ The statute was amended, however, in 1851.⁴ In Kentucky, the seventh section was omitted; but the courts treat all parol agreements that would create a trust as agreements for the sale or purchase of some interest in land, and therefore void as within the fourth section of the statute.⁵ In nearly all the other States the statute of frauds was substantially re-enacted at an early day in its full extent, and in those States it has not since been an open question whether parol trusts could be created.⁶

§ 76. It must also be observed that if a trust is declared in writing, courts never permit parol proof of a trust to contradict an intention expressed upon the face of the instrument itself,⁷ for that would be to allow parol evidence

v. Harris, 19 Tex. 102; *Osterman v. Baldwin*, 6 Wall. 116; *Leakey v. Gunter*, 25 Tex. 400; *Grooves v. Rush*, 27 Tex. 231; *Dunham v. Chat-ham*, 21 Tex. 231; *Crenney v. Dupree*, 21 Tex. 20; *Pierce v. Fort*, 60 Tex. 464, and cases cited.

¹ *Thompson v. Thompson*, 1 Yerg. 100; *McLanahan v. McLanahan*, 6 Humph. 99; *Haywood v. Ensley*, 8 Humph. 460; *Wilburn v. Spofford*, 4 Sneed, 705.

² *Bank of United States v. Carrington*, 7 Leigh, 576; *Walraven v. Lock*, 2 P. & H. 549; *Lockwood v. Canfield*, 20 Cal. 126; *Hidden v. Jordan*, 21 Cal. 92.

³ *German v. Gabbald*, 3 Binn. 302; *Wallace v. Duffield*, 2 S. & R. 521; *Slaymaker v. St. Johns*, 5 Watts, 27; *Murphy v. Hubert*, 7 Barr, 420; *Tritt v. Crotzer*, 13 Penn. St. 452; *Wetherell v. Hamilton*, 15 id. 195; *Money v. Herrick*, 18 id. 128; *Blyholder v. Gilson*, id. 134. See *Freeman v. Freeman*, 2 Pars. Eq. 81.

⁴ *Shoofstall v. Adams*, 2 Grant's Cas. 209; *Barnett v. Dougherty*, 32 Pa. St. 371.

⁵ *Parker v. Bodley*, 4 Bibb, 102; *Childs v. Woodson*, 2 Bibb, 72.

⁶ See *Browne's Statute of Frauds*, §§ 79-82; *Anding v. Davis*, 38 Miss. 574; *Harper v. Harper*, 5 Bush, 177; *Wolf v. Corley*, 30 Md. 356; *Eaton v. Eaton*, 35 N. J. L. 290; *Knox v. McFarren*, 4 Col. 586; *Thomas v. Merry*, 113 Ind. 83; *McGinness v. Barton*, 71 Iowa, 644; *Hain v. Robinson*, 72 Iowa, 735; *Ingham v. Burnell*, 31 Kansas, 333; *Lawrence v. Lawrence*, 14 Oregon, 77.

⁷ *Lewis v. Lewis*, 2 Ch. R. 77; *Finch's Cas.* 4 Inst. 86; *Childers v. Childers*, 3 K. & J. 310; 1 De G. & J. 482; *Fordyce v. Willis*, 3 Bro. Ch.

to vary, contradict, or annul a written instrument; nor is it necessary, in order to exclude evidence, that the beneficial estate should be expressly conferred upon the grantee of the legal estate, for a trust cannot be raised by parol if, from the nature of the instrument or from any circumstance of evidence appearing upon the face of it, an intention can be clearly implied of making the holder of the legal estate also the holder of the beneficial estate.¹ Thus a trust cannot be proved by parol where a valuable consideration was paid from the grantor's own money.² Oral proof cannot be heard, to engraft an *express* trust on a conveyance absolute in its terms.³ (a) Nor will *subsequent* declarations of the grantor, oral or written, avail for this purpose.⁴ To establish by parol that the grantee in an absolute deed is a trustee, it

587; *Leman v. Whitley*, 4 Russ. 423; *Lloyd v. Inglis*, 1 Des. 333; *Sims v. Smith*, 11 Ga. 198; *Harris v. Barnett*, 3 Grat. 339; *Dickenson v. Dickenson*, 2 Murph. 279; *Steere v. Steere*, 5 Johns. Ch. 1; *Gainus v. Cannon*, 42 Ark. 503.

¹ *Ibid.*; *Lewin*, 42, 5th ed.; *Gilbert on Uses*, 56, 57; *Pilkington v. Bailey*, 7 Bro. P. C. 526; *Dean v. Dean*, 6 Conn. 285; *Hutchinson v. Tindall*, 2 Green, Ch. 257; *Starr v. Starr*, 1 Ohio, 321; *Moyan v. Hays*, 1 Johns. Ch. 343; *Philbrooke v. Delano*, 29 Maine, 410; *Clagett v. Hall*, 9 Gill & J. 80. See notes to *Woollam v. Hearn*, 2 Lead. Cas. Eq. 404; *Irnham v. Child*, 1 Bro. Ch. 92; *Bartlett v. Pickersgill*, 1 Ed. 515.

² *Ibid.*

³ *Kelly v. Karsner*, 72 Ala. 110; *Lawson v. Lawson*, 117 Ill. 98; *Green v. Cates*, 73 Mo. 122; *Hansen v. Berthelson*, 19 Neb. 433; *Cain v. Cox*, 23 W. Va. 594; *Pavey v. American Ins. Co.*, 56 Wis. 221.

⁴ *Phillips v. South Park Com'rs*, 119 Ill. 626.

(a) See *Lovett v. Taylor*, 54 N. J. Eq. 311; *Wood v. Perkins*, 57 Fed. Rep. 258; *Myers v. Myers*, 167 Ill. 52; *Walton v. Follansbee*, 165 Ill. 480, 486; *Hemstreet v. Wheeler*, 100 Iowa, 290; *Weisham v. Hocker* (Okla.), 54 Pac. 464. A conveyance of personal property, absolute in form, may always be shown by clear evidence to have been made in trust or by way of security. *Minchin v. Minchin*, 157 Mass. 265; *Riley v. Hampshire County National Bank*, 164 Mass. 482, 486; *Raphael v. Mullen*, 171 Mass. 111; *Ditmars v. Smith*, 38 N. Y. S. 1036; *Beckett v. Allison*, 188 Penn. St. 279; *Hebron v. Kelly*, 75 Miss. 74; *First Nat. Bank v. Fries*, 121 N. C. 241. But although an absolute deed may be proved to be a conveyance by way of mortgage or trust, a recital that an assignment is in trust is conclusive. See *Caldwell v. Fulton*, 31 Penn. St. 475; 72 Am. Dec. 760; *McDermith v. Voorhees*, 16 Col. 402.

must be shown that the whole or a part of the purchase-money was not his, or that fraud, artifice, solicitation, or persuasion entered into the inducements for executing the deed. A mere breach of a parol agreement is not enough to create a trust.¹ A parol trust is not, however, an absolute nullity in any case, but rests in the election of the trustee in those cases where the *cestui* cannot enforce it. The courts will protect the trustee in the execution of the trust if he chooses so to do, and as far as possible will protect the beneficiaries in the enjoyment of the fruits of its execution.² But where A. agreed to purchase land for B., and purchased it and took an absolute title to himself, it was held that B., not being privy to the deed, was not bound by it, and might prove a trust by parol.³ And where one holds lands in secret trust to defraud creditors, a subsequent parol agreement by which the land is to be held in trust *for* the creditors, &c., will be good.⁴

§ 77. If a trust is once effectually created by parol, it cannot subsequently be revoked or altered by the party creating it, for it is governed by the same rules that govern trusts created by writing.⁵ And if a parol trust has been executed it cannot be revoked, and if money has been paid upon it, it cannot be recovered back.⁶ The declarations of the grantor, to create a trust, must be prior to, or contemporaneous with, the conveyance, for it would be against reason and the rules of evidence to allow a man who has parted with all interest in an estate to charge it with any

¹ Hollinshead's App., 103 Penn. St. 158.

² Karr v. Washburn, 56 Wis. 303.

³ Strong v. Glasgow, 2 Murph. 289; Squire's App., 70 Penn. St. 266.

⁴ Langsdale v. Woollen, 99 Ind. 575.

⁵ Kilpin v. Kilpin, 1 M. & K. 531; Adlington v. Cann, 3 Atk. 151; Freeman v. Freeman, 2 Pars. Eq. 81; Crabb v. Crabb, 1 M. & K. 511; Walgrave v. Tibbs, 2 K. & J. 313; Lee v. Ferris, 2 K. & J. 357; Russell v. Jackson, 10 Hare, 204; Lomax v. Ripley, 3 Sm. & Gif. 48; *In re Dunbar*, 2 Jon. & La. 120; Brown v. Brown, 12 Md. 87; Greenfield's Est., 14 Penn. St. 489; Kirkpatrick v. McDonald, 11 id. 387; Tritt v. Crotzer, 13 id. 451.

⁶ Eaton v. Eaton, 35 N. J. L. 290.

trust or incumbrance after such conveyance;¹ (a) nor can the *cestui que trust* give his own declarations in evidence to create a trust in his favor; but where parties may be witnesses, he can testify to the facts like any other witness; and if the circumstances are such as to raise a resulting or implied trust upon the conveyance, the person entitled to such beneficial interest has the right at any time to declare the trust.² The declarations of a trustee can be given in evidence to show how he held the estate;³ that is, in those States where the trust may be proved by parol. But these declarations must be clear and explicit, and point out with certainty both the subject-matter of the trust and the person who is to take the beneficial interest. Casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust.⁴ If a pension from the government is granted to A., a trust cannot be raised by parol in favor of B., for a pension is conferred as an honor, and is founded upon the personal services and merits of the annuitant.⁵

¹ *Adlington v. Cann*, 3 Atk. 145; *Walgrave v. Tibbs*, 2 K. & J. 313; *Lee v. Ferris*, 2 K. & J. 357; *Russell v. Jackson*, 10 Hare, 204; *Lomax v. Ripley*, 3 Sm. & Gif. 48; *Brown v. Brown*, 12 Md. 87; *In re Dunbar*, 2 Jon. & La. 120; *Tritt v. Crotzer*, 13 Penn. St. 451; *Ivory v. Burns*, 56 id. 303; *Bennett v. Fulmer*, 49 Penn. St. 155; *Knox v. McFarren*, 4 Col. 586. See *Chapman v. Wilbur*, 3 Oregon, 326, for a particular case.

² *Bellasis v. Compton*, 2 Vern. 294; *Lee v. Huntton*, 1 Hoff. Ch. 447; *Harris v. Barnett*, 3 Grat. 339; *Reid v. Reid*, 12 Rich. Eq. 213.

³ *Ambrose v. Ambrose*, 1 P. Wms. 322; *Gardner v. Rowe*, 2 S. & S. 346; 5 Russ. 258; *Wilson v. Dent*, 3 Sim. 385; *Willard v. Willard*, 56 Penn. St. 119; *Dollinger's App.*, 71 id. 425.

⁴ *Kilpin v. Kilpin*, 1 M. & K. 520; *Benbow v. Townsend*, 1 id. 506; *Bayley v. Boulcott*, 4 Russ. 345; *Harrison v. McMennomy*, 2 Edw. Ch. 251; *Slocumb v. Marshall*, 2 Wash. C. C. 398; *Side v. Walters*, 5 Watts, 389; *Mercer v. Stock*, 1 S. & M. Ch. 479; *Hurst v. McNeil*, 1 Wash. C. C. 70; *Smith v. Patton*, 12 W. Va. 541; *Childs v. Wesleyan Cemetery Ass.*, 4 Mo. App. 74.

⁵ *Fordyce v. Willis*, 3 Bro. Ch. 587.

(a) *Boyd v. Boyd*, 163 Ill. 611; *Phillips v. Sherman (Texas)*, 39 S. Burling v. Newlands, 112 Cal. 476; W. 187.
Boyd v. Cleghorn, 94 Va. 780;

§ 78. The seventh section of the statute of frauds enacted that all declarations or creations of trusts or confidences in any lands, tenements, or hereditaments, "shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing," or else they shall be utterly void and of none effect.

SEC. 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of like force as the same would have been if this statute had not been made, anything heretofore to the contrary notwithstanding.

SEC. 9. All grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.¹

¹ 29 Car. II. c. 3, §§ 7, 8, 9.

In Arkansas, Florida, Georgia, Illinois, Maryland, Missouri, New Jersey, and South Carolina, the statute of Charles is re-enacted, almost in words, and the trust or confidence must be "manifested or proved by some writing signed by the party."

In Alabama, California, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, Rhode Island, Vermont, and Wisconsin, "the trust must be created or declared by instrument in writing signed by the party creating or declaring the same."

In New York, the seventh section was re-enacted; but in the revised statutes it was enacted "that the trust should be created or declared by deed or conveyance in writing," signed, etc.; but in 1860 it was enacted "that any writing signed by the parties" should be sufficient.

In Pennsylvania, the seventh section was not enacted, and trusts could be created and proved by parol; but in 1856 the seventh section was substantially enacted.

In Texas, North Carolina, Tennessee, Virginia, Connecticut, Delaware, Kentucky, Indiana, and Ohio, the seventh section does not seem to be re-enacted. See *ante*, § 75.

In Iowa, declarations and creations of trust or powers in relation to real estate must be executed in the same manner as deeds of conveyance.

The ninth section seems to be in force in all the States.

§ 79. Wherever this statute or the substance of the statute is in force, express trusts in realty cannot be *proved* by parol.¹ (a) In suits to establish or enforce trusts in real

¹ *Gerry v. Stimson*, 60 Maine, 186; *Stevenson v. Crapnell*, 114 Ill. 19.

(a) See *Ducie v. Ford*, 138 U. S. 587; *Moran v. Somes*, 154 Mass. 200; *Fitzgerald v. Fitzgerald*, 168 Mass. 488; *Taft v. Dimond*, 16 R. I. 584; *Ward v. Ward*, 59 Conn. 188, 196; *Wentworth v. Shibles*, 89 Maine, 167; *Bickford v. Bickford*, 68 Vt. 525; *McKee v. Griggs*, 51 N. J. Eq. 178; *Blackburn v. Blackburn*, 109 N. C. 488; *Keller v. Strong*, 104 Iowa, 585; *Pearson v. Pearson*, 125 Ind. 341; *Moore v. Horsley*, 156 Ill. 36; *Ellis v. Hill*, 162 id. 557; *Kyle v. Wills*, 166 id. 501, 511; *Dick v. Dick*, 172 id. 578; *McDearmon v. Burnham*, 158 id. 55; *Cameron v. Nelson* (Neb.), 77 N. W. 771; *Thomas v. Churchill*, 48 Neb. 266; *Von Trotha v. Bamberger*, 15 Col. 1; *Farrand v. Beshoar*, 9 Col. 291; *Simons v. Bedell* (Cal.), 55 Pac. 3; *Rogers v. Ramey*, 137 Mo. 598; *Dover v. Rhea*, 108 N. C. 88; *Brock v. Brock*, 90 Ala. 86; *Guntert v. Guntert* (Tenn.), 37 S. W. 890; *Levis v. Kengla*, 8 App. D. C. 230; 169 U. S. 234.

A trust in personal property may be created and proved by parol, but an express trust in land cannot be so created. *Chase v. Perley*, 148 Mass. 289; *Taft v. Stow*, 167 Mass. 363; *Bath Savings Inst'n v. Hathorn*, 88 Maine, 122; *Hirsh v. Auer*, 146 N. Y. 13; *Godschalk v. Fulmer*, 176 Ill. 64; *Pitney v. Bolton*, 45 N. J. Eq. 639; *Eipper v. Benner*, 113 Mich. 75; *Bedell v. Scoggins* (Cal.), 40 Pac. 954; *Ray v. Sim-*

mons, 11 R. I. 266; *Gadsden v. Whaley*, 14 S. C. 210. But although an express trust in land cannot be established by parol, a parol agreement to hold the proceeds of a sale of the land in trust for another, if based upon a sufficient consideration, is valid. *Worley v. Sipe*, 111 Ind. 238; *Thomas v. Merry*, 113 id. 83; *Talbott v. Barber*, 11 Ind. App. 1, 7. Land subsequently bought with trust property will be impressed with the trust. *Cobb v. Knight*, 74 Maine, 253. No special form of words is necessary to create an express trust. *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326; *O'Rourke v. Beard*, 151 Mass. 9; *Mullins v. Mullins*, 79 Hun, 421; *People v. Powers*, 83 id. 449; *Steinhardt v. Cunningham*, 130 N. Y. 292. Delivery is necessary to make a signed declaration of trust binding. *Govin v. De Miranda*, 30 N. Y. S. 550; 27 id. 1049.

An express trust can only be created by conveying some estate or interest to the intended trustee. *Nichols v. Emery*, 109 Cal. 323. Such a trust is necessarily exclusive of any implied trust. *Mayfield v. Forsyth*, 164 Ill. 32; *Coleman v. Parran*, 43 W. Va. 737.

The statute of frauds does not apply when a trust results by operation of law. *Valentine v. Richardt*, 126 N. Y. 272; *Sanford v. Sanford*, 139 U. S. 642; *Hudson v. White*, 17 R. I. 519; *Von Trotha v. Bamber-*

estate parol proof is insufficient.¹ They must be *manifested* or *proved* by some writing, signed by the party to be charged with the trust. They need not *be created and declared in writing*, but only manifested or proved by writing; for if there be written evidence of the existence of the trust, the danger of parol evidence, against which the statute was directed, is effectually removed.² It may be questioned whether it was not the intention of the statute that the creation or declaration itself should be in writing; for the ninth section enacts that "all grants and assignments of any trust or confidence *shall likewise* be in writing, signed by the party granting or assigning the same, or by his last will or devise;" but whatever may have been the actual intention of the legislature, the construction put upon the clause is now firmly established.³ A mere admission in writing that parol promises to hold the land in trust were made at the time of the conveyance is not enough to give life to the trust.⁴

¹ *Todd v. Munson*, 53 Conn. 579. It is to be remembered, however, that in suits to enforce contracts, correct mistakes, and punish or prevent frauds, it may be necessary to show incidentally an express trust by parol. *Id.* 592. And so a parol trust may be proved in order to show that the apparent owner has no interest in the land which equity will subject to the lien of a judgment. *Hays v. Reger*, 102 Ind. 524.

² *Forster v. Hale*, 3 Ves. Jr. 707; 5 Ves. 315; *Smith v. Mathews*, 3 De G., F. & J. 139; *Randall v. Morgan*, 12 Ves. 74; *Unitarian Society v. Woodbury*, 14 Me. 281; *Steere v. Steere*, 5 Johns. Ch. 1; *Moyan v. Hays*, 1 id. 339; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Barrell v. Joy*, 16 Mass. 221; *Pinney v. Fellows*, 15 Vt. 525; *Rutledge v. Smith*, 1 McCord, Ch. 119; *Johnson v. Ronald*, 4 Munf. 77; *Hutchinson v. Tindall*, 2 Green, Ch. 357; *Lane v. Ewing*, 31 Mo. 75; *Safford v. Rantoul*, 12 Pick. 233; *Gibson v. Foote*, 40 Miss. 788; *Reid v. Reid*, 12 Rich. Eq. 213. Numerous other cases might be cited; but the rule is so well established that it is not necessary.

³ *Lewin on Trusts*, 45; *Black v. Black*, 4 Pick. 236.

⁴ *Scott v. Harris*, 113 Ill. 447.

ger, 15 Col. 1; *Roby v. Colehour*, a trust from the parties' acts and 135 Ill. 300; *Myers v. Myers*, 167 relations not dependent merely Ill. 52; *Ryan v. O'Connor*, 41 Ohio upon oral evidence. *McCahill v. St.* 368; *Davis v. Whitehead* [1894], *McCahill*, 32 N. Y. S. 836; *Sherley* 2 Ch. 133; or when equity imposes *v. Sherley*, 97 Ky. 512.

It is well established that the interest of the *cestui que trust* in land cannot be conveyed by parol.¹

§ 80. In many of the United States the words of the seventh section are replaced by words to the effect that "the trust must be created or declared by an instrument in writing signed by the party;"² (a) and the question has arisen whether this is a change of the law as established under the words of the original statute of frauds.

§ 81. The question has not been directly adjudged in a reported case raising the exact point; but it has arisen incidentally before the courts, and the intimations are that these words do not change the law, and that "created and declared" are equivalent to "manifested and proved." In practice, the great majority of trusts are not created by a deed or conveyance of land, but they arise from the transactions and agreements of parties; and if these transactions or agreements are evidenced in writing, the trust is sufficiently created, declared, manifested, or proved. Thus Mr. Justice Bennett, in Vermont, where the words are "created and declared by instrument," said, that "our statute is the same in effect as the English statute."³ And Mr. Justice Story said, that "in his opinion, there was no substantial difference between the Massachusetts statute of frauds" (which is in substance the same as the statute of Vermont) "and the statute of 29 Car. II. c. 3; and such is the conclusion to which I have arrived upon an examination of these statutes."⁴ And in Wisconsin, where the statute is the same as the statutes of Massachusetts and Vermont, it was held that an express trust need not be declared in express terms; that it is sufficiently declared or created if shown by any proper written evidence, such as an answer to a bill in

¹ *Richards v. Richards*, 9 Gray, 313; *Smith v. Burnham*, 3 Sumn. 435.

² See *ante*, § 78, note. *Bibb v. Hunter*, 79 Ala. 351.

³ *Pinnock v. Clough*, 17 Vt. 508.

⁴ *Jenkins v. Eldredge*, 3 Story, 294.

(a) See 1 Ames on Trusts (2d ed.), 176, n.

equity, note, letter, or memorandum, disclosing facts which create a fiduciary relation.¹ In New York, the words of the statute were that "the trust should be created or declared by deed or conveyance in writing." In relation to this Mr. Justice Strong said, that "the definition of the term conveyance given in the Revised Statutes² comprehends a declaration of trust, although not under seal, as it is an instrument by which the title to such estate may be affected in law or equity."³ In another case, Chief-Justice Ruggles said: "The statute prescribes no particular form by which the trust is to be created or declared. Under our former statute, in relation to this subject, it was only necessary that the trust should be manifested in writing, and therefore letters from the trustee disclosing the trust were sufficient; such is the law of England.⁴ Our present statute requires that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust;⁵ but it need not be done in the form of a grant. A declaration of trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and the *cestui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other."⁶ (a) Upon sound reason, then, and upon the decided cases, it would seem that the peculiar form of words in some of the statutes of the American States has not altered the general rule, as established under the English statute; and that the same evidence would be generally received in the United States to establish a trust, as in England.⁷

¹ Pratt v. Ayer, 2 Chand. 265.

² 1 R. S. 762, § 38.

³ Corse v. Leggett, 25 Barb. 394.

⁴ Stat. 29 Car. II. c. 3, § 7; Forster v. Hale, 3 Ves. Jr. 696.

⁵ The act of 1860 now makes the statute of New York conform in words to the statutes of the other States. Cook v. Barr, 44 N. Y. 158.

⁶ Wright v. Douglass, 3 Seld. 569; Cook v. Barr, 44 N. Y. 158.

⁷ Sheet's Estate, 52 Penn. St. 527; Blodgett v. Hildreth, 103 Mass.

(a) See McDermith v. Voorhees, 16 Col. 402; Neill v. Keese (Texas), 51 Am. Dec. 746, 757.

§ 82. There is no particular formality required or necessary in the creation of a trust.¹ All that is required is written evidence supplying every essential detail of the trust.² In New York, a trust is valid if the intention is clear to create a trust to accomplish one of the purposes named in the statute,³ whether it is stated in the precise words of the statute or not.⁴ But trusts not authorized by the statute are void.⁵ A sealed paper, delivered with the deed and mentioned in the deed as part of it, *is* a part of it, even though the instructions were that the sealed document should not be opened until after the death of the grantor.⁶ Any agreement or contract in writing, made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice;⁷ (a) and the statute of frauds

486. Mr. Browne, in his able treatise upon the Statute of Frauds, cites the case of *Jaques v. Hall*, where the Supreme Judicial Court of Massachusetts, notwithstanding the words of the Massachusetts statute, considered an entry in a private memorandum book of the trustee, setting forth clearly a previous transaction by which he had become trustee, as a satisfactory declaration of trust. There was other evidence; and, as the case is not put upon this ground, in the printed report, 3 Gray, 194, the court probably chose to rest the decision upon other grounds. In *Titcomb v. Morrill*, 10 Allen, 15, Mr. Justice Chapman said it was not necessary to decide the question. See Browne on Statute of Frauds, § 104, 1st ed.

¹ *Tyler v. Tyler*, 25 Brad. (Ill.) 339, quoting the text. In a will it is sufficient if the intent is clear. *Quinn v. Shields*, 62 Iowa, 129.

² *Dyer's App.*, 107 Penn. St. 446.

³ 1 R. S. 728, § 55.

⁴ *Morse v. Morse*, 85 N. Y. 53.

⁵ *Syracuse S. Bank v. Porter*, 36 Hun, 168; *Follett v. Badeau*, 26 id. 253.

⁶ *Van Cott v. Prentice*, 35 Hun, 322.

⁷ See § 122 and cases cited; 2 Spence, Eq. 860; *Legard v. Hodges*,

(a) *Carter v. Gibson*, 29 Neb. Ga. 528, 535; *Smith's Estate*, 144 324; *McCreary v. Gewinner*, 103 Penn. St. 428.

will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, as by an express declaration,¹ or any memorandum to that effect,² or by a letter under his hand,³ or by his answer in chancery,⁴

1 Ves. Jr. 478; *Baylies v. Peyton*, 5 Allen, 488; *Taylor v. Pownall*, 10 Leigh, 183; *Currie v. White*, 45 N. Y. 822; *Pingre v. Coffin*, 12 Gray, 288; *Cressman's App.*, 42 Penn. St. 147; *Reed v. Lukens*, 44 id. 200; *Conway v. Kewsworthy*, 21 Ark. 9; *Rahun v. Rahun*, 15 La. An. 471; *Rees v. Livingston*, 41 Penn. St. 113; *Paul v. Fulton*, 32 Miss. 110; *Seymour v. Freer*, 8 Wall. 202; *Price v. Reeves*, 38 Cal. 457; *Waddingham v. Loker*, 44 Mo. 132; *Giddings v. Palmer*, 107 Mass. 270; *Homer v. Homer*, 107 id. 82; *Price v. Minot*, 107 id. 61. But see *Kelley v. Babcock*, 49 N. Y. 32; *Ogden v. Larrabee*, 57 Ill. 389; *Lake v. Freer*, 11 Brad. (Ill.) 576; *Freer v. Lake*, 115 Ill. 662; *Jones v. Lloyd*, 117 id. 597; *Tichenell v. Jackson*, 26 W. Va. 460; *Whitcomb v. Cardell*, 45 Vt. 24; *Pinson v. McGehee*, 44 Miss. 229; *Conway v. Cutting*, 51 N. H. 408; *Jones v. Wilson*, 60 Ala. 332. An agreement to support the grantor as a substantial part of the consideration of the conveyance creates a secret trust void against existing creditors not otherwise having a sufficient remedy. *Funk v. Lawson*, 12 Brad. (Ill.) 229.

¹ *Lewin on Trusts*, 62; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Crop v. Norton*, 10 Mod. 233; *Willard v. Willard*, 56 Penn. St. 119; *Knox v. McFarren*, 4 Col. 586; *Phillips v. South Park Com'rs*, 119 Ill. 640, quoting the text.

² *Bellamy v. Burrow*, Cas. tem Talb. 97; *Fisher v. Fields*, 10 Johns. 495; *Urann v. Coates*, 109 Mass. 581; *Brooke's App.*, 109 Penn. St. 188.

³ *Johnson v. Deloney*, 35 Tex. 42; *Phelps v. Seeley*, 22 Grat. 573; *Montague v. Hayes*, 10 Gray, 609; *Kingsbury v. Burnside*, 58 Ill. 310; *Forster v. Hale*, 3 Ves. Jr. 696; 5 Ves. 308; *Morton v. Tewart*, 2 Yo. & Col. Ch. 67; *Bentley v. Mackay*, 15 Beav. 12; *Childers v. Childers*, 1 De G. & J. 482; *Smith v. Wilkinson*, 3 Ves. 705; *O'Hara v. O'Neill*, 7 Bro. P. C. 227; *Gardner v. Rowe*, 2 S. & S. 346; *Crook v. Brooking*, 2 Vern. 106; *Steere v. Steere*, 5 Johns. Ch. 1. But this case was before the statute. It is not necessary that the trust and its terms should be found in one letter; it is sufficient if they appear from any number of letters or writings. *McCandless v. Warner*, 26 W. Va. 754; *Loring v. Palmer*, 118 U. S. 321, construing Michigan law.

⁴ *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404; 1 Eq. Cas. Ab. 464; *Gil. Eq.* 146; *Cottingham v. Fletcher*, 2 Atk. 155; *Ryall v. Ryall*, 1 Atk. 59; *Wilson v. Dent*, 3 Sim. 385; *Butler v. Portarlington*, 1 Conn. & Laws. 1; 1 Dr. & W. 20; *McCubbin v. Cromwell*, 7 Gill & J. 175; *Jones v. Slubey*, 5 Har. & S. 372.

or by his affidavit,¹ or by a recital in a bond² or deed,³ or by a pamphlet⁴ written by the trustees, or by an entry in a bank-deposit book;⁵ in short, by any writing in which the fiduciary relation between the parties and its terms can be clearly read.⁶ (a) And if there is any competent written evidence that the person holding the legal title is only a trustee, that will open the door for the admission of parol evidence to explain the position of the parties,⁷ as where there are entries in the books of the grantee of payments made by him to or on account of the grantor, which payments were consistent only with the fact that the grantee took in trust, he was decreed to be a trustee.⁸ (b) Nor is it necessary that

¹ *Barkworth v. Young*, 4 Drew. 1; *Pinney v. Fellows*, 15 Vt. 525.

² *Moorcroft v. Dowding*, 2 P. Wms. 314; *Wright v. Douglass*, 3 Seld. 564; *Gomez v. Traders' Bank*, 4 Sandf. 102.

³ *Deg v. Deg*, 2 P. Wms. 412; *Selden's App.*, 31 Conn. 548; *Wright v. Douglass*, 3 Seld. 564, reversing s. c. 10 Barb. 97.

⁴ *Barrell v. Joy*, 16 Mass. 221.

⁵ *Barker v. Frye*, 75 Maine, 29.

⁶ *Baylies v. Payson*, 5 Allen, 473; *Plymouth v. Hickman*, 2 Vern. 167; *Blake v. Blake*, 2 Bro. P. C. 250; *Dale v. Hamilton*, 2 Phill. 266; *Orleans v. Chatham*, 2 Pick. 29; *Hardin v. Baird*, 6 Litt. 346; *Graham v. Lambert*, 5 Humph. 595; *Gome v. Tradesman's Bank*, 4 Sand. 106; *Bragg v. Paulk*, 42 Maine, 502; *Unitarian Society v. Woodbury*, 14 id. 281; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Podmore v. Gunning*, 7 Sim. 655; *Fisher v. Fields*, 10 Johns. Ch. 505; *Murray v. Glass*, 23 L. J. Ch. 126; *Paterson v. Murphy*, 17 Jur. 298; *Raybold v. Raybold*, 20 Penn. St. 308; *Barron v. Barron*, 24 Vt. 375; *Steere v. Steere*, 5 id. 1; *Cuyler v. Bradt*, *Caines' Cas.* 326; *Packard v. Putnam*, 57 N. H. 43.

⁷ *Cripps v. Lee*, 4 Bro. Ch. 472; *Hollinshed v. Allen*, 17 Penn. St. 275; *Prevost v. Gratz*, 1 Pet. C. C. 366; *Morton v. Tewart*, 2 Yo. & Coll. Ch. 67-77; *Hutchins v. Lee*, 1 Atk. 447; *Corse v. Leggett*, 25 Barb. 389. But see *Homer v. Homer*, 107 Mass. 82.

⁸ *Ibid.*

(a) See *Patton v. Chamberlain*, 44 Mich. 5; *Eipper v. Benner*, 113 id. 75; *Larrabee v. Hascall*, 88 Maine, 511; *Hutchins v. Van Vechten*, 140 N. Y. 115; *Tusch v. German S. Bank*, 46 N. Y. S. 422; *Cathcart v. Nelson*, 70 Vt. 317.

(b) So part payment of the pur-

chase-money, and delivery of possession of one of several parcels of land included in a parol contract of sale, enable the purchaser to enforce specific performance as to all the parcels, and the vendor is a trustee to the extent of the money paid. *Bartz v. Paff*, 95 Wis. 95, 99, 100.

the letters, memoranda, or recitals should be addressed to the *cestui que trust*, or should have been intended when made to be evidence of the trust.¹ A deed of gift to the husband, as "an advancement" to the wife, will create a trust for the wife. It is not necessary that the word "trust" or "trustee" should be used.² (a) The trust thus proved, however late the proof, will relate back to its creation; as where a lease was granted to A., who afterwards became a bankrupt, and *then* executed a declaration of trust in favor of B., the jury having found upon an issue out of chancery that A.'s name

¹ *Forster v. Hale*, 5 Ves. 308; *Hutchinson v. Tindall*, 2 Green, Ch. 357; *Barrell v. Joy*, 16 Mass. 221; *Welford v. Beazeley*, 3 Atk. 503; *Browne on Statute of Frauds*, § 99; *Furman v. Fisher*, 4 Cold. 626; *Urann v. Coates*, 109 Mass. 581. In *Steere v. Steere*, 5 Johns. Ch. 1, Mr. Chancellor Kent recognized and approved the general proposition that trusts could be proved by letters signed by the party; but in showing that the letters in that particular case were insufficient to prove a trust, he took notice of the fact that they were not addressed to the *cestui que trust*, and seemed to intimate that it was necessary that letters should be so addressed in order to manifest the trust. If the eminent chancellor intended to lay down such a rule, it would seem to be effectually overthrown by the well-considered cases cited above.

² *Cresswell's Adm'r v. Jones*, 68 Ala. 420.

See *Miller v. Sharp*, 47 W. R. 268. In general, the making of improvements on another's land does not create a resulting trust. *Bodwell v. Nutter*, 63 N. H. 446. See *Goldsmith v. Goldsmith*, 145 N. Y. 313; *Pillsbury—Washburn F. M. Co. v. Kistler*, 53 Minn. 123; *Frick Co. v. Taylor*, 94 Ga. 683; *Tolleson v. Blackstock*, 95 Ala. 510; *Smith v. Jeffreys* (Miss.), 16 So. 377. Improvements, if they can ever be relied upon as a partial performance, must be substantial, permanent, and made in reliance upon the contract. *Cooley v. Lobdell*, 153 N. Y. 596, 602; *Krauth v. Thiele*, 45 N. J. Eq. 407; *Duval v. Duval*, 54 id. 581; *Dunn v.*

Berkshire, 175 Ill. 243; 2 Harv. L. Rev. 28. It is only in equity, and not at law, that part performance can take a case out of the operation of the statute of frauds. *Chicago Att. Co. v. Davis S. M. Co.*, 142 Ill. 171; *Cooper v. Thomason*, 30 Oregon, 161; *Wittenbrock v. Cass*, 110 Cal. 1.

(a) *Packard v. O. C. R. Co.*, 168 Mass. 92; *Chadwick v. Chadwick*, 59 Mich. 87; *infra*, § 225, n. When no trust is declared or beneficiary named, and the conveyance is for a valuable consideration, the word "trustees" used therein is surplusage, and does not show a trust. *Andrews v. Atlanta R. E. Co.*, 92 Ga. 260.

was used in good faith in the lease as the trustee of B., it was held that the assignees of A. took nothing in the property.¹ But it must clearly appear that the parties intended a trust by the transaction, and parol evidence is competent to explain receipts and other papers connected with the case which may be explained by parol in other cases.² A mere declaration of *motive*, as a grant to A. in order that he may maintain his children, will not create a trust;³ nor will a mere *request* of an owner to his heirs to convey land to a person named in the letter expressing his wish.⁴ In case of a deposit in bank in trust for another there must be an intent to pass the beneficial interest during the life of the donor, and not merely a testamentary intent that the person named as *cestui* shall have the money at the decease of the donor, who retains complete control of the fund during his life.⁵ The general rule is that a deposit of money in the name of the depositor, in trust for another, transfers the title to the latter.⁶ Where a savings-bank depositor "in trust" kept the book, but before his death told the beneficiary in substance, "That money I put in the savings bank for you, is yours," a finding that there was a perfected gift was justified.⁷ The question is, Do the facts show

¹ *Gardner v. Rowe*, 2 S. & S. 346; 5 Russ. 258; *Plymouth v. Hickman*, 2 Vern. 167; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Wilson v. Dent*, 3 Sim. 385; *Smith v. Howell*, 3 Stockt. 349; *Owens v. Owens*, 23 N. J. Ch. 60; *McGovern v. Knox*, 21 Ohio St. 547; *Malin v. Malin*, 1 Wend. 625; *Steere v. Steere*, 5 Johns. Ch. 1; *Jackson v. Moore*, 6 Cow. 706; *Reid v. Fitch*, 11 Barb. 390; *Reggs v. Swann*, 6 Jones, Eq. 115; *Noble v. Morris*, 24 Ind. 478; *Sime v. Howard*, 4 Nev. 473; *Reid v. Reid*, 12 Rich. Eq. 213; *McLaurie v. Partlow*, 53 Ill. 340.

² *Smith v. Tome*, 59 Penn. St. 158; *Hays v. Quay*, id. 263.

³ *Bryan v. Howland*, 98 Ill. 625.

⁴ *Preston v. Casner*, 104 Ill. 262.

⁵ *Nutt v. Morse*, 142 Mass. 1, 3; *Waynesburg College's App.*, 111 Penn. St. 130; *Smith v. Speer*, 34 N. J. Eq. 336.

⁶ *Scott v. Harbeck*, 49 Hun, 292.

⁷ *Alger v. North End Savings Bank*, 146 Mass. 418. See *Mabie v. Bailey*, 95 N. Y. 206, and *Boone v. Citizens Bank*, 84 N. Y. 83. At the death of the trustee the trust goes to her executor or administrator, and in the absence of notice from the beneficiary to the contrary, he may pay the money to said representative.

an intent to create a present trust? And the facts that the grantor drew interest on the deposit, or offered to loan the money after the deposit was made, are not conclusive against a trust.¹ But where A. deposits money in the name of B., "sub. to A.," and A. receives the dividends and keeps the pass-book and draws such portions of the principal for her own use as she chooses, there is no gift to nor trust for B. If there is any trust, it is B. who is trustee for A.² (a)

¹ Willis v. Smyth, 91 N. Y. 297.

² Northrop v. Hale, 73 Maine, 71. See Marcy v. Amazeen, 61 N. H. 131, retaining control and giving *cestui* no notice, no trust; and Bartlett v. Remington, 59 N. H. 364, a similar case, an executory trust without consideration, is not enforceable; and Pope v. Burlington Savings Bank, 57 N. Y. 126, where the *cestui* had no knowledge of the deposit, and the depositor withdrew part of the fund.

(a) Depositing money in a savings bank in another's name is not conclusive evidence of a gift. Booth v. Bristol County S. Bank, 162 Mass. 455; Bath Savings Inst'n v. Hathorn, 88 Maine, 122; Cooney v. Ryter, 46 La. An. 883. A bank deposit in another's name, and with his knowledge and assent, may be a valid gift, though the donee is to hold it in trust during the donor's life; if made for the donor's child, such deposit is treated as a gift rather than an advancement. Beaver v. Beaver, 117 N. Y. 421; Cunningham v. Davenport, 147 N. Y. 43; Conn. River S. Bank v. Albee, 64 Vt. 571; Providence Inst'n v. Carpenter, 18 R. I. 287; Miller v. Clark, 40 F. R. 15; McDonald v. Donaldson, 47 id. 765; Telford v. Patton, 144 Ill. 611; Re Atkinson, 16 R. I. 413; Patterson's Appeal, 128 Penn. St. 269; Williamson v. Yager, 91 Ky. 184; Dunlap v. Dunlap, 94 Mich. 11; Crook v. First Nat. Bank, 83 Wis. 31; White v. White, 52 Ark. 188. A deposit by A. for "A. or B." does not necessarily show that B. has an interest as donee, as such a deposit may be merely matter of convenience. *In re* Bolin, 136 N. Y. 177; see *Ide v. Pierce*, 134 Mass. 260. To constitute a gift in such case there must be a transfer of the fund, or at least a transfer of it to the depositor as trustee for the donee, with the latter's knowledge and acceptance. *Sherman v. New Bedford S. Bank*, 138 Mass. 581; *Scott v. Berkshire County S. Bank*, 140 id. 157; *Alger v. North End S. Bank*, 146 id. 418; *Noyes v. Newburyport S. Inst'n*, 164 id. 583; *Cogswell v. Newburyport S. Inst'n*, 165 id. 524; *Henchey v. Henchey*, 167 id. 77; *Keniston v. Mayhew*, 169 id. 166; *Norway S. Bank v. Merriam*, 88 Maine, 146; *Fairfield S. Bank v. Small*, 90 id. 546; *Lee v. Kennedy*, 54 N. Y. S. 155; *Jones v. Moore* (Ky.), 44 S. W. 126; *Booth v. Oakland S. Bank* (Cal.), 54 Pac. 370. When one seeks by a bill in

§ 83. The same principles of construction apply to trusts proved by this description of evidence as in other cases; and the objects and nature of the trust must always appear from such writings with sufficient certainty, and also their connection with the subject-matter of the trust.¹ Indeed, courts require demonstration on the latter point; and the trust will not be executed if the precise nature of it, and the particular persons who are to take as *cestuis que trust*, and the proportions in which they are to take, cannot be ascertained.² When all these particulars properly appear from writings signed by the party, the trust will be executed; but if the terms of the trust are collected from several papers, it is not necessary that all of them should be signed, provided they are so referred to and connected with the paper that is signed that they may be identified and read as genuine papers, and a part of the transaction.³ (a) Nor need there

¹ Forster v. Hale, 3 Ves. Jr. 708; Steere v. Steere, 5 Johns. Ch. 1; Abel v. Radcliff, 13 Johns. 297; Rutledge v. Smith, 1 McC. Ch. 119; Freeport v. Bartol, 3 Greenl. 340; Arms v. Ashley, 4 Pick. 71; Hill on Trustees, 61.

² Ibid.; Smith v. Mathews, 3 De G., F. & J. 139; Morton v. Tewart, 2 Yo. & Col. Ch. 80; Lewin on Trusts, 46; Leman v. Whitley, 4 Russ. 423; Whelan v. Whelan, 3 Cow. 537; Jackson v. Moore, id. 706; Reid v. Fitch, 11 Barb. 399; Jones v. Wilson, 6 Ala. 332; Taylor v. Keep, 2 Brad. (Ill.) 368.

³ Ibid.; Denton v. Davis, 18 Ves. 503; Lewin on Trusts, 47; Browne on the Statute of Frauds, §§ 105, 350-355.

equity to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit: Gregory v. Merchants' National Bank, 171 Mass. 67; but the bank is not. Oppenheimer v. First Nat. Bank, 20 Mont. 192.

As to gifts of insurance policies, choses in action, etc., see 1 Ames on Trusts (2d ed.), 139, 145, 155, 163.

(a) The written declaration of trust must contain the substantial

terms of the trust, or at least sufficient to identify the subject-matter by writing, and when it is contained in separate papers, these must be identified and connected by internal reference. *Re Smith*; Champ v. Marshallsay, 64 L. T. 13; Knowlton v. Atkins, 134 N. Y. 313; Hamer v. Sidway, 124 N. Y. 538; Hammig v. Mueller, 82 Wis. 235; Atwater v. Russell, 49 Minn. 57; Yerkes v. Perrin, 71 Mich. 567; Renz v. Stoll, 94 id. 377; Eipper v. Benner, 113 id. 75; McAuley's Estate, 184

be an actual subscription of the party's name, if the paper is authenticated by the party as his writing for the purpose of declaring the trust by writing his initials.¹ The party whose signature is essential is the party who by law is enabled to declare the trust; and it has been decided, that, whether the property is real or personal, the party enabled to declare the trust is the owner of the beneficial interest, who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit pipe for him.² But if there is an absolute conveyance of the legal title to a supposed trustee, and there is no declaration of a trust prior to or at the time of the conveyance by the grantor, and the *cestui que trust* attempts to charge the grantee with a trust in respect to the land, he must produce some writing signed by the grantee of the legal title in order to charge him with the trust.³ (a) It is only when

¹ *Smith v. Howell*, 3 Stockt. 349.

² *Tierney v. Wood*, 19 Beav. 330; *Donahoe v. Conrahy*, 2 Jon. & La. 688; *Lewin on Trusts*, 47.

³ *Browne on Statute of Frauds*, § 106; *Adlington v. Cann*, 3 Atk. 145; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Lee v. Ferris*, ib. 357; *Russell v. Jackson*, 10 Hare, 204; *Lomax v. Ripley*, 3 Sm. & Gif. 48; *Brown v. Brown*, 12 Md. 87; *Tritt v. Crotzer*, 13 Penn. St. 451; *In re Dunbar*, 2 Jon. & La. 120.

Penn. St. 75; *Heidenheimer v. Bauman*, 84 Texas, 174. The invalidity of some provisions in a declaration of trust does not avoid it wholly, when the unobjectionable clauses are separable from them. *Culross v. Gibbons*, 130 N. Y. 447; *Re Butterfield*, 133 N. Y. 473; *Kelly v. Nichols*, 17 R. I. 306; 18 R. I. 62.

(a) A declaration of trust which is signed only by the trustee does not, by its covenants, and the acceptance of the declaration by the beneficiaries, limit their equitable estates under the statute of frauds. *Adams v. Carey*, 53 N. J. Eq. 334.

An unsealed declaration of trust must be supported by a consideration, must upon its face be intended to create a trust, and clearly indicate the beneficiary. *Finley v. Isett*, 154 U. S. 561; *Emerson v. Galloupe*, 158 Mass. 146; *Leslie v. Leslie*, 53 N. J. Eq. 275; *Hart v. Seymour*, 147 Ill. 598; *Hamilton v. Downer*, 152 id. 651; *Carter v. Gibson*, 29 Neb. 324; *Leeper v. Taylor*, 111 Mo. 312; *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135; *Wilcox v. Gilchrist*, 85 Hun, 1; *Hamer v. Sidway*, 124 N. Y. 538; 57 Hun, 229, 236.

there is no dispute concerning the existence of a trust, or when the trust arises by operation of law as a resulting or implied trust, that the *cestui que trust* himself can declare its terms.¹

§ 84. It remains to consider when and how far trusts may be declared or proved by the answers of parties in chancery. It has been decided that a defendant is bound to answer to a bill suggesting a parol trust, and that a general demurrer² would be overruled; but perhaps this doctrine is confined to parol trusts that arise from fraud, accident, or mistake; for in the case of express trusts, if it can be gathered from the bill that the plaintiff relies upon parol evidence alone, with no circumstances to take it out of the statute, it has been held that the defendant may demur.³ But the general rule is that if a trust is alleged in a bill it will be presumed to be legally created, *i. e.*, in writing, unless the contrary appears; therefore it must clearly appear from the bill that the alleged trust rests in parol only, or the demurrer will be overruled.⁴ It has also been decided, that if the bill simply omits to state that the trust is in writing, a demurrer will be overruled; for, as the statute only requires that it should be proved, not created, by writing, the writing is no part of the trust, but only evidence of the trust to be adduced at the hearing.⁵ In all cases, however, the defendant *may* answer, and if in his answer he confess the trust without insisting upon the statute of frauds, he will be held to have

¹ *Bellasis v. Compton*, 2 Vern. 294; *Lee v. Huntoon*, 1 Hoff. Ch. 447; *Harris v. Barnet*, 3 Grat. 339; and cases in preceding note.

² *Muckleston v. Brown*, 6 Ves. 52; *Stickland v. Aldridge*, 9 Ves. 516; *Chamberlain v. Agar*, 2 V. & B. 259; *Newton v. Pelham*, 1 Ed. 514; *Lomax v. Ripley*, 3 Sm. & Gif. 48; *Peralta v. Castro*, 6 Cal. 354; *Cottingham v. Fletcher*, 2 Atk. 155; *Childers v. Childers*, 3 K. & J. 310; 1 De G. & J. 485.

³ *Walker v. Locke*, 5 Cush. 91; *Wood v. Midgeley*, 27 Eng. L. & Eq. 206; 5 De G., M. & G. 41; *Ridgway v. Wharton*, 3 id. 677; *Barkworth v. Young*, 4 Dr. 1. See *Skinner v. McDonall*, 2 De G. & Sm. 265.

⁴ *Cozine v. Graham*, 2 Paige, 177.

⁵ *Davis v. Otty*, 33 Beav. 540.

waived the benefit of the statute, and his answer may be used as a written declaration and proof of the trust,¹ on the ground that the plaintiff is not called upon to introduce evidence, and the trust appears upon the written answer before the court.(a)

§ 85. Resulting and implied trusts that arise from fraud can be proved by parol, although the defendant in his answer denies the trusts and sets up the statute in bar; for such trusts are not within the statute. In cases of express trusts, if the defendant denies them, or if he denies them and at the same time sets up the statute, or if he do not answer at all, only legal evidence or evidence in writing can be given in proof.² And if the defendant confesses the parol trusts

¹ *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404; 1 Eq. Cas. Ab. 404; *Gil. Eq.* 146; *Dean v. Dean*, 1 Stockt. 425; *Whiting v. Gould*, 2 Wis. 552; *Woods v. Dille*, 11 Ohio, 455; *Newton v. Swazey*, 8 N. H. 9; *Rowton v. Rowton*, 1 Hen. & Munf. 91; *Lingan v. Henderson*, 1 Bland. 236; *Tarleton v. Vietes*, 1 Gilm. 470; *Stearnes v. Hubbard*, 8 Greenl. 320; *Thornton v. Henry*, 2 Scam. 219; *School Trustees v. Wright*, 12 Ill. 432; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Kinzie v. Penrose*, 2 Scam. 250; *Talbot v. Bowen*, 1 A. K. Marsh. 436; *Albert v. Ware*, 2 Md. Ch. 169, 6 Md. Ch. 66; *Chitwood v. Brittain*, 1 Green, Ch. 450; *Baker v. Hollabaugh*, 12 Ark. 322; *Cozine v. Graham*, 2 Paige, 177; *Tilton v. Tilton*, 9 N. H. 386; *Switzer v. Skiles*, 1 Gilm. 529; *Allen v. Chambers*, 4 Ired. Eq. 125; *Hall v. Hall*, 1 Gill, 383; *McLaurie v. Partlow*, 53 Ill. 340.

² *Trapnal v. Brown*, 19 Ark. 39; *Wynn v. Garland*, id. 23; *Smith v. Howell*, Stockt. 349; *Whyte v. Arthur*, 2 Green, Ch. 521; *Broadness v. Woodman*, 27 Ohio St. 353; *Matthews v. Denman*, 24 id. 615.

(a) As the character of the trust, as an express or implied one, depends on the nature of the facts which brought it into being, and not on the manner in which its existence is proved after its creation, the fact that it is fully set forth by the trustee in his answer in chancery, does not change a resulting trust into an express trust. The statements of a party who is compelled to answer, either by answer in chancery or by deposition, will not be treated as a declaration of trust, when the statute of frauds is pleaded in bar. *Davis v. Stam- baugh*, 163 Ill. 557; *Mayfield v. Forsyth*, 164 id. 32; *Myers v. Myers*, 167 id. 52.

Warren v. Tynan, 54 N. J. Eq. 402.

in his answer, and at the same time sets up the statute in bar, he will have the benefit of the statute, and the court will not use the answer as a written declaration and proof of the trust.¹ In one case it was held that a trust appearing from defendant's answer would be executed by the court although it was entirely different from the trust alleged in the bill;² but this case has not been followed. In a late case where a bill was filed setting forth a fraud and asking to have a resulting trust declared and a deed set aside, and the defendant confessed an express trust by parol, and offered to execute it, Chancellor Vroom said, "I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that it might be so decreed according to the original intention of the parties, the answer of the defendant admitting the trust would have been good evidence of it. It would have amounted to a sufficient declaration of trust. But it would seem to be different when a complainant seeks on the ground of fraud to set aside a deed absolute on its face, and confessedly without any consideration paid; for, to suffer a defendant in

¹ *Dean v. Dean*, 1 Stockt. 425; *Whiting v. Gould*, 2 Wis. 552. The proposition in the text was long a disputed point. It was apparently held that, as the defendant by his answer had admitted the trust, the plaintiff was not called upon to introduce any evidence. There was no danger of fraud and perjury; as the court had the defendant's statement of a trust in writing under oath, and as equity takes hold of a party's conscience, he ought to be held to execute the trust which he confesses, notwithstanding the statute. On the other hand, in bills for the specific performance of a parol contract for the sale of lands, the defendant was held not bound to execute the contract if he set up the statute, although he confessed the contract in his answer. There would seem to be no reason for a different rule in the two cases; and since it is now established that a defendant may demur to a bill that on its face alleges a mere parol trust, it would seem to follow that the confession of a defendant should not be used to override a positive rule of law. The two cases cited establish the proposition of the text, and it is presumed that the same rule would be held in all the United States. It is a question of pleading and practice, and it is considered here only incidentally in considering how trusts may be created under the statute of frauds. The reader will find a full discussion of the question in Story's Eq. Pleading, §§ 765-768.

² *Hampton v. Spencer*, 2 Vern. 288.

such case to come in and avoid the claim by setting up a trust would be to permit him to create a trust according to his own views, and thereby prevent the consequences of a fraud."¹ It must be observed, that if the answer of the trustee is used to prove the trust, the terms of the trust must be gathered from the whole answer as it stands, for one part of the answer cannot be read and another part rejected. If, therefore, the plaintiff read the answer in proof of the trust, he must at the same time read the particular terms of the trust as therein stated.² (a) In States where the statute of frauds is not in force, trusts may be proved by parol, in opposition to the defendant's answer denying them.

§ 86. Personal chattels are not within the terms of the statute, and trusts in personal property may be declared and proved by parol, though Mr. Eden said that "he had not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution."³ And certainly the English cases usually referred to do not establish the proposition in express terms.⁴ There

¹ *Hutchinson v. Tindall*, 2 Green, Ch. 357; and see *Jones v. Slubey*, 5 Harr. & J. 372; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Haigh v. Kay*, L. R. 7 Ch. 469.

² *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404; *Freeman v. Tatham*, 5 Hare, 329; *Stearnes v. Hubbard*, 8 Greenl. 320; *Lewin on Trusts*, 46.

³ *Fordyce v. Willis*, 3 Bro. Ch. (n.).

⁴ *Nab v. Nab*, 10 Mod. 404, 1 Eq. Cas. Ch. 404, and *Jones v. Nabbe*, Gil. Eq., are usually cited to sustain the proposition, but they do not. In *Crook v. Brooking*, 2 Vern. 50, 106; *Inchiquin v. French*, 1 Cox, 1; *Metham v. Devon*, 1 P. Wms. 529, and *Smith v. Attersoll*, 1 Russ. 274, there were written declarations of trust, and the question was as to the effect of the writings, though it was remarked in these cases that trusts of personality could be evidenced by parol. The case of *Benbow v. Townsend*, 1 My. & K. 506, was this: A. had loaned £2,000, and taken a mortgage in the name of B., his brother, declaring that he intended it for the benefit of

(a) The answer must be complete as a declaration of trust, and fully show a trust. *White v. Ross*, 160 Ill. 56; *Warren v. Tynan*, 54 N. J. Eq. 402.

does not seem to be any objection, however, to the establishment of a trust in personal property by parol. The owner in the absence of a statute has entire control of it; he can sell and transfer it without writing and by parol, and if he can transfer it by parol, there is no reason why he may not by parol transfer it upon such lawful terms, and to such uses and trusts, as he may desire. It has been so ruled in express decisions in the United States.¹ When a person *sui juris*

B. After the death of A. his executor brought a bill against B. to obtain the mortgage, and the question was whether the representatives of A. were entitled to the mortgage. It was held that B. was entitled to hold the mortgage, and it was remarked that a trust of personal property was not within the statute of frauds. It will be observed that the mortgage was in writing in the name of B., and that the parol evidence was not used to establish a trust in B., but to rebut a trust resulting to A. from his having paid the purchase-money. If A. had taken the mortgage in his own name, but had declared that it was in trust for B., the question would have fairly arisen, whether a parol declaration could create a trust in a mortgage of real estate. *Bayley v. Boulcott*, 4 Russ. 346, only establishes the proposition that a paper prepared under the direction of the owner, but which she refused to execute, will not create a trust. But in *McFadden v. Jenkyns*, 1 Phill. 153, 1 Hare, 458, it was directly held that a parol declaration was sufficient to create a trust in personal property. If there are doubts and difficulty upon the supposed words, the court will give weight to the fact that they were not written to infer that they may not be the deliberate sentiments of the party. *Dipple v. Corles*, 11 Hare, 183; *Paterson v. Murphy*, id. 91, 92.

¹ *Hooper v. Holmes*, 3 Stockt. 122; *Day v. Roth*, 18 N. Y. 448; *Robson v. Harwell*, 6 Ga. 589; *Higgenbottom v. Peyton*, 3 Rich. Eq. 398; *Kirkpatrick v. Davidson*, 2 Kelley, 297; *Gordon v. Green*, 10 Ga. 534; *Kimball v. Morton*, 1 Halst. Ch. 31. See *McFadden v. Jenkyns*, 1 Hare, 461, 1 Phill. 157; *Thorpe v. Owens*, 5 Beav. 224; *George v. Bank of England*, 7 Price, 646; *Hawkins v. Gordon*, 2 Sm. & Gif. 451; *Peckham v. Taylor*, 3 Beav. 250; *Hunnewell v. Lane*, 11 Met. 163; *Simms v. Smith*, 11 Ga. 195; *Crissman v. Crissman*, 23 Mich. 218; *Berry v. Norris*, 1 Drew, 302; *Maffitt v. Rynd*, 69 Penn. St. 30; *Thatcher v. Churchill*, 118 Mass. 108; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; *Chase v. Chapin*, 130 Mass. 128; *Davis v. Coburn*, 128 Mass. 377; *Hellman v. McWilliams*, 70 Cal. 449; *Hon. v. Hon.* 70 Ind. 135; *Hunt v. Elliott*, 80 Ind. 245; *Patterson v. Mills*, 69 Iowa, 755; *Cobb v. Knight*, 71 Maine, 253; *Danser v. Warwick*, 33 N. J. Eq. 133; *Gilman v. McArdle*, 99 N. Y. 451; *Gadsden v. Whaley*, 14 S. C. 211; *Dickerson's App.* 115 Penn. St. 198.

orally or in writing explicitly or impliedly declares that he holds personal property *in presenti* for another, he thereby constitutes himself an express trustee.¹ Under these decisions trusts may be created by parol in any mere personal property, as in the shares of corporations, although the corporations themselves own real estate.² If one receives notes of another in trust to pay such person's debt, and agrees with creditor to turn over the notes or their proceeds to him, a trust arises.³ So where a fund is received and held to invest for another.⁴ Money or a debt secured by mortgage of real estate is a personal chattel, and a trust in the money or mortgage debt, and in the mortgage itself, may be created by parol;⁵ and although a parol declaration of trust will not affect land, yet if the land is to be converted into money, and is converted, a parol declaration will bind the proceeds or the money.⁶ And this will hold though the parol agreement to hold the money in trust is subsequent to the parol trust respecting the land, no sale by the parol trustee having been contemplated.⁷ Mr. Hill says that "it would seem to follow that legacies and annuities, and other sums of money charged on land, do not come within the operation of the statute respecting parol declarations of trusts in land."⁸ But all chattels real are within the statute, and trusts in them must be evidenced in writing, as in case of freehold or leasehold interests.⁹ The same remarks are to be made in relation to

¹ Tyler v. Tyler, 25 Brad. (Ill.) 339.

² Porter v. Bank of Rutland, 19 Vt. 410; Forster v. Hale, 3 Ves. Jr. 696; 5 Ves. 308; Ashton v. Langdale, 4 De G. & Sm. 402; 4 Eng. L. & Eq. 80; Myers v. Perigal, 16 Sim. 533; 14 Eng. L. & Eq. 229; Hilton v. Giraud, 1 De G. & Sm. 183; Kilpin v. Kilpin, 1 M. & K. 520; Wheatley v. Purr, 1 Keen, 551.

³ Walden v. Karr, 88 Ill. 49.

⁴ Clapp v. Emery, 98 Ill. 523.

⁵ Bellasis v. Compton, 2 Vern. 294; Benbow v. Townsend, 1 M. & K. 510; Childs v. Jordon, 106 Mass. 322; Hackney v. Brooman, 62 Barb. 650.

⁶ Maffitt v. Rynd, 69 Penn. St. 30; Mohn v. Mohn, 112 Ind. 285; Wiseman v. Baylor, 69 Tex. 63.

⁷ Thomas v. Merry, 113 Ind. 83.

⁸ Hill on Trustees, 58 (n.); see note 1, p. 74.

⁹ Skett v. Whitmore, Freem. 280; Forster v. Hale, 3 Ves. Jr. 696;

parol trusts of personal property that were made in relation to parol trusts of real estate where such trusts are possible.¹ The subject-matter of the trust must be *clearly* ascertained, as well as the purposes of the trust and the persons who are to take the beneficial interests. Loose, vague, and indefinite expressions are insufficient to create the trust.² A mere declaration of a purpose to create a trust is of no value unless carried into effect. A simple promise of a future donation without consideration good or valuable creates no trust that equity can enforce.³ If the trust is once created in writing it cannot be varied by parol, and if it is once created by parol it cannot be altered or varied by other declarations of the trustee; as where a daughter delivered to her father \$7000 upon the parol trust that he would secure the money in trust for her and invest it for her sole benefit, and the father made his will giving said notes to two trustees to receive and pay over the income and interest to the daughter during her life, and at her decease to pay the principal to such persons as she by her last will should direct and appoint, and in default of such appointment, to her heirs-at-law: the father died, and his estate turning out insolvent, she brought a bill praying that the notes might be delivered to some person to be appointed by the court as trustee for her. Mr. Justice Wilde, in delivering the opinion of the court, said, "It is very clear that the father, his executor, and his heirs and creditors, are bound by the trust. It was not in the power of the trustee to divest or defeat the trust without the consent of the *cestui que trust*, except by a sale of the trust property to a *bona fide* purchaser, for a valuable consideration, and without notice of the trust. Nor could the trustee vary the terms of the trust, or declare

Riddle v. Emerson, 1 Vern. 108; Hutchins v. Lee, 1 Atk. 417; Bellasis v. Compton, 2 Vern. 294; Gardner v. Rowe, 5 Russ. 258; Otis v. Sill, 8 Barb. 102.

¹ *Ante*, § 77, n. 4, p. 60; Crissman v. Crissman, 23 Mich. 218.

² Bailey v. Irwin, 72 Ala. 505; a parol trust must be clear, and the evidence of it convincing.

³ Allen v. Withrow, 110 U. S. 119.

any new trust, to the prejudice of the *cestui que trust*, unless with her consent.”¹

§ 87. Under the statutes relating to the execution of last wills and testaments, no parol declaration can take effect as a nuncupative will, except in the case of soldiers in actual service, and mariners at sea. These persons may, according to the statutes of nearly all the States, make nuncupative wills of their wages and other personal property. It would seem to follow that they can create valid trusts in their wages and other personal property by nuncupative wills so made as to be proved and allowed in the courts of probate, or other courts having jurisdiction in such matters. Personal property may be so given and delivered to one in trust for another for a particular purpose that it will be good as a *donatio causa mortis*, and the trust will be executed by courts of equity;² but courts do not favor donations *mortis causa*. (a) It has been held that a gift, *mortis causa*, of a fund in trust to be disposed of for benevolent purposes, at the absolute and unlimited discretion of the donee, could not be sustained.³

¹ Hunnewell v. Lane, 11 Met. 163.

² Blunt v. Burrow, 4 Bro. Ch. 75, and Perkins's notes, 1 Ves. Jr. 546, and Sumner's notes; Moore v. Darton, 4 De G. & Sm. 517, 7 Eng. L. & Eq. 134; Borneman v. Sedlinger, 3 Shep. 429, 8 Shep. 185; Constant v. Schuyler, 1 Paige, 316. And see Tate v. Leithhead, 1 Kay, 658; Ham-brooke v. Simmons, 4 Russ. 25; Hill v. Hill, 8 M. & W. 401; Drury v. Smith, 1 P. Wms. 404; 1 Story, Eq. Jur. § 607.

³ Dole v. Lincoln, 31 Me. 422. But the court decided the case on the ground: (1) that there was not a sufficient delivery to constitute a good gift *mortis causa*, and (2) that if the gift had been good in form, the trust

(a) Upon the question whether a check drawn upon a bank may be an equitable assignment *pro tanto*, see Fourth St. Nat. Bank v. Yardley, 165 U. S. 634; *Re Griffin*, [1899] 1 Ch. 408; McIntyre v. Farmers' Bank (Mich.), 73 N. W. 233; Niblack v. Park Nat. Bank, 169 Ill. 517; Dickinson v. Coates, 79 Mo. 250; House v. Kountze (Tex.), 43

S. W. 561. In an article in 36 Am. L. Reg. n. s. 246, 289, Mr. Luther E. Hewitt maintains, upon a review of the authorities, that a *donatio mortis causa* may be well executed in equity, upon the giving of a check by the donor, even though the check is not paid or presented before his death.

§ 88. An attempt was made at one time to hold gifts to charitable uses as excepted from the statute ; but Lord Talbot decided,¹ and Lord Hardwicke affirmed the decision,² and Lord Northington said every man of sense must subscribe to it, that a gift to a charity must be treated on the same footing with any other disposition.³

§ 89. In addition to the statute of frauds, which forbids the creation of express trusts in lands unless the trust is evidenced by some writing signed by the party, there are statutes in every State that regulate the execution of wills. By the original statute of frauds, all wills to pass real estate were required to be in writing, signed by the testator, and attested in his presence by three or four witnesses.⁴ This statute has been substantially adopted in all the States, though there is some diversity in the number of witnesses required. By this statute nuncupative wills of personal chattels were not prohibited, but they were placed under such regulations that they ceased to be in common use. Written wills of personal property were not required to be attested by witnesses. But in England at the present time, and in most of the United States, a will to pass personal property must be executed with the same formalities, and attested by the same number of witnesses, that are required to wills affecting real estate.⁵

§ 90. It follows from these statutes, that no trusts in real or personal estate can be created by any declaration of trust for the charity could not be executed on account of its vagueness and uncertainty.

¹ *Lloyd v. Spillett*, 3 P. Wms. 344 ; *Lewin on Trusts*, 61.

² *Lloyd v. Spillett*, 2 Atk. 150, Barn. 384 ; *Adlington v. Cann*, 3 Atk. 150.

³ *Boson v. Statham*, 1 Eden, 513 ; *Thayer v. Wellington*, 9 Allen, 283.

⁴ 29 Car. II. c. 3, § 5.

⁵ It is not within the general purposes of this treatise to enter into a discussion of the manner of executing wills in England and the several States of the Union. The reader will find the laws of the various States fully and accurately stated in the learned notes of the Hon. J. C. Perkins to 1 *Jarman on Wills*, pp. 113-135 (4th Am. ed.), as to real estate, and pp. 135-144 as to personal property.

in a will, unless the will is executed in such form that it can be allowed in the court of probate having jurisdiction, and in such form that it will pass the estate that it is intended to operate upon. Mr. Hill lays down the proposition, that if an instrument containing a declaration of trust by reason of some informality cannot be supported as a will, it may, nevertheless, if signed by the party, be a sufficient evidence of the creation of the trust to take it out of the statute.¹ And Lord Northington declared his opinion generally, "that a writing signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses according to the solemnities of the statute of frauds."² But these propositions, in the broad form in which they are stated, are clearly not law. The dictum of Lord Northington stands alone, and the highest authorities are in opposition to it.³ (a)

§ 91. There is one state of facts in which the above proposition of Mr. Hill may be good law. If a testator in making his will should declare by way of recital that a certain parcel

¹ Hill on Trustees, 61. Mr. Hill cites *Nab v. Nab*, 10 Mod. 404, 1 Eq. Ca. Ab. 404, Gil. Eq. 146. The case was this: "A daughter put into her mother's hands £180, and afterwards made a will, which was duly executed, and appointed her mother executrix, but made no mention of the £180. After making the will she desired her mother to give the money to a third person. After the death of the daughter, this third person brought a bill in chancery, alleging that the mother held this money in trust. The mother admitted the trust in her answer, and set up that she was not to give the money except at her option. The court held that the trust was admitted by the answer, and that the trust should be executed. It will be observed that the question as to a will informally executed did not arise. The question was wholly upon the effect of the defendant's answer in chancery. And the court, as reported in 1 Eq. Cas. Ab. 404, said that if the mother had set up the statute of frauds the trust could not have been carried into effect.

² *Boson v. Statham*, 1 Eden, 514.

³ *Adlington v. Cann*, 3 Atk. 151; *Muckleston v. Brown*, 6 Ves. 67; *Stickland v. Aldridge*, 9 Ves. 519; *Puleston v. Puleston*, Finch, 312; *Thayer v. Wellington*, 9 Allen, 283; *Burlington University v. Barrett*, 22 Iowa, 60.

(a) See *Re Smith*; *Champ v. Marshallsay*, 64 L. T. 13.

of land, or sum of money, was held by him upon trusts therein stated, and the will should be so informally executed that it could not be proved in a court of probate, still, if it was signed by him, it would seem to be as good proof of the trust as letters and other memoranda signed by the party and found after his death. (a) In such case the will could have no effect in creating the trust, it would be simply proof in writing of a trust already created and existing at the date of the will. But if the validity of the trust in any way depended upon the effect of the will in transferring the title to the property, the will could not be used in evidence, unless it was itself so executed as to be valid as a will.¹ In all cases where trusts originate in a will, the will must be executed according to the statute, or it cannot be used as a declaration and proof of the trusts. (b)

§ 92. Mr. Lewin clearly states the law and gives the reasons, as follows: "We must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot by an informal instrument affect the equitable any more than the legal estate, for the one is a constituent part of the ownership as much as the other. Thus a person cannot, but by will duly signed and attested, give a sum of *money* originally and primarily out of land; for the charge is part of the land and to be raised out of it by sale or mortgage.² And if a testator by will duly signed and attested give lands to A. and his heirs

¹ *Anding v. Davis*, 38 Miss. 574.

² *Brudenell v. Boughton*, 2 Atk. 272.

(a) This view was approved in *Leslie v. Leslie*, 53 N. J. Eq. 275, 281.

(b) An imperfectly executed or revoked will is insufficient as proof of a trust thereby created. *Davis v. Stambough*, 163 Ill. 557; *Chase v. Stockett*, 72 Md. 235. Its revo-

cation does not, however, necessarily affect a trust created contemporaneously by a separate instrument which is to be executed according to the terms of the will. See *Kopp v. Gunther*, 95 Cal. 63; *Keith v. Miller*, 174 Ill. 64.

‘upon trust,’ but without specifying the particular trust intended, and then by a paper not duly signed and attested, as a will or codicil, declare a trust in favor of B., the beneficial interest under the will is a part of the original ownership, and cannot be passed by the informal paper, but will descend to the heir-at-law.¹ Again, if a legacy be bequeathed by a will in writing to A. ‘upon trust,’ and the testator by parol express an intention that it shall be held by A. upon trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which imposes the necessity of a written will. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and, therefore, that where the legal estate of a freehold is well devised a trust may be engrafted upon it by a single note in writing; and where a personal chattel is well bequeathed, a trust of it, as excepted from the seventh section of the statute of frauds, may be raised by a mere parol declaration, — the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. ‘The deed,’ observed Lord Loughborough, in a similar case, ‘is built on the will; if the will is destroyed, the deed I should consider absolutely gone; the will without the deed is incomplete, and the deed without the will is a nullity.’² And Mr. Justice Buller observed, ‘A deed must take place upon its execution or not at all · it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing an interest to be conveyed at the execution: but a will is quite the reverse, and can only operate after death.’³ We may therefore safely assume, as an established rule, that if the intended disposition be of a testamentary character and not to take effect in the testator’s lifetime, but ambulatory until

¹ *Adlington v. Cann*, 3 Atk. 151.

² *Habergham v. Vincent*, 2 Ves. Jr. 209.

³ *Ibid.*

his death, such disposition is inoperative, unless it be declared in writing in strict conformity with the statutory enactments regulating devises and bequests.”¹ (a)

§ 93. There is an additional reason in the United States why a will or testamentary paper informally executed cannot be used as an original declaration of trust. In nearly all the United States no will can be used to prove the transfer of any interest, legal or equitable in property of the testator, unless such will has been duly proved, allowed, and recorded, in a court of probate having jurisdiction over it;² and if such will is to be used to affect the title to property in any State other than the one where it is originally proved, it must be recorded in such other State;³ so a court in equity has no jurisdiction over trusts created by the will of a foreigner, a certified copy of which is not filed in the probate court of the jurisdiction where the remedy is sought.⁴ But no will can be proved and allowed in a probate court unless it is duly executed under the statutes in force where it is made. This rule does not interfere with the doctrine that a testator may by his last will refer to and incorporate therein any document or paper which is in actual existence at the time, and is thus made a part of his will.⁵ In such cases, all such papers must be clearly iden-

¹ Lewin on Trusts, 66 (2d Am. ed.).

² *Rex v. Netherseal*, 4 T. R. 258; 1 Wms. Ex'rs, 172; *Strong v. Perkins*, 3 N. H. 517; *Kittredge v. Fulsome*, 8 N. H. 98; 2 Redf. on Wills, 10; *Metham v. Devon*, 1 P. Wms. 529; *Inchiquin v. French*, 1 Cox, 1. And see Mr. Lewin's remarks upon this last case, *Lewin on Trusts*, p. 49.

³ *Wilson v. Tappan*, 6 Ohio, 172; *Bailey v. Bailey*, 8 Ohio, 239; *Ives v. Allyn*, 12 Vt. 589; *Campbell v. Sheldon*, 13 Pick. 8; *Campbell v. Wallace*, 10 Gray, 162; 2 Redf. on Wills, 10.

⁴ *Campbell v. Wallace*, 2 Gray, 162.

⁵ 1 Wms. Ex'rs, 289, 290, and notes; *Willington v. Adam*, 1 V. & B.

(a) An erroneous recital in a will that the testator has by another instrument conveyed certain land to his child as an advancement does not enable the child to claim such land under the will or otherwise. *Hunt v. Evans*, 134 Ill. 496; *Stodder v. Hoffmann*, 158 Ill. 486.

tified and probated and recorded with the will as a part thereof, and such papers must be in actual existence at the time of making the will. If they are made afterwards, they must be so executed that they may be probated as a revocation of the will, or as a codicil thereto, or they will have no effect;¹ (a) as where a testator made an absolute devise of an estate, and left a declaration of trust not referred to in the will, and not duly attested, and not communicated to the devisee nor assented to by him in the testator's lifetime, the devisee is entitled to both the legal and beneficial interest, because it is a good devise on the face of the will, and the informal declaration of trust cannot be probated or admitted in evidence.² So, if a testator should devise real

445; *Habergham v. Vincent*, 2 Ves. Jr. 228; *Smart v. Prujean*, 6 Ves. 560; *Goods of Lady Truro*, L. R. 1 P. and D. 201; *Doe v. Walker*, 12 M. & W. 591, 600; *In re Earle's Trusts*, 4 K. & J. 673; *Allen v. Maddock*, 11 Moore, P. C. 201; *Croker v. Hertford*, 4 Moore, P. C. 339, 363; *Thayer v. Willington*, 9 Allen, 283.

¹ *Adlington v. Cann*, 3 Atk. 141-152; *Briggs v. Penny*, 3 De G. & Sm. 547, 3 Mac. & G. 546; 8 Eng. L. & Eq. 231; *Johnson v. Ball*, 5 De G. & Sm. 85; *Dawson v. Dawson*, 1 Chev. 148; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Thayer v. Willington*, 9 Allen, 283. How far papers referred to in a will become part thereof may be a very troublesome question. Statutes require last wills to be solemnly attested or witnessed by a certain number of witnesses. Whether papers referred to in the will as in actual existence but not attested by the witnesses can be probated, and if they cannot be probated whether they can have any effect upon the disposition made by the will, or of the construction of it, has not been determined.

² *Adlington v. Cann*, 3 Atk. 141; *Stickland v. Aldridge*, 9 Ves. 519; *Briggs v. Penny*, 3 De G. & Sm. 547; 3 Mac. & G. 546; 8 Eng. L. & Eq. 231; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Lee v. Ferris*, 2 K. & J. 357; *Russell v. Jackson*, 10 Hare, 204; *Lomax v. Ripley*, 3 Sm. & Gif. 48; *Brown v. Brown*, 12 Md. 87; *Thayer v. Willington*, 9 Allen, 283; *Habergham v. Vincent*, 5 T. R. 92, 2 Ves. Jr. 204; *Rose v. Cunningham*, 12 Ves. 29; *Johnson v. Ball*, 5 De G. & Sm. 85; *Langdon v. Astor*, 3 Duer, 477; *Thompson v. Quimby*, 2 Brad. 449; *Tucker v. Seaman's Aid Soc.*, 7 Met. 404; *In re Sothron*, 2 Curteis, 831; *Ferraris v. Hertford*, 3 Curteis, 468; *Waggstaff v. Waggstaff*, 2 P. Wms. 258; *Marlborough v. Godolphin*, 2 Ves. Sr. 76.

(a) See *Payton v. Almy*, 17 R. I. 605.

or personal property to A. in trust and state no trusts upon which A. is to hold, no paper not referred to in the will, and not duly executed, could be received in evidence to prove the trusts, nor could A. hold the beneficial interest, because he is stamped with the character of a trustee; but he would hold only the legal title, while the beneficial interest would descend or result to the testator's heirs-at-law.¹ But if any words in the will itself *clearly* qualify an absolute devise in the will, and show the testator's intent that others should share the property, the devisee holds in trust.²

§ 94. Even at common law parol evidence could not be received to convert a devisee under a will in writing into a trustee. In *Vernon's Case* it was resolved that a devise implies a consideration, and therefore that it cannot be averred or proved by parol to be for the use of another;³ "for that," said Lord Ch. B. Gilbert, "were an averment contrary to the design of the will appearing in the words;"⁴ and in *Lady Portington's Case*, the court refused to receive parol evidence, not only because of the statute of frauds, but also *from the nature of the thing*.⁵ For the same reason, at common law parol evidence of a trust was always inadmissible against a legatee under a written will.⁶ Until a late statute⁷ in England a person appointed executor had the title to all the personal property, and was entitled to take the surplus, after paying debts and legacies, beneficially to

¹ *Ibid.*; *Muckleston v. Brown*, 6 Ves. 52; *Boson v. Statham*, 1 Ed. 513.

² *Major v. Herndon*, 78 Ky. 128.

³ *Vernon's Case*, 4 Coke, R. 4 a.

⁴ *Gilbert on Uses*, 162.

⁵ *Lady Portington's Case*, 1 Salk. 162. It is stated by Jenkins that at common law parol proof might be received to engraft a trust upon a written will. *Jenk. 3 Cent. Cas.* 26. But by comparing the case cited by Jenkins with the same case in *Fitzherb. Ch. Devise*, 22, it will be seen that Jenkins was mistaken in the point decided. And see *Lewin on Trusts*, 58 (2d Am. ed.).

⁶ *Porey v. Juxon*, Nels. 135; *Fane v. Fane*, 1 Vern. 30.

⁷ 11 Geo. IV. and 1 W. IV. c. 40.

himself, and no parol evidence was admissible to convert him into a trustee for the heirs or next of kin.¹ But the authorities seem to establish that if there was any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the law *presumed* that it was not intended that he should take the surplus beneficially; the executor might rebut that presumption by parol evidence,² when, of course, the next of kin might fortify the presumption by opposing parol evidence in contradiction. Where, however, the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly, the *prima facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention.³ By the act referred to in England, and by statutes in all the United States, an executor is made *prima facie* a trustee for the next of kin.⁴

§ 95. Where an agreement is entered into for a *valuable and legal consideration*, and a trust is intended, the mere form of the instrument is not very material; for if the trust is not perfectly created or executed by the instrument, a court of equity can enforce it as a contract.⁵ Where a husband had treated his wife with extreme cruelty, so that she left him and instituted proceedings for a divorce, and he gave a note to a trustee for his wife, in consideration of her

¹ Langham v. Sandford, 19 Ves. 641; White v. Williams, 3 Ves. & B. 72; Coop. 58.

² Walton v. Walton, 14 Ves. 322; Clennell v. Lewthwaite, 2 Ves. Jr. 477; Langham v. Sandford, 17 Ves. 442; Lynn v. Beaver, 1 T. & R. 66.

³ Rachfield v. Careless, 2 P. Wms. 158; Langham v. Sandford, 17 Ves. 435; 19 Ves. 641; Gladding v. Yapp, 5 Mad. 42; White v. Evans, 14 Ves. 21; Walton v. Walton, id. 322; Read v. Steadman, 26 Beav. 495.

⁴ Love v. Gaze, 8 Beav. 472; Juler v. Juler, 29 Beav. 34; Harrison v. Harrison, 2 Hem. & Mill. 237; Read v. Steadman, 26 Beav. 495; Hill v. Hill, 2 Hayw. 298; Paup v. Mingo, 4 Leigh, 163; Hays v. Jackson, 6 Mass. 153; Wilson v. Wilson, 3 Bin. 559; Darrah v. McNair, 1 Ash. 240; 2 Story's Eq. Jur. §§ 1208-1210, and notes; Lewin on Trusts, 50.

⁵ Baldwin v. Humphrey, 44 N. Y. 609; Taylor v. Pownal, 10 Leigh, 183.

giving up the said suit and resuming cohabitation with him, it was held that the consideration was illegal; but the dissent by Holmes is far weightier than the majority opinion.¹ (a) If a deed is given by B. to A. on condition that A. will support B. and C., a trust is created that equity will enforce.² Wherever a *valuable consideration* is paid, the contract will be executed as near to the intention of the parties as possible; as where for a valuable consideration a man executed a deed of land purporting to be under his hand and seal, but no seal was affixed, by reason of which defect the legal title did not pass, the court held that the defective deed might be used as a declaration of trust, and that the holder of the legal title should hold it in trust for the grantee in the deed, and that he should be ordered to convey;³ and where a husband for a meritorious consideration conveyed personal property directly to his wife by deed, which could not operate, because a husband cannot convey directly to his wife, the court ordered the deed to stand as a declaration of trust for the wife, and the husband's representatives to hold the legal title in trust for her.⁴ The authorities establish this proposition, that where there is a valuable consideration the court will enforce the trust, though it is not perfectly created, and though the instruments do not pass the title to the property, if from the documents the court can clearly perceive the terms and conditions of the trust, and the parties to be benefited. In such cases, effect is given to the *consideration* to carry out the intentions of the parties, though informally expressed. But if no *cestui que trust* is named, or so designated that he can be identified, the court cannot carry a trust into effect, however clearly it may be

¹ Merrill v. Peaslee, 146 Mass. 460.

² Benscotter v. Green, 60 Md. 327.

³ Wadsworth v. Wendell, 5 Johns. Ch. 224; Haskill v. Freeman, 1 Wins. Eq. (N. C.) 31.

⁴ Huntley v. Huntley, 8 Ired. Eq. 250; Livingston v. Livingston, 2 Johns. Ch. 537; Garner v. Garner, 1 Busb. Eq. 1; Jones v. Obinchain, 10 Grat. 259; Fellows v. Heermans, 4 Lans. 230.

(a) See Whitehouse v. Whitehouse, 90 Maine, 468.

created in other respects.¹ Even if a purchaser of land direct a declaration of trust to be inserted in the deed to him, he will be bound by it, though it is voluntary on his part.² And if no trustee's name is inserted in the deed, it may be reformed, and a suitable trustee may be appointed and inserted.³ (a)

§ 96. And where there is *no valuable consideration*, yet if the settlor, by a clear and explicit declaration duly executed and intended to be final and binding upon him, makes himself a trustee, courts of equity will enforce the trust, whether the nature of the property be legal or equitable, and whether it be capable or incapable of transfer.⁴ (b) If it is a mere

¹ Dillage v. Greenough, 45 N. Y. 438; Ownes v. Ownes, 23 N. J. Eq. 60.

² Reilly v. Whipple, 2 S. C. 277.

³ Burnside v. Wayman, 49 Mo. 356.

⁴ *Ex parte* Pye, 18 Ves. 140; Thorpe v. Owen, 5 Beav. 224; Wilcocks v. Hannington, 5 Ir. Ch. 38; Draiser v. Brereton, 15 Beav. 221; Gray v. Gray, 2 Sim. (N. S.) 273; Vandenberg v. Palmer, 4 Kay & J. 204; Stapleton v. Stapleton, 14 Sim. 186; Searle v. Law, 15 Sim. 99; Bridge v. Bridge, 16 Beav. 315; Steele v. Waller, 28 Beav. 466; Paterson v. Murphy, 11 Hare, 88; Bentley v. MacKay, 15 Beav. 12; Ownes v. Ownes, 23 N. J. Eq. 60; Crawford's App., 61 Penn. St. 52; Morgan v. Malleson, L. R. 10 Eq. 475; McFadden v. Jenkyns, 1 Hare, 471. In the last case, Sir J. Wigram said: "If the owner of property executes an instrument by

(a) A trust deed in which the trustee's name is omitted, may be treated as an equitable mortgage on the application of the *cestui que trust*. Dulaney v. Willis, 95 Va. 606. See Dunn v. Raley, 58 Mo. 134.

(b) A voluntary trust, of which the settlor has attempted to make himself the trustee, where the settlor has kept the property in his own hands subject to his own disposal, and has never informed the beneficiaries of it, is invalid. Welch v. Henshaw, 170 Mass. 409. A voluntary conveyance, for the grantor's

own benefit, if fraudulent as to creditors, may be set aside by subsequent creditors. Brundage v. Cheneworth, 101 Iowa, 256; Schenck v. Barnes, 49 N. Y. S. 222; 156 N. Y. 316; Scott v. Keane, 79 Md. 709; Williams v. Williams, (Ky.), 43 S. W. 198. If not fraudulent as to creditors, a secret trust for the grantor will not be treated as void. *Ibid.*; Brown v. Bradford, 103 Iowa, 378; *infra*, § 585; Crawford v. Langmaid, 171 Mass. 309; Donahoe v. Chicago Cricket Club (Ill.), 52 N. E. 351.

agreement, without consideration, to execute a declaration of trust, courts will not act upon it; but if a party has declared himself to be a trustee, the beneficial interest in the property becomes vested in the *cestui que trust* without further action, and the *cestui que trust* can enforce his rights.¹

§ 97. If the donor or settlor does not propose to make himself a trustee, the trust is not *perfectly* created. As where there is a mere *intention* of creating a trust, or a mere voluntary agreement to do so, and the donor or settlor contemplates some further act to be done by him to give it effect, the trust is not completely instituted; and if it is voluntary, the settlor cannot be compelled to complete it.²

which he declared himself a trustee, and had disclosed that instrument to the *cestui que trust*, and afterwards acted upon it, that might perhaps be sufficient, and a court of equity might not be bound to inquire further into an equitable title so established." Mr. Lewin says that this is "expressed with *unnecessary caution*." Lewin on Trusts, 57. The contrary was held in *Bowering v. King*, 37 Ala. 606; *Walker v. Crews*, 73 Ala. 412, 417.

¹ *Ex parte Pye*, 18 Ves. 149; *Gee v. Liddell*, 35 Beav. 621. To create a trust, a man must express an intention to become a trustee; and words that express a present gift show an intention to give property over to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise. *Heartley v. Nicholson*, L. R. 19 Eq. 244; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Ellison v. Ellison*, 6 Ves. 656. If one mode of transfer is indicated, the court will not give effect to it by applying another. *Milroy v. Lord*, 2 De G., F. & J. 264; *Warriner v. Rogers*, L. R. 10 Eq. 340.

² *Lloyd v. Brooks*, 34 Md. 33; *Swan v. Frick*, id. 139; *Cotteen v. Missing*, 1 Mad. 176; *Bayley v. Boulcott*, 4 Russ. 345; *Dipple v. Corles*, 11 Hare, 183; *Jones v. Lock*, L. R. 1 Ch. 25; *Caldwell v. Williams*, 1 Bailey, Eq. 175; *Crompton v. Vasser*, 19 Ala. 259; *Hayes v. Kershaw*, 1 Sand. Ch. 258; *Reid v. Vanarsdale*, 2 Leigh, 560; *Evans v. Battle*, 19 Ala. 378; *Pinkard v. Pinkard*, 2 Ala. 649; *Minturn v. Seymour*, 4 Johns. Ch. 438; *Acker v. Phoenix*, 4 Paige, 395; *Dawson v. Dawson*, 1 Dev. Eq. 93; *Banks v. May*, 3 A. K. Marsh. 435; *Bibb v. Smith*, 1 Dana, 589; *Darlington v. McCooole*, 1 Leigh, 36; *Tiernan v. Poor*, 1 Gill & J. 217; *Forward v. Armistead*, 12 Ala. 124; *Lawry v. McGee*, 3 Head, 239; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Dillinger v. Llewelyn*, 4 De G., F. & J. 517; *Gardner v. Merritt*, 32 Md. 78; *Lantermann v. Abernathy*, 47 Ill. 437; *Shaw v. Bur-*

So if the paper executed by the settlor is in the nature of a testamentary disposition which requires to be proved in a court of probate, but is so imperfectly executed that it cannot be proved as a last will and testament, no trust will be created.^{1(a)}

§ 98. But if the trust is *perfectly created*, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settlor, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, at the suit of a party interested, although it was without consideration, and the possession of the property was not changed.^{2 (b)} And this will be true although the

ney, 1 Ired. Eq. 148; Clarke v. Lott, 11 Ill. 105; Read v. Robinson, 6 W. & S. 338; Yarborough v. West, 10 Ga. 471; Colman v. Sarel, 3 Bro. Ch. 12; Antrobus v. Smith, 12 Ves. 39; Edwards v. Jones, 1 M. & Cr. 226; Dillon v. Coppin, 4 id. 647; Jefferys v. Jefferys, 1 Cr. & Phil. 138; Penfold v. Mould, L. R. 4 Eq. 562; Disher v. Disher, 1 P. Wms. 204.

¹ *Ante*, §§ 92-94; Warriner v. Rogers, L. R. 16 Eq. 340; Richardson v. Richardson, L. R. 3 Eq. 686; Morgan v. Malleson, L. R. 10 Eq. 475.

² Stone v. Hackett, 12 Gray, 227; Ellison v. Ellison, 6 Ves. 662; Pul-

(a) If a settlement is intended to effectuate by gift, the court will not give effect to it by construing it as a trust. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. Moore v. Moore, 43 L. J. Ch. 617, 623; Martin v. Funk, 75 N. Y. 134; Gannon v. McGuire, 47 N. Y. S. 870. If a gift was clearly intended by a writing, which fails for want of delivery, the writing cannot be upheld as a declaration of trust. Wadd v. Hazelton, 137 N. Y. 215; Smith's Estate, 144 Penn. St. 428; Roberts v. Mullinder, 94 Ga. 493; Wylie v. Charlton, 43 Neb.

840; Soulard's Estate, 141 Mo. 642. The delivery of the property may precede or follow the gift. Alderson v. Peel, 64 L. T. 645. It may be made to a third person for the donee. Bump v. Pratt, 84 Hun, 201. But delivery is neither necessary nor predicable of a gift of a beneficial interest. Smith's Estate, 144 Penn. St. 428. A gift may arise from necessary implication. Bishop v. McClland, 44 N. J. Eq. 450. A deed of gift may be admitted to probate as a will, if properly executed therefor. *In re Slinn*, 15 P. D. 156; see Graves v. Safford, 41 Ill. App. 659; Sanborn v. Sanborn, 65 N. H. 172.

(b) See 1 Ames on Trusts (2d ed.), 125, n.

person who is intended to be benefited has no knowledge of the act at the time it is done, provided he accepts and

vertoft v. Pulvertoft, 18 Ves. 99; Sloan v. Cadogan, Sugd. Ven. & Pur. App. 26; Edwards v. Jones, 1 M. & Cr. 226; Wheatley v. Purr, 1 Keen, 551; Garrard v. Lauderdale, 3 Sim. 1; Collinson v. Patrick, 2 Keen, 123; Dillon v. Coppin, 4 M. & Cr. 647; Meek v. Kettlewell, 1 Hare, 464; Fletcher v. Fletcher, 4 Hare, 74; Price v. Price, 4 Beav. 598; Bridge v. Bridge, 16 Beav. 315; Beech v. Keep, 18 Beav. 285; Donaldson v. Donaldson, 1 Kay, 711; Scales v. Maude, 6 De G., M. & G. 43; Airey v. Hall, 3 Sm. & Gif. 315; Wright v. Miller, 4 Seld. 9; Andrews v. Hobson, 23 Ala. 219; Lechmere v. Carlisle, 3 P. Wms. 222; Bunn v. Winthrop, 1 Johns. Ch. 329; Minturn v. Seymour, 4 id. 498; Dennison v. Goehring, 7 Barr, 175; Tolar v. Tolar, 1 Dev. Eq. 456; Dawson v. Dawson, id. 93, 396; Hardin v. Baird, 6 Litt. 340; Hayes v. Kershaw, 1 Sand. Ch. 261; Fogg v. Middleton, Riley, Ch. 193; Greenfield's Estate, 2 Harr. 489; Kirkpatrick v. McDonald, 1 Jones, 387; Graham v. Lambert, 5 Humph. 595; Henson v. Kinard, 3 Strob. Eq. 371; Dupre v. Thompson, 4 Barb. 280; Cox v. Sprigg, 6 Md. 274; Lane v. Ewing, 31 Mo. 75; Ownes v. Ownes, 23 N. J. Eq. 60; Baker v. Evans, 1 Wins. Eq. (N. C.), 109; Massey v. Huntington, 118 Ill. 80; Richardson v. Richardson, L. R. 3 Eq. 686; Toker v. Toker, 3 De G., J. & S. 487; Howard v. Savings Bank, 40 Vt. 597; Tanner v. Skinner, 11 Bush (Ky.), 120. Except against creditors and *bona fide* purchasers without notice. Padfield v. Padfield, 68 Ill. 25; Borum v. King, Ala. Sel. Cas. 534, is *contra*.

In *Stone v. Hackett*, 12 Gray, 227, the settlor had purchased stocks in various corporations in the name of H. P. K., and took from H. P. K. a declaration that she held the stocks upon certain trusts therein particularly specified. Afterwards the settlor caused H. P. K. to indorse and sign upon the backs of the certificates a transfer to the plaintiff and a power of attorney to the plaintiff to complete the transfer, and took from her a declaration of trust, stating the purposes for which she held the stock. The settlor died, and a question arose as to the title to the stock. Chief-Justice Bigelow said: "The key to the solution of the question raised in this case is to be found in the equitable principle now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions enforced and carried into effect against all persons except creditors and *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the

ratifies it when he is notified.¹ But if there is any fraud, accident, or mistake in the transaction, courts will not carry a voluntary trust into execution.²

relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery. The leading case in which the principle is declared and acted upon is *Ellison v. Ellison*, 6 Ves. 656, in which Lord Eldon decreed the enforcement of a trust which in its creation was wholly voluntary and without consideration. This has been followed by many other cases in which the same principle was recognized. *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Ex parte Pye*, id. 140; *Sloan v. Cadogan*, Sugd. Ven. & Pur. (11th ed.) 1119; *Fortescue v. Barnett*, 3 My. & K. 36; *Wheatley v. Purr*, 1 Keen, 551; *Blakely v. Brady*, 2 Dru. & Wal. 311; *Browne v. Cavendish*, 1 Jon. & La. 637; *Kekewich v. Manning*, 1 De G., M. & G. 176. The last-named case contains a full discussion of all the authorities, and a clear and accurate statement of the law upon the subject.

“The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity of trustee was full and complete, and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff’s title, as between the parties the delivery of the certificates of stock, with the assignments of some of them and the power of attorney to transfer the others, was equivalent to a complete executed transfer of the shares. Nor is it at all material to the validity of the plaintiff’s title that transfers of the shares had not been recorded in the books of the different corporations and new certificates of stock taken out by her. That was not necessary to the conveyance of the legal title as between the donor and the plaintiff. This is well settled by the authorities in this State. *Quinn v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Ellis v. Essex Merrimack Bridge*, 2 Pick. 248; *Sargent v. Franklin Ins. Co.*, 8 Pick. 96; *Eames v. Wheeler*, 19 Pick. 444. Such, too, is the plain import of the statute. . . . Nothing therefore was left *in fieri*. The transaction was a completely executed transfer of property, and fully created a trust which, according to the principles already stated, a court of equity is bound to recognize and enforce.” *Penfield v. Public Adm’r*,

¹ *Neilson v. Blight*, 1 Johns. Cas. 205; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Weston v. Barker*, 12 Johns. 276; *Cumberland v. Codrington*, 3 Johns. Ch. 261. And see *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Hosford v. Merwin*, 5 Barb. 51; *Wetzel v. Chaplin*, 3 Bradf. 386; *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 231.

² *Lister v. Hodgson*, L. R. 4 Eq. 30.

§ 99. The trust must be for a lawful purpose and perfectly created. If a will creates several trusts, some of which are legal and others not, the lawful ones will be upheld if they can be separated from the others.¹ Whether the trust is *perfectly created* or not, is a question of fact in each case; and the court, in determining the fact, will give effect to the situation and relation of the parties, the nature and situation of the property, and the purposes or objects which the settlor had in view in making the disposition.² A vast

2 E. D. Smith, 505; *Millsbaugh v. Putnam*, 16 Abb. 380; *Hunter v. Hunter*, 19 Barb. 631; *Grangiar v. Arden*, 10 Johns. 293; *Bendow v. Townsend*, 1 My. & K. 506; *Mendon v. Merrill*, 2 Edw. Ch. 333; *Howard v. Windham County Savings Bank*, 40 Vt. 597; *Sherwood v. Andrews*, 2 Allen, 79; *Warriner v. Rogers*, L. R. 16 Eq. 341; *Blasdel v. Locke*, 62 N. H. 238.

¹ *Kennedy v. Hoy*, 105 N. Y. 134.

² See *Brabrook v. Savings Bank*, 104 Mass. 228, where deposits in savings banks are fully discussed. *Jones v. Lock*, L. R. 1 Ch. 25. In this case a father put a check for £900 into the hands of his child, nine months old, with the strongest expression of an intent to give the check to the child. He afterwards took the check and locked it up, saying he should keep it for the child, and died the same day. A bill was brought in behalf of the child against his father's representatives to enforce his interest in the check as a trust. Lord Cranworth said: "No doubt a gift may be made by any person *sui juris* and *compos mentis*, by conveyance of real estate or by delivery of chattels; and there is no doubt also that by some decisions, unfortunate I must think them, a parol declaration of a trust of personalty may be perfectly valid even when voluntary. If I give any chattel, that of course passes by delivery, and if I say expressly, or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration. I do not think it necessary to go into any of the authorities cited before me. *They all turn upon the question whether what has been said was a declaration of trust or an imperfect gift.* In the latter the parties would receive no aid from a court of equity, if they claimed as volunteers; but if there has been a declaration of trust, then it will be enforced whether there has been a consideration or not. *Therefore the question in each case is one of fact, has there been a gift or not, or has there been a declaration of trust or not?* This case turns on the very short question whether the father intended to make a declaration that he held the property in trust for the child, and I cannot come to any other conclusion than that he did not." His Lordship then comments upon the evidence, and says "that it was all very natural, but that the father would have been very much surprised if he

number of cases have been decided involving the last three propositions. There is much seeming conflict in the decisions, and it would be an endless, perhaps useless, task to attempt to reconcile them. The proposition laid down by Lord Cranworth, that it is a question of fact in each case whether a perfect trust is created or not, goes far to reconcile the differences. Some judges give greater prominence to one element of fact in the case than other judges, and thus different judges might decide the same question upon the facts in a different manner; but so long as it is a question of fact in each case, the rule of law is the same, however the fact may be found. When a deed fully declaring the trust is executed and delivered, and nothing further remains to be done by the grantor, the trust is created.¹ Failing to name the beneficiary will not be fatal, if the title is properly conveyed and the trustee *admits* that he holds for the plaintiff.² In New York, however, it is held that the absence of a defined beneficiary capable of enforcing the trust is in general fatal, and that giving power to the trustee to select the beneficiary is not sufficient, unless the persons among whom the choice is to be made are so defined and limited that a court of equity could in default of selection by the trustee enforce the trust by a distribution among all the beneficiaries.³ In this case the trust was to have prayers

had been told that he had parted with the £900, and could no longer dispose of it; and that the child, by his next friend, could have brought an action of trover for the check." See *Scales v. Maude*, 6 De G., M. & G., 51; *Hackney v. Vrooman*, 62 Barb. 650; *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Martin v. Funk*, 75 N. Y. 134; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; *Taylor v. Henry*, 48 Md. 550; *Stone v. Bishop*, 4 Cliff. 593; *Ray v. Simmons*, 11 R. I. 266; *O'Brien, Pet'r*, id. R. I. 419; *Blaisdell v. Locke*, 52 N. H. 238. The decisions are not uniform as to the effect of a deposit in Savings Bank and entry in the books for the benefit of, or in trust for a child or other beneficiary: in some cases it is held sufficient declaration of a trust, and in others something further is required, as notice, or delivery of the book.

¹ *Massey v. Huntington*, 118 Ill. 80

² *Sleeper v. Iselin*, 62 Iowa, 585; *Boardman v. Willard*, 73 Iowa, 20.

³ *Holland v. Alcock*, 108 N. Y. 312.

offered in a Roman church for the repose of the souls of the grantor, his family, and all others in purgatory. A deed saying, "The following notes I leave in trust with E. C. to be divided among A., B., and C. at my death," was held to create a perfect present trust.¹ A conveyance may be made upon trusts to be subsequently declared, and when the subsequent declaration occurs, the trust is treated in the same way as if declared at the time of the deed.² The consent or even knowledge of the *cestui* is not a necessary element in the creation of a valid trust. A transfer of stock, for instance, in proper form vests the title in the transferee subject to his repudiation when informed of the transaction.³

§ 100. If the donor or settlor propose to make a stranger the trustee of his property, and the property is a legal estate, capable of legal transfer and delivery, the trust is not perfectly created, unless the legal interest is actually transferred to or vested in the trustee. It is not enough that the settlor executed a paper purporting to pass it, if in fact the paper does not have that effect. The intention of the settlor to divest himself of the legal title must be consummated and executed, or the court will not enforce the trust. As, for instance, if a settlor execute a deed in trust of scrip, stock, or shares in corporations, which scrip, stock, or shares can be transferred only by assignment upon the backs of the certificates, and upon the company's books, the deed, if voluntary, will not create a trust which the court will execute, unless the stocks are actually transferred in fact.⁴

¹ *Egerton v. Carr*, 94 N. C. 648.

² *Ireland v. Geraghty*, 11 Biss. (U. S.) 465.

³ *Standing v. Bowring*, 31 Ch. D. 282.

⁴ *Garrard v. Lauderdale*, 2 R. & M. 451; 3 Sim. 1; *Meek v. Kettlewell*, 1 Hare, 464; *Dillin v. Coppin*, 4 M. & Cr. 647; *Cunningham v. Plunkett*, 2 Y. & Col. Ch. 245; *Searle v. Law*, 15 Sim. 95; *Price v. Price*, 14 Beav. 598; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Tottingham v. Vernon*, 29 Beav. 604; *Dillon v. Bone*, 3 Gif. 238; *Milroy v. Lord*, 8 Jur. (n. s.) 806; 4 De G., F. & J. 264; *Parnell v. Hingston*, 3 Sm. & Gif. 337; *Kiddill v. Farnell*, ib. 428; *Weale v. Ollive*, 17 Beav. 252; *Denning v. Ware*, 22 Beav. 184; *Roberts v. Roberts*, 11 Jur. (n. s.) 992; *For-*

And so of mortgages, mortgage debts, and other securities. If anything remains for the donor to do to vest the legal title in the donee, the court cannot execute the trust, if it is voluntary. Lord Eldon stated the principle thus: "I take the distinction to be, that if you want the assistance of the court to constitute a *cestui que trust*, and the instrument is *voluntary*, you shall not have the assistance for the purpose of constituting a *cestui que trust*, as upon a covenant to transfer stock, &c.; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.¹

§ 101. But if the subject of the trust is a legal interest that cannot be transferred or assigned at law, as a bond or any other *chose in action*, what then is the rule? On the one hand it has been argued that in equity the universal rule is, that a court will not enforce a voluntary agreement in favor of a volunteer, and as by the supposition the legal interest remains in the settlor (who, therefore, at law retains the full control and benefit of it), a court of equity will not, in the absence of a valuable or good consideration, deprive him of that interest, with which he has not actually parted. And this reasoning has been sustained by numerous cases.² On the other hand, as the settlor cannot divest himself of the legal interest, to say that he shall not constitute another

est *v. Forest*, 34 L. J. Ch. 428; *Peckham v. Taylor*, 31 Beav. 250; *Lonsdale's Estate*, 29 Penn. St. 407; *Cressman's App*, 42 id. 147; *Jones v. Obinchain*, 10 Grat. 259; *Henderson v. Henderson*, 21 Mo. 379; *Lane v. Ewing*, 31 Mo. 75; *Gilchrist v. Stevenson*, 9 Barb. 9; *Doty v. Wilson*, 5 Lans. 7.

¹ *Ellison v. Ellison*, 6 Ves. 662; *Antrobus v. Smith*, 12 Ves. 39; *Colman v. Sarel*, 1 Ves. Jr. 50; 3 Bro. Ch. 12; *Dening v. Ware*, 22 Beav. 184; *Airey v. Hall*, 3 Sm. & Gif. 315; *Kiddill v. Farnell*, id. 428; *Pulvertoft v. Pulvertoft*, 18 Ves. 89; *Brabrook v. Savings Bank*, 104 Mass. 228.

² *Edwards v. Jones*, 1 My. & Cr. 226; *Ward v. Audland*, 8 Sm. 571; *C. P. Coop. Cas.* (1846), 146; 8 Beav. 201; *Meek v. Kettlewell*, 1 Hare, 464; *Scales v. Maude*, 6 De G., M. & G. 43; *Sewell v. Moxsy*, 2 Sim. (n. s.) 189; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285.

as trustee without passing the legal interest, would be to debar him from the creation of a trust at all in the hands of another, and that the rule, therefore, should be, that if the settlor make all the assignment of the property in his power, and perfect the transaction as far as the law permits, the court should recognize the act and support the validity of the trust. And this reasoning has also been supported by many decided cases.¹ In a late leading case, Lord Justice K. Bruce made a thorough examination of all the authorities, and established this proposition: "It is upon legal and equitable principles, we apprehend, clear that a person *sui juris*, acting freely and fairly, and with sufficient knowledge, ought to have, and *has it in his power to make* in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary, or howsoever circumstanced.*"² Mr. Lewin says, "that it is conceived that this principle will, for the future, prevail,"³ and it has been followed in the later cases.⁴ But if part of the property be capable of delivery and transfer, and part of it incapable of delivery, and that which might have been legally assigned and delivered is not so assigned and delivered, no trust is created.⁵

¹ Fortescue v. Barnett, 3 My. & K. 36; Roberts v. Lloyd, 2 Beav. 376; Blakely v. Brady, 2 Dru. & Wal. 311; Airey v. Hall, 3 Sm. & Gif. 315; Parnell v. Hingston, id. 337; Pearson v. Amicable Office, 27 Beav. 229; Sloan v. Cadogan, Sugd. Vend. & Pur. App.

² Kekewich v. Manning, 1 De G., M. & G. 187.

³ Lewin on Trusts, 58.

⁴ Wilcocks v. Hannington, 5 Ir. Ch. 45; Voyle v. Hughes, 2 Sm. & Gif. 18; Gilbert v. Overton, 33 L. J. Ch. 683; Way's Settlement, 10 Jur. (N. S.) 1166; 34 L. J. Ch. 49; Lambe v. Orton, 1 Dr. & Sm. 125; Donaldson v. Donaldson, Kay, 711; Appeal of Elliott's Ex'rs, 50 Penn. St. 75. And see Hill on Trustees, 140, 141 (4th Am. ed.); Morgan v. Malleson, L. R. 10 Eq. 475.

⁵ Woodford v. Charnley, 28 Beav. 96. In Richardson v. Richardson L. R. 3 Eq. 686, there was a voluntary assignment of all the personal property, whatsoever and wheresoever, of the assignor. There were promissory notes not indorsed by the assignor, but it was held to be a complete assignment of them in trust.

§ 102. It is well established that if the subject of the trust is an equitable interest, the *cestui que trust* may create a valid trust by executing an assignment of his interest to a new trustee, for the equitable interest can be transferred from one to another, and as the relation of trustee and *cestui que trust* already exists, the original settlor need not be called upon to do any act.¹ Lord Justice K. Bruce said: "Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life-interest for C. absolutely, surely it must be competent for C., in the lifetime of B., with or without the consent of A., to make an effectual gift of his interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D?"² So the *cestui que trust* can assign voluntarily his equitable interest to a stranger in trust for himself.³ Or by a new declaration of trust the *cestui que trust* can direct the old trustees to hold his interest thereafter upon new trusts.⁴ But it has been decided that a voluntary assignment of a *mere expectancy* in an equitable interest did not perfectly create a trust that the court would enforce; that any dealing with what a person only expects to have must in some sense be *in fieri*.⁵ And if a settlor intend to make a voluntary settlement in a particular mode, as by conveying the legal title, and he fails to convey the

¹ Sloan v. Cadogan, Sugd. Vend. & Pur. App. This case was questioned in Beatson v. Beatson, 12 Sim. 281, but it has since been acted on. Voyle v. Hughes, 2 Sm. & Gif. 18; Lambe v. Orton, 1 Dr. & Sm. 125; Gilbert v. Overton, 2 Hem. & M. 110; Woodford v. Charnley, 28 Beav. 99; Way's Settlement, 2 De G., J. & Sm. 365, reversing 4 New R. 453. And see Reed v. O'Brien, 7 Beav. 32; Bridge v. Bridge, 16 Beav. 315; Gannon v. White, 2 Ir. Ch. 207; Donaldson v. Donaldson, 1 Kay, 711.

² Kekewich v. Manning, 1 De G., M. & G. 188.

³ Sloan v. Cadogan, *ut supra*; Cotteen v. Missing, 1 Mad. 176; Godsall v. Webb, 2 Keen, 99; Collins v. Patrick, *id.* 123; Wilcocks v. Hannington, 5 Ir. Ch. 38.

⁴ Rycroft v. Christy, 3 Beav. 238; McFadden v. Jenkyns, 1 Hare, 458; 1 Phill. 153.

⁵ Meek v. Kettlewell, 1 Hare, 464, by Sir J. Wigram, affirmed by Lord Lyndhurst in 1 Phill. 342.

title, the court will not lend its aid to give effect to the settlement in another and different mode, as by converting the attempted conveyance into a declaration of trust, for that would be to convert every imperfect voluntary instrument into a perfect trust.¹

§ 103. In case of a sale of real estate for a valuable consideration, nothing passes by the deed, although it is signed and sealed, until the purchase-money is paid and the deed delivered to the vendee, or until so much is done that the law will construe the deed to be for the use, or under the control, of the vendee; but if a party execute a voluntary settlement and the deed recites that it is sealed and delivered, it will be binding upon the settlor although he never parts with it, but keeps it in his possession until his death.² (a) Still, if there are circumstances that show that the settlor never intended the deed, though executed, to operate, the court will consider them; and if the deed was

¹ *Milroy v. Lord*, 8 Jur. (N. S.) 809; *Lister v. Hodgson*, L. R. 4 Eq. 30.

² *In re Way's Trust*, 2 De G., J. & Sm. 365; *Fletcher v. Fletcher*, 4 Hare, 67; *Hope v. Harman*, 11 Jur. 1097; *Jones v. Obinchain*, 10 Grat, 259; *Urann v. Costes*, 109 Mass. 581; *Sear v. Ashwell*, 3 Swanst. 411; *Barlow v. Heneage*, Pr. Ch. 211; *Clavering v. Clavering*, 2 Vern. 474; *Cecil v. Butcher*, 2 J. & W. 573; *Garnons v. Knight*, 5 B. & C. 671; *Exton v. Scott*, 6 Sim. 31; *Hall v. Palmer*, 3 Hare. 532; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, id. 329; *Boughton v. Boughton*, 1 Atk. 625; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Roberts v. Roberts*, Daniel, 143. And see *Cecil v. Butcher*, 2 J. & W. 565.

(a) A declaration of trust, when relied upon, must be shown to have been delivered as well as signed or acknowledged, even when recorded by the grantor. Delivery is presumed when the paper is produced by a beneficiary who is its proper custodian. *Govin v. De Miranda*, 76 Hun, 414; *Starbuck v. Farmers' Loan Ass'n*, 51 N. Y. S. 58; *Loring v. Hildreth*, 170 Mass. 328. But a deed executed and acknowledged as

a voluntary family settlement, in the presence of the grantor's family, may be effective from the time of its execution, though retained by the grantor. *Tarbox v. Grant*, 56 N. J. Eq. 199; *O'Neil v. Greenwood*, 106 Mich. 572. The trustee's written acceptance, on the deed of trust, conclusively shows delivery. *New South B. Co. v. Gann*, 101 Ga. 678.

never delivered it will be one circumstance, and it may be a controlling circumstance, to show that the trust was never perfectly created or that it was revocable.¹

§ 104. A completed trust without reservation of power of revocation can only be revoked by consent of all the *cestuis*.² If a voluntary trust for the benefit, wholly or partly, of some person or persons other than the grantor³ is once perfectly created, and the relation of trustee and *cestui que trust* is once established, it will be enforced, though the settlor has destroyed the deed,⁴ or has attempted to *revoke* it by making a second voluntary settlement of the same property or otherwise,⁵ or if the estate, by some accident, afterwards becomes

¹ *Uniacke v. Giles*, 2 Moll. 257; *Antrobus v. Smith*, 12 Ves. 39; *Birch v. Blagrove*, Amb. 262; *Dillon v. Coppin*, 4 M. & Cr. 647; *Platimone v. Staple*, Coop. 250; *Naldred v. Gilham*, 1 P. Wms. 577; *Cotton v. King*, 2 P. Wms. 358, 674; *Alexander v. Brame*, 7 De G., M. & G. 525; *Otis v. Beckwith*, 49 Ill. 121.

² *Sargent v. Baldwin*, 60 Vt. 17.

³ *Light v. Scott*, 88 Ill. 239.

⁴ *Tolar v. Tolar*, 1 Dev. Eq. 456; *Dawson v. Dawson*, id. 93, 396; *In re Way's Trust*, 10 Jur. 837; 2 De G., J. & Sm. 365; *Ritter's App.* 59 Penn. St. 9.

⁵ *Newton v. Askew*, 11 Beav. 145; *Rycroft v. Christy*, 3 Beav. 238; *Boughton v. Boughton*, 1 Atk. 625; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Clavering v. Clavering*, 2 Vern. 473; *Roberts v. Roberts*, Daniel, 143; *Cook v. Fountain*, 3 Swans. 565; *Young v. Peachy*, 2 Atk. 254; *Cecil v. Butcher*, 2 J. & W. 565; *Kekewich v. Manning*, 1 De G., M. & G. 176; *In re Way's Trust*, 2 De G., J. & S. 365; *Hildreth v. Eliot*, 8 Pick. 293; *Stone v. Hackett*, 12 Gray, 227; *Falk v. Turner*, 101 Mass. 494; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, id. 329; *Denison v. Goehring*, 7 Barr, 175; *Viney v. Abbott*, 109 Mass. 302; *Sewall v. Roberts*, 115 Mass. 272; *Cobb v. Knight*, 74 Maine, 253; *Gulick v. Gulick*, 39 N. J. Eq. 401; *Williams v. Vreeland*, 32 id. 135; *McPherson v. Rollins*, 107 N. Y. 316; *Nearpass v. Newman*, 106 N. Y. 47; *Meigs v. Meigs*, 22 Hun (N. Y.), 453. As where A. had a policy of insurance issued on his life "in trust" for his children, and notified the *cestuis* and paid the premiums for several years, it was held that he could not revoke the interest of his children, and a second policy issued substantially as a continuation of the first, but made payable to A.'s widow, was held for the children. *Garner v. Ger. L. Ins. Co.*, 110 N. Y. 266. It must be observed, however, that the absence of a power to revoke a voluntary

revested in the settlor.¹ In all these cases the first perfectly created trust will be upheld, with all its consequences, and

settlement or trust is viewed by courts of equity as a circumstance of suspicion, and very slight evidence of mistake, misapprehension, or misunderstanding on the part of the settlor will be laid hold of to set aside the deed. The following opinion by the Chancellor (Runyon) in a late case in New Jersey, *Garnsey v. Mundy*, 24 N. J. Eq. 243, reprinted in 13 Am. Law Reg. (n. s.) 315, with a learned note by Mr. Bispham, gives a very clear view of the law applicable to voluntary settlements without a power of revocation made under circumstances which may lead to the conclusion that the settlor did not intend to put the property entirely beyond his control, or that he acted unadvisedly or improvidently:—

“ On the 4th of July, 1861, the complainant, Sarah M. Garnsey, who was then a single woman (her maiden name being Sarah M. Mundy), and of the age of about twenty-one years, was seized in her own right, in fee, in possession, through inheritance from her father, James Mundy, deceased, of a parcel of unimproved farming land of about seven acres in Middlesex County in this State, and was also the owner of an undivided third of the remainder, in fee, of two other lots there, — one a wood-lot of about two acres, and the other the house-lot, containing about nine and a half acres, which had been set off to her mother, Elizabeth Mundy, in dower. She had no other property, real or personal. By a deed of that date she conveyed in fee to her mother, for the expressed consideration of natural love and affection to the grantor's daughter, Elmina May, and of fifty cents to her paid by her mother, the whole of said property on the following trust: That the said Elizabeth Mundy shall and will hold, use, occupy, and rent the same, and receive the rents, issues, and profits thereof to and for the maintenance of said Elmina May Mundy until she shall arrive at the age of twenty-one years, or in case of her death, the said Elizabeth Mundy, her heirs or assigns, shall pay the rents or profits arising as above to the said Sarah M. Mundy, and in further trust to convey the land and premises with the appurtenances herein before mentioned, in fee-simple, to the said Elmina May Mundy, or in equal shares to her and any other children of said Sarah M. Mundy (should there be any other), when the youngest of said children shall have attained the age of twenty-one years; and in the event that no issue of the said Sarah M.

¹ *Ellison v. Ellison*, 6 Ves. 656; *Smith v. Lyne*, 2 Y. & Col. 345; *Patterson v. Murphy*, 11 Hare. 88; *Gilchrist v. Stevenson*, 9 Barb. 9; *Uzzle v. Wood*, 1 Jones, Eq. 226; *Browne v. Cavendish*, 1 J. & L. 637. See also *Aylsworth v. Whitcomb*, 13 R. I. 298, where it is said, if deliberate intent to make it irrevocable does not appear, the absence of power of revocation will be *prima facie* evidence of mistake. *Estes v. Tillinghast*, 4 R. I. 276; *Russell's App.* 75 Penn. St. 269.

the settlor will be declared to be a trustee.¹ (a) A trust once created and accepted without reservation of power can

Mundy shall survive to inherit the same, that the estate herein named shall be conveyed according to the direction of the executor of the will of the said Sarah M. Mundy heretofore made.'

"In 1864 Sarah M. Mundy was married to Silas Garnsey. The bill is filed by her and her husband against her two children and her mother, the trustee, to set aside the deed. The property at the time of making the conveyance in question was and still is of but little value as farming land. The buildings upon the house-lot, which alone was improved, were old and dilapidated and have gone to decay, and even the fences on the premises are down. The trustee, who is a woman of advanced age, was and is wholly without means, except her dower. The deed is voluntary. It was made at the suggestion and on the advice of the grantor's mother, and of her uncle, Dr. Jacob Martin, her mother's brother. The grantor neither proposed nor suggested it. Indeed, it appears she knew nothing of it until it was presented to her for her signature, and she was urged by her mother and her uncle to execute it, 'for her good.' Their motive, they say, was to save the property for her, to prevent her from improvidently disposing of it. No professional advice whatever was taken. The deed was drawn by a son of Dr. Martin, at the latter's direction; and its execution was witnessed by Dr. Martin, who, being a commissioner of deeds, took the grantor's acknowledgment. The grantor had no advice whatever, except that which her mother and uncle gave her. Not only was she not consulted in regard to the matter in any way, but it was clear that she did not understand the provisions of the deed, nor their effect. She did not suppose that the effect of the conveyance would be to place the property beyond her reach and control. Nay, her mother and uncle both supposed that the trust was revocable, and that the grantor under it retained full power to sell the property, with the trustee's consent. The

¹ *Ellison v. Ellison*, 6 Ves. 656; *Smith v. Lyne*, 2 Y. & Col. 345; *Paterson v. Murphy*, 11 Hare, 88; *Gilchrist v. Stevenson*, 9 Barb. 9.

(a) See *Thurston*, petitioner, 154 Mass. 596; *Keyes v. Carlton*, 141 Mass. 45; *Beekman v. Hendrickson* (N. J.), 21 Atl. 567; *Crue v. Caldwell*, 52 N. J. L. 215; *Dickerson's Appeal*, 115 Penn. St. 198; *Lines v. Lines*, 142 id. 149; *Stockett v. Ryan*, 176 id. 71; *Gaylord v. Lafayette*, 115 Ind. 423; *Hatch v. St. Joseph*, 68 Mich. 220; *Ewing v. Warner*, 47 Minn. 446; *Hellman v. McWilliams*, 70 Cal. 449; *Nichols v. Emery*, 109 Cal. 323; *Nelson v. Ratliff*, 72 Miss. 656; *Haxton v. McClaren*, 132 Ind. 235; *Copeland v. Summers*, 138 Ind. 219; *Brunson v. Henry*, 140 Ill. 455; *Strong v. Weir*, 47 S. C. 307; *Riggan v. Riggan*, 93 Va. 78.

only be revoked by the full consent of all parties in interest;¹ if any of the parties are not in being, or are not *sui juris*, it

conveyance not only deprived the grantor of all her property, without reserving a power of revocation to enable her to meet the exigencies of life, but the arrangement which it made was in other respects injudicious, disadvantageous, and improvident. The motives and intentions of the mother and uncle were most praiseworthy. Their design manifestly was simply to put the property in such a position that the grantor could not dispose of it without her mother's consent and concurrence. They in good faith urged her to make the deed. She and they were alike under an erroneous impression as to the effect of it. From the operation of such a conveyance, made under such circumstances, equity will relieve the complainants. The rigidity of the ancient doctrine, that a voluntary settlement, not obtained by fraud, is binding on the settlor, and will not be set aside in equity, although the settlor has not reserved a power of revocation (*Villers v. Beaumont*, 1 Vern. 100; *Petre v. Espinasse*, 2 M. & K. 496; *Bill v. Cureton*, 2 M. & K. 503), has been relaxed by modern decisions. In the case first cited, *Villers v. Beaumont*, decided in 1682, the Lord Chancellor said: 'If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put on himself, but he must lie down under his own folly.' Recent cases, however, have narrowed the doctrine, and have held, not only that the absence of a power of revocation throws on the person seeking to uphold the settlement the burden of proving that such a power was intentionally excluded by the settlor, and that in the absence of such proof, the settlement may be set aside, but that equity will set aside the settlement on the application of the settlor, when it appears that he did not intend to make it irrevocable, or when the settlement would be unreasonable or improvident for the lack of a provision for revocation. (a) In *Everitt v. Everitt* (1870), L. R. 10 Eq. 405, — a case

¹ *Hellman v. McWilliams*, 70 Cal. 449.

(a) Voluntary settlements, without consideration, when testamentary in character, are now often treated as revocable, though a power of revocation may not be therein reserved. *Neal v. Black*, 177 Penn. St. 83; *Chestnut St. Nat. Bank v. Fidelity Ins. Co.*, 186 id. 333; *Sturgeon v. Stevens*, id. 350; *Wilson v. Anderson*, id. 531; *Krankel v. Krankel* (Ky.), 47 S. W. 1084. The ab-

sence of such power of revocation is thus regarded as merely one circumstance to be considered in weighing all the circumstances of the case. *Brown v. Mercantile Trust Co.*, 87 Md. 377. In Massachusetts and Texas, it is held that a voluntary trust completely established, with no power of revocation reserved, cannot be avoided by the person by whom and with whose property it

cannot be revoked at all.¹ It is perfectly clear that where the settlor did not misapprehend the contents of the deed,

almost precisely similar in its facts to that under consideration, — a voluntary settlement was set aside on the application of the donor. The court said: ‘It is very difficult indeed for any voluntary settlement, made by a young lady so soon after she attained twenty-one, to stand, if she afterwards changes her mind and wishes to get rid of the fetters which she has been advised to put upon herself.’

“In *Wollaston v. Tribe* (1869), L. R. 9 Eq. 44, a voluntary gift which was not subject to a power of revocation, but was meant to be irrevocable, was held to be invalid, and was set aside on the donor’s application. In pronouncing the decree, the court said: ‘Of course a voluntary gift is perfectly good if the person who makes it knows what it is, and intended to carry it into execution.’ In *Coutts v. Aeworth*, L. R. 8 Eq. 558, it was held that ‘Where the circumstances are such that the donor in a voluntary settlement or gift ought to be advised to retain a power of revocation, it is the duty of the solicitor to insist on the insertion of such power, and the want of it will in general be fatal to the deed.’ In *Prideaux v. Lonsdale* (1863), 1 De G., J. & S. 433, a voluntary settlement, which the settlor was advised to execute by persons under whose influence, as regarded money matters, she was, and which subjected her property to trusts and contained provisions which the court thought it was impossible to suppose she understood, and against which she ought to have been advised and cautioned, was set aside. In *Hall v. Hall*, L. R. 14 Eq. 365, it was held that a voluntary settlement should contain a power of revocation; and if it does not, the parties who rely on it must prove that the settlor was properly advised when he executed it, and that he thoroughly understood the effect of omitting the power, and that he intended to be excluded from the settlement, and further, if that is not established, and the court sees from the surrounding circumstances that the settlor believed the instrument to be revocable, it will, even after the lapse of twenty years and the death of the settlor, interfere and give relief against it. The decree in that case was reversed. (1873, L. R. 8 Ch. App. 430.) In his opinion,

¹ *Shaw v. Delaware, &c. R. R. Co.*, 3 Stockt. 229.

was created. *Lovett v. Farnham*, 169 Mass. 1; *Monday v. Vance* (Tex.), 49 S. W. 516. Also, in Massachusetts, that such a trust can be set aside only because of unsoundness of mind, fraud, mistake, or undue influence; and that the mere omission of a power of revocation in the

trust-deed of a woman, made in contemplation of marriage, is not a mistake entitling her to relief. *Taylor v. Buttrick*, 165 Mass. 547. In *Richards v. Reeves*, 149 Ind. 427, it was held that the absence of a power of revocation in a voluntary settlement is *prima facie* evidence of mistake.

and there was no fraud or undue influence, and no power of revocation was reserved, the settlor is bound, though some

Selborne, L. C., said: 'The absence of a power of revocation in a voluntary deed, not impeached on the ground of any undue influence, is of course material where it appears that the settlor did not intend to make an irrevocable settlement, or where the settlement itself is of such a nature, or was made under such circumstances as to be unreasonable and improvident, unless guarded by a power of revocation.' *Forshaw v. Welsby*, 30 Beav. 243, was a case where a voluntary settlement was made by one, *in extremis*, on his family. It contained no power of revocation in case of the settlor's recovery. On his recovery it was set aside on his application, on the ground that it was not executed with the intention that it should be operative in case of his recovery from his illness. See also *Huguenin v. Baseley*, Lead. Cas. in Eq. 406; *Cook v. Lamotte*, 15 Beav. 241; *Sharp v. Leach*, 31 Beav. 491; *Phillipson v. Kerry*, 32 Beav. 628. It is not necessary, however, to rest a decision of this case adverse to the deed on so narrow a foundation as the mere absence of a power of revocation. The circumstances under which a voluntary deed was executed may be shown, with a view of impeaching its validity, and if it appears that it was fraudulent or improperly obtained, equity will decree that it be given up and cancelled. In the present case there is no room for doubt that the grantor was induced, by those in whom she very justly placed confidence, and by whose better judgment she was willing to be guided, to execute a voluntary deed whose effect she and they not only did not understand, but, on the other hand, misapprehended; and which, so far from being according to their intentions, was in two very important respects, at least, admittedly precisely the reverse. It was irrevocable; but they all supposed it was revocable, and intended that it should be so. It deprived the grantor of the power of sale; but they all supposed that she would have that power, and intended that she should have it, clogged only by the necessity of obtaining her mother's consent and concurrence in any bargain or conveyance she might make. The deed contains no power of sale whatever. The testimony of all the parties to the transaction — the grantor, her mother and uncle — has been taken in the cause. It satisfies me that the deed was not 'the pure, voluntary, well-understood act of the grantor's mind' (*Lord Eldon in Huguenin v. Baseley*), but was unadvised and improvident, and contrary to the intention of all of them. The fact that the infant children of the grantor are beneficiaries under the deed will not prevent the court from setting it aside. *Huguenin v. Baseley*; *Everitt v. Everitt, ubi sup.* There will be a decree that the deed be delivered up to be cancelled." See also *Rhodes v. Bates*, L. R. 1 Ch. 252; *Leach v. Farr*, 13 Am. Law Reg. 350 (N. S.); *Villers v. Beaumont*, 1 Vern. 99; *Bridgman v. Greene*, 2 Ves. 627; *Petre v. Espinasse*, 2 M. & K. 496; *Bill v. Cureton*, id. 511; *Hastings v. Ord*, 11 Sim. 205; *Coutts*

contingency was forgotten and unprovided for.¹ A policy of insurance on the life of A., payable to his mother, who furnished a portion of the money, is a trust which cannot be revoked by a surrender of the policy, without the mother's consent, and the issue of a new one in favor of A.'s wife.² The effect of the delivery of the deed of trust cannot be impaired by any mental reservation of the grantor, or oral condition repugnant to the terms of the deed.³ But where the trust deed was never delivered to the trustee except for safe keeping, and on the understanding that it should be returned for cancellation on demand, and with the consent of the *cestui* it was so returned and cancelled, no trust arose.⁴ If the voluntary settlement be subject to a life estate in the settlor, and also subject to such debts as he contracts during his life, he can defeat the trust by contracting debts to the full amount of the estate, even if the debts are contracted by giving voluntary bonds for the purpose of defeating the settlement.⁵ If, however, the settlor has not reserved the right to revoke the settlement, or to charge it with his debts, he can do nothing to impair the rights of those in remainder.⁶ Although the power of revocation is reserved, the trust is as good and effectual as if irrevocable, until the power is exercised.⁷ (a) Where the trust does not break the

v. Acworth, L. R. 8 Eq. 538; *Phillips v. Mullings*, L. R. 7 Ch. 244; *Hall v. Hall*, L. R. 8 Ch. 430; *Toker v. Toker*, 3 De G., J. & S. 487; *Evans v. Russell*, 31 Leg. Int. 125.

¹ *Keyes v. Carleton*, 141 Mass. 45, 50.

² *Pingrey v. Nat'l Ins. Co.* 144 Mass. 374, 382.

³ *Wallace v. Berdell*, 97 N. Y. 13.

⁴ *Burroughs v. De Coutts*, 70 Cal. 361.

⁵ *Markwell v. Markwell*, 34 Beav. 12.

⁶ *Aubuchon v. Bender*, 44 Mo. 560; *Dean v. Adler*, 30 Md. 147; *Hall v. Hall*, L. R. 14 Eq. 365; *Beal v. Warren*, 2 Gray, 447.

⁷ *Van Cott v. Prentice*, 104 N. Y. 45.

(a) See *Von Hesse v. MacKaye*, when coupled with a power of appointment, is not such an interest in the property as can be transferred to another, sold under execution or devised by will, or passed to an

natural course of descent of the property, and is not needed for the protection of the life *cestui*, who is the grantor, equity will, on application of the *cestui*, terminate the trust and decree a conveyance.¹ In this case the trust was made by a woman before marriage for herself for life, remainder to her appointees by will, or her heirs-at-law, if she died intestate. After marriage she applied for a conveyance and discharge of the trust, and as the natural descent was not broken, and the laws of the State sufficiently protected married women, the request was granted.

§ 105. Nor is notice to the *cestui que trust* or to the trustee, and acceptance by him, essential to the validity of a voluntary trust as against the settlor, if it is otherwise perfectly created.² But the absence of notice may become a fact of more or less importance in determining whether the trust is perfectly created or not.³ As between purchasers for value, notice or no notice may have important effects; but a voluntary trust, as between the settlor, the trustee, and the *cestui que trust*, can be perfectly created without it.

§ 106. Under the statute of uses, uses could be raised either upon a valuable or pecuniary consideration, or upon what was called a good or meritorious consideration; that is, a consideration arising out of blood, marriage, or family

¹ *Nightingale v. Nightingale*, 13 R. I. 116.

² *Tate v. Leithhead*, Kay, 658; *Donaldson v. Donaldson*, id. 711; *Roberts v. Lloyd*, 2 Beav. 376; *Burn v. Carvalho*, 4 M. & Cr. 690; *Sloper v. Cottrell*, 6 El. & Bl. 504; *Gilbert v. Overton*, 2 Hem. & Mill. 110; *Kekewich v. Manning*, 1 De G., M. & G. 176; *Tierney v. Wood*, 19 Beav. 330; *Lamb v. Orton*, 1 Dr. & Sm. 125; *Meux v. Bell*, 1 Hare, 73; *Otis v. Beckwith*, 49 Ill. 121.

³ *Beatson v. Beatson*, 12 Sim. 281; *Meek v. Kettlewell*, 1 Hare, 476; 1 Phill. 342; *Bycroft v. Christy*, 3 Beav. 238; *Godsall v. Webb*, 2 Keen, 99; *McFadden v. Jenkyns*, 1 Phill. 153; *Bridge v. Bridge*, 16 Beav. 315; *Cecil v. Butcher*, 2 J. & W. 573.

assignee. *Jones v. Clifton*, 101 112 U. S. 344; *Hill v. Cornwall*, U. S. 225; *Brandies v. Cochrane*, 94 Ky. 512.

affection, and the moral obligation that every one is under to provide for his family or relations. Thus, a covenant to stand seized to the uses of a stranger, founded upon a valuable consideration, operated under the statute as a deed of bargain and sale to be enrolled, and conveyed the land to the stranger. But a covenant in consideration of blood or marriage, to stand seized to the use of a wife or child or other relation, created a use only in the *cestui que trust*, and the deed need not be enrolled. In all cases the *consideration of this conveyance was the foundation of it*. Therefore, a covenant to stand seized to the use of a stranger in consideration of love or affection for him was inoperative for want of a consideration; and a covenant in consideration of blood or marriage, to stand seized to the use of a relative and a stranger, vested the whole use in the relative, and was inoperative as to the stranger. From this brief statement can be seen the effect and meaning of what was called a good or meritorious consideration under the statute of uses.¹

§ 107. In analogy to this doctrine, under the statute of uses it has been urged that a voluntary post-nuptial settlement in favor of a wife or child, executory in all its aspects, would be enforced in favor of such wife or child on the ground of a good or meritorious consideration for such settlement.² And in *Ellis v. Nimmo*, Sugden, Lord Chancellor of Ireland, after a most exhaustive examination of the authorities, decided that the meritorious consideration of providing for a child was sufficient to lead a court of equity to enforce an executory contract against the settlor.³ This

¹ Sand. Uses, 96-101; 2 Black. Com. 338.

² *Bonham v. Newcomb*, 2 Vent. 365; *Leech v. Leech*, 1 Ch. Cas. 249; *Fothergill v. Fothergill*, Freem. 256; *Sear v. Ashwell*, and *Gordon v. Gordon*, 3 Swanst. 411; *Watts v. Bullas*, 1 P. Wms. 60; *Bolton v. Bolton*, 3 Sev. 414; *Goring v. Nash*, 3 Atk. 186; *Darley v. Darley*, id. 399; *Hale v. Lamb*, 2 Eden, 292; *Evelyn v. Templar*, 2 Bro. Ch. 148; *Colman v. Sarel*, 1 Ves. Jr. 50; 3 Bro. Ch. 12; *Antrobus v. Smith*, 12 Ves. 39; *Rodgers v. Marshall*, 17 Ves. 294; *Ellison v. Ellison*, 6 Ves. 656.

³ *Ellis v. Nimmo*, Lloyd & Goold, 333.

case met with considerable criticism, and several cases were decided, more or less in opposition to it.¹ In *Moore v. Crofton*, he allowed it to be overruled, declaring, however, at the same time, that he still thought it decided upon sound principles of equity,² so that now it may be considered as settled in England, that an executory agreement founded on a meritorious consideration only will not be executed against the settlor himself.³

§ 108. As to other parties claiming under the settlor, if he had sold the estate, or become indebted, the equity of a wife or child claiming as *cestui que trust*, on the ground of a meritorious consideration, would not be enforced against a purchaser or creditors.⁴ But if the settlor subsequently made a voluntary settlement, or died without disposing of the estate by some act *inter vivos*, there were authorities that the voluntary *cestui que trust* could enforce his equity as against other volunteers under another settlement,⁵ or against devisees or legatees,⁶ or against the heir-at-law or next of kin.⁷ There was, however, this condition, that the persons against whom the settlement was sought to be enforced could not also plead a meritorious consideration; for if they also were children of the settlor, the considerations would be equal. In such cases the court referred it to a master to report whether they had an adequate provision

¹ *Holloway v. Headington*, 8 Sim. 324; *Dillon v. Coppin*, 4 My. & Cr. 646; *Jefferys v. Jeffreys*, 1 Cr. & Ph. 138.

² *Moore v. Crofton*, 3 Jon. & La. 442.

³ *Antrobus v. Smith*, 12 Ves. 46; *Holloway v. Headington*, 8 Sim. 325; *Walrond v. Walrond*, 1 Johns. 25. And see *Phillips v. Frye*, 14 Allen, 36; *White v. White*, 52 N. Y. 368.

⁴ *Bolton v. Bolton*, 3 Swanst. 414, note; *Goring v. Nash*, 3 Atk. 186; *Finch v. Winchelsea*, 1 P. Wms. 277; *Garrard v. Lauderdale*, 2 R. & M. 154, 453. But see *Mackay v. Douglass*, L. R. 14 Eq. 106; *Perry Herrick v. Attwood*, 2 De G. & J. 39; *Beal v. Warren*, 2 Gray, 447.

⁵ *Bolton v. Bolton*, 3 Swanst. 414.

⁶ *Ibid.*

⁷ *Watts v. Bullas*, 1 P. Wms. 60; *Goring v. Nash*, 3 Atk. 186; *Rodgers v. Marshall*, 17 Ves. 294.

independent of the estate.¹ But at the present day in England it would appear that even as against volunteers claiming under the settlor, with or without an adequate provision, a voluntary executory agreement, whether under seal or not, cannot be enforced on the mere ground of a meritorious consideration.²

¹ *Goring v. Nash*, 3 Atk. 186; *Rodgers v. Marshall*, 17 Ves. 294.

² *Price v. Price*, 14 Beav. 598; *Colman v. Sarel*, 1 Ves. Jr. 50; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Antrobus v. Smith*, 12 Ves. 39; *Evelyn v. Templar*, 2 Bro. Ch. 148; *Holloway v. Headington*, 8 Sm. 334; *Joyce v. Hutton*, 11 Ir. Ch. 123; *Moore v. Crofton*, 3 Jon. & La. 442.

Mr. Lewin (p. 95 of his 3d ed.) has discussed this whole matter with a fulness that leaves little to be said. He says: "It has also been supposed that where the trust is imperfectly created, the court, without proof of valuable consideration, will act upon a meritorious consideration, as the payment of debts or provision for wife or child. The covenant to stand seized to uses, and the jurisdiction of the court in supplying surrenders and aiding the defective execution of powers, have generally been referred to as establishing, or at least countenancing, this doctrine.

"As regards the covenant to stand seized to uses, it is evident that mere meritorious consideration was not a sufficient ground to attract the jurisdiction of the court; for no use would have arisen in favor of a wife or child unless there had been a covenant. 'There are several ways in the law,' said Lord Justice Holt, 'for declaring uses, whether upon transmutation of the possession or not. If a use be declared upon a transmutation of the possession, as in a fine of feoffment, it is sufficient for the party on the transmutation to declare that the use shall be to such a party of such an estate; but if the use arise without transmutation of the possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which must be founded on some consideration; for a use, having its foundation generally on grounds of equity, could not be relieved in chancery without transmutation of possession, or an agreement founded on a consideration; and therefore if bargain and sale were made of a man's lands, on the payment of the money, the use could have arisen without deed by parol; but if the use was in consideration of blood, then it could not arise by parol agreement without a deed, because that agreement was not an obliging agreement: it wanted a consideration, and therefore to make it an obliging agreement, there was necessity of a deed.' *Jones v. Morley*, 12 Mod. 161.

"Thus, if equity be governed by the strict analogy of uses, the court cannot act upon meritorious consideration where the contract is by parol; and though, where the agreement is under seal, the argument of analogy applies, yet it follows not that equity will now raise a trust because for-

§ 109. The tendency in the United States is to sustain and carry into effect an executory trust in favor of a wife

merly it would have created a use. A bargain and sale for 5s. consideration still operates by way of conveyance to transfer the estate; but should the bargain and sale be void as such for want of an indenture or an indenture duly enrolled, it could not be argued that the agreement at the present day would be specifically executed upon the basis of a trust. It may further be remarked that if the covenant to stand seized to uses were now to regulate the administration of trusts, there would still be no ground for extending the relief to *creditors*, who, however, it is admitted on all hands, are equally entitled to the benefit of meritorious consideration. And the covenant to stand seized to uses extended, we must remember, not only to wife and child, but also to brothers, nephews, and cousins; but no one at the present day would think of admitting the same latitude in the execution of a trust.

“ With respect to the jurisdiction of the court in supplying surrenders of copyholds, the principle upon which the relief is founded appears to be this, that as the heir was never meant by the law to take otherwise than in default of the ancestor’s will, if the ancestor manifests any intention in favor of a meritorious object, the court will not suffer the mere want of form to carry a benefit to the representative. ‘ I have looked,’ said Lord Alvanley, ‘ at all the cases I can find upon what principle this court goes in supplying the defect. It is this: whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligation, shows an intention to execute such power, the court will operate upon the conscience of the *heir* to make him perfect this intention. This is not to be confounded with the case of the heirs being disinherited by a will of freeholds not duly executed: there is no will at all. The court cannot see that there is such an instrument; but whenever there is such a power, it has been executed.’ Chapman v. Gibson, 3 Bro. Ch. 230. And see Ellis v. Nimmo, Lloyd & Goold, 341.

“ The ground upon which the courts aid the defective execution of powers will be found upon examination to be precisely that upon which it supplies the surrender of copyholds. The power to the extent to which it may be exercised is regarded in equity as part of the dominion, — as a portion of the actual estate; and the donee of it is *pro tanto* the *bonâ fide* owner of the property, and the person taking in default of the donee’s disposition is a *quasi* heir. Holmes v. Coghill, 12 Ves. 213; Coventry v. Coventry, at the end of Francis’s Maxims in Equity. The only distinction between an actual heir and the person taking in default of the power is this: that the former is so constituted by course of law, while the latter is a *quasi* heir specially appointed by the settlor. Thus in aiding the defective execution of powers the court says, as in supplying surrenders, the donee of the power, who is the owner of the property to the extent of that

or child founded upon a meritorious consideration, if the instrument is under seal,¹ though the rule is not fully estab-

power, has indicated an intention of providing for a meritorious object, and the person taking in default of the power, who is a kind of heir, shall not, through want of form, run away with the estate from those who are much better entitled.

“It is clear that an agreement founded on meritorious consideration will not be executed as against the settlor himself. *Antrobus v. Smith*, 12 Ves. 39. Indeed, relief in such a case would offend against the security of property; for if a man improvidently bind himself by a complete alienation, the court will not unloose the fetters he hath put upon himself, but he must lie down under his own folly. *Villers v. Beaumont*, 1 Vern. 101; but if the court interpose where the act is left incomplete, what is it but

¹ *Stone v. Stone*, L. R. 5 Ch. 74; *Shepherd v. Bevin*, 4 Md. Ch. 133; 9 Gill, 32; *Harris v. Haines*, 6 Md. 435; *McIntire v. Hughes*, 4 Bibb, 186; *Mahan v. Mahan*, 7 B. Mon. 579; *Bright v. Bright*, 8 id. 194; *Dennison v. Goehring*, 7 Barr, 175; *Hayes v. Kershaw*, 1 Sand. 258; *Taylor v. James*, 4 Des. 5; *Caldwell v. Williams*, 1 Bailey Eq. 175; *Garner v. Garner*, 1 Busb. Eq. 1; *Jones v. Obinchain*, 10 Grat. 259; *Harvey v. Alexander*, 1 Rand. 219; *Blackely v. Holton*, 5 Dana, 520; 2 Spence, Eq. Jur. 58; *Pennington v. Gitting*, 2 Gill & J. 208; *Tolar v. Tolar*, Dev. Ch. 451; *Thompson v. Thompson*, 2 How. (Miss.) 737; *Woodson v. McClelland*, 4 Miss. 495. But see *Taylor v. Taylor*, 2 Humph. 597; *Martin v. Ramsey*, 5 Humph. 349; *Campbell's Estate*, 7 Barr, 101; *Kennedy v. Ware*, 1 Barr, 445; *Cressman's App.* 42 Penn. St. 155; *Bunn v. Winthrop*, 1 Johns. Ch. 329. The above cases of *McIntire v. Hughes*, *Mahan v. Mahan*, and *Bright v. Bright*, are direct decisions upon the point, and fully establish the rule for the State of Kentucky, while the cases of *Bunn v. Winthrop*, *Dennison v. Goehring*, *Jones v. Obinchain*, and most of the other cases, presented a completely executed trust for enforcement, and the court was not called upon to decide whether a meritorious consideration alone would support an executory trust. In *Hayes v. Kershaw*, the settlement was for a collateral relative, and the Vice-Chancellor declined to support it, but intimated in strong language that an executory trust for a wife or child would be supported upon meritorious consideration merely. The cases are very fully commented upon by the learned editors to 1 Lead. Cas. in Eq. 330-333, with a strong leaning to the opinion that voluntary executory trusts for a wife or child would be supported. The learned editors also express strong doubts whether the case of *Ellis v. Nimmo*, 1 Lloyd & Goold, 333, is overruled by the cases which are usually thought to overrule it; and their criticism is ingenious and acute. They do not, however, advert to the case of *Moore v. Crofton*, 3 Jon. & La. 442. See *Cox v. Sprigg*, 6 Md. 274.

lished, and perhaps, upon thorough consideration, would not be acted upon. But the rule would be strictly confined to a wife and child, and would not be extended to brothers, sisters, nephews, or parents,¹ and probably not to grandchildren,² nor to illegitimate children.³

to wrest property from a person who has not legally parted with it? Another observation that suggests itself is, that during the life of the settlor the ground of the meritorious consideration scarcely seems to apply; for can it be thought to be the duty of a husband to endow his wife, during the coverture, with a separate and independent provision? or is a parent bound by any natural or moral obligation to impoverish himself (for such a case may be supposed) for the purpose of enriching a child? or has a court of equity the jurisdiction to appropriate a specific fund to creditors, when the debtor is still living? the presumption of law is that the creditor can obtain satisfaction of his debt by the usual legal process. It is after the *decease* of the settlor that meritorious consideration becomes such a powerful plea in a court of equity. The wife and children have then lost the personal support of the husband and parent, and who can have a juster claim to the inheritance of the property? The creditor is then barred, by Act of God, of his remedy against the debtor; and should the assets prove insufficient, how but by the assistance of equity can he hope to be satisfied in his demand? Another objection to the execution of a voluntary contract against the settlor himself, at least in respect of land, is the principle expressed by Lord Cowper, that equity, like nature, will do nothing in vain. *Seeley v. Jago*, 1 P. Wms. 389; *Billingham v. Lawthen*, 1 Ch. Cas. 243; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; as if money be directed to be converted into land, or land into money, the devisee or legatee may elect to take the property in the original state, for should the court direct an actual conversion, the devisee or legatee might immediately annul the order by resorting to a reconversion; and so, should the court decree a specific performance of a contract regarding realty for meritorious consideration, the property the next moment might be disposed of to a *bonâ fide* purchaser, and the settlement become nugatory. Again, if the imperfect gift can be enforced against the settlor himself, then the equitable right must form a *lien* upon the property; and upon the death of the settlor his heir would, *in all events*, be bound to convey: but even in aiding the defective execution of powers and supplying surrenders of copyholds, a previous inquiry by the master is invariably directed whether the heir of the settlor has any other adequate provision."

¹ *Downing v. Townsend*, Amb. 592; *Buford's Heirs v. M'Kee*, 1 Dana, 107; *Hayes v. Kershaw*, 1 Sand. Ch. 258.

² *Buford's Heirs v. M'Kee*, 1 Dana, 107.

³ *Fursaker v. Robinson*, Pr. Ch. 475; but see *Bunn v. Winthrop*, 1 Johns. Ch. 329.

§ 110. Marriage is a valuable consideration, therefore executory agreements, made in contemplation of marriage, will be enforced if the marriage actually takes place.¹

§ 111. A contract under seal imports a consideration, and an action at law can be maintained upon such a contract. And it has sometimes been supposed that a court of equity would enforce a contract in favor of a volunteer whenever an action of law could be sustained upon the instrument.² But equity never enforced a voluntary covenant, though under seal, to stand seized to the uses of a stranger; and it is now settled, in England, that equity will not enforce a voluntary contract, although under seal.³ Equity will not decree the specific performance of a contract, where a court of law would give only nominal damages. In the United States, however, considerable stress is laid upon the solemnity of a seal. The courts say that they will not execute a voluntary executory agreement unless it is under seal,⁴ thereby implying that an executory contract under seal will be enforced, though voluntary. And in Kentucky, where the distinction between sealed and unsealed instruments is now abolished, a voluntary executory contract not under seal has been upheld.⁵ But there is the same uncertainty

¹ *Duval v. Getting*, Gill, 38; *Gough v. Crane*, 3 Md. Ch. 119; *Crane v. Gough*, 4 id. 316; *Hale v. Lamb*, 2 Eden, 271; *Stone v. Stone*, L. R. 5 Ch. 74.

² *Beard v. Nutthall*, 1 Vern. 427; *Williamson v. Coddington*, 1 Ves. 511; *Hervey v. Audland*, 14 Sim. 531; *Husband v. Pollard and Randal v. Randal*, 2 P. Wms. 467; *Vernon v. Vernon*, id. 594; *Goring v. Nash*, 3 Atk. 186; *Stephens v. Trueman*, 1 Ves. 73; *Wiseman v. Roper*, 1 Ch. R. 158.

³ *Hale v. Lamb*, 2 Eden, 294; *Fursaker v. Robinson*, Pr. Ch. 475; *Evelyn v. Templar*, 2 Bro. Ch. 148; *Colman v. Sarel*, 3 id. 12; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Meek v. Kettlewell*, 1 Hare, 464; *Fletcher v. Fletcher*, 4 id. 74; *Newton v. Askew*, 11 Beav. 145; *Dillon v. Coppin*, 4 M. & Cr. 647; *Kekewich v. Manning*, 1 De G., M. & G. 188; *Denning v. Ware*, 22 Beav. 184.

⁴ *Kennedy v. Ware*, 1 Barr, 445; *Caldwell v. Williams*, 1 Bailey, Eq. 175; *Dennison v. Goehring*, 7 Barr, 175; *McIntire v. Hughes*, 4 Bibb, 186.

⁵ *Mahan v. Mahan*, 7 B. Mon. 579.

whether a seal would render a voluntary executory contract binding in equity, as there is whether a mere meritorious consideration will enable the court to enforce the settlement. Generally, in America, very little regard is paid to mere formalities, and a seal is regarded in most States as a mere formality. A mere scratch or scroll of the pen passes for a seal, and in some States they are abolished altogether. Why any effect should be given to a form that has ceased to be a solemnity would be hard to explain on principle, and is equally uncertain upon the authorities.

§ 111 *a*. By the construction given to the New York statutes a trust to sell land for the benefit of creditors and legatees must be absolute and imperative without discretion in the trustee; and a trust to receive rents and profits is not valid if there is no direction to apply them to the use of any person or for any period.¹

¹ *Cooke v. Platt*, 98 N. Y. 38, 39.

CHAPTER IV.

IMPLIED TRUSTS.

- § 112. The manner in which trusts are implied, and the words from which they are implied.
- § 113. Words from which a trust will not be implied.
- §§ 114-116. Rules by which trusts will or will not be implied.
- §§ 117, 118. Implied trusts from directions as to the maintenance of children or others.
- § 119. When trusts for maintenance are not implied.
- § 120. Rules that govern implied trusts.
- § 121. Trusts arising by implication from the provisions of a will.
- § 122. Implied trusts arising from contracts.
- § 123. A direction to employ certain persons does not raise an implied trust.

§ 112. IMPLIED trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust.¹ (a) Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed through the medium of a trust. Implied trusts may arise out of agreements and settlements *inter vivos*² where there is

¹ Lane v. Lane, 8 Allen, 350.

² Liddard v. Liddard, 28 Beav. 266.

(a) In *Gorrell v. Alsbaugh*, 120 N. C. 362, 366, Douglas, J., said: "Implied trusts are either resulting or constructive. In this State all implied trusts are generally denominated parol trusts, referring to their origin and nature of proof rather than their incidents and results. Some eminent authorities, as Lewin and Perry, make a separate division of implied trusts as distinguished both from resulting and constructive trusts; but this distinction does not seem to be recognized in this State, nor, indeed, in the Statute of Frauds (29 Charles II., ch. 3, § 8), which refers to a trust 'arising or resulting by implication or construction of law.' "

a sufficient consideration; but they more frequently arise from the construction of wills where a consideration is implied. In Pennsylvania, such words as "my wish is," "my further request is," or others merely expressive of a desire, recommendation, or confidence, are not sufficient to convert a devise or bequest into a trust.¹ But the general rule is that if a testator make an absolute gift to one person in his will, and accompany the gift with words expressing a "belief,"² "desire,"³ "will,"⁴ "request,"⁵ "will and desire,"⁶ or, if he "will and declare,"⁷ "wish and request,"⁸ "wish and desire,"⁹ "entreat,"¹⁰ "most heartily beseech,"¹¹ "order and direct,"¹² (a) "authorize and empower,"¹³

¹ *Hopkins v. Glunt*, 111 Penn. St. 287; *Bowlby v. Thunder*, 105 id. 178; *Colton v. Colton*, 10 Sawyer, 325.

² *Cary v. Cary*, 2 Sch. & Le. 189; *Paul v. Compton*, 8 Ves. 380.

³ *Harding v. Glyn*, 1 Atk. 469; *Mason v. Limbury*, and *Vernon v. Vernon*, Amb. 4; *Trot v. Vernon*, 8 Vin. Abr. 72; *Pushman v. Filliter*, 3 Ves. 7; *Brest v. Offley*, 1 Ch. R. 246; *Bonser v. Kinnear*, 2 Gif. 195; *Cruwys v. Colman*, 9 Ves. 319; *Shaw v. Lawless*, *Lloyd & Goold*, 154; 5 Cl. & Fin. 129; *Lloyd & Goold*, *Tem. Plunket*, 559.

⁴ *Eales v. England*, Pr. Ch. 200; *Cloudsley v. Pelham*, 1 Vern. 411.

⁵ *Pierson v. Garnet*, 2 Bro. Ch. 38, 226; *Eade v. Eade*, 5 Mad. 118; *Moriarty v. Martin*, 3 Ir. Ch. 26; *Bernard v. Minshull*, 1 Johns. 276; *Knox v. Knox*, 59 Wis. 172.

⁶ *Birch v. Wade*, 3 Ves. & B. 198; *Forbes v. Ball*, 3 Mer. 437.

⁷ *Gray v. Gray*, 11 Ir. Ch. 218.

⁸ *Foley v. Parry*, 5 Sim. 139; 2 M. & K. 138; *Cook v. Ellington*, 6 Jones, Eq. 371.

⁹ *Liddard v. Liddard*, 28 Beav. 266; *Cockrill v. Armstrong*, 31 Ark. 580.

¹⁰ *Prevost v. Clarke*, 2 Mad. 458; *Meredith v. Heneage*, 1 Sim. 543; *Taylor v. George*, 2 Ves. & B. 378.

¹¹ *Meredith v. Heneage*, 1 Sim. 553.

¹² *Cary v. Cary*, 2 Sch. & Le. 189; *White v. Briggs*, 2 Phill. 583.

¹³ *Brown v. Higgs*, 4 Ves. 708; 5 id. 495; 8 id. 561; 18 id. 192.

(a) Such words as "order" and "direct" are now treated as *prima facie* mandatory; they are imperative words, even when a discretion is given, as to the mode of execution, by a later clause in a will which contains them. See *Collister v. Fassitt*, 39 N. Y. S. 800; 38 id. 601.

"recommend,"¹ "hope,"² "do not doubt,"³ "be well assured,"⁴ "confide,"⁵ "have the fullest confidence,"⁶ "trust and confide,"⁷ "have full assurance and confident hope;"⁸ or, if he make the gift "under the firm conviction,"⁹ or "well knowing;"¹⁰ or, if he use the expression, "of course the legatee will give,"¹¹ or, "in consideration that the legatee has promised to give,"¹² — in these and similar cases courts will consider the intention of the testator as manifestly implied, and they will carry the intention into effect by declaring the donee or first taker to be a trustee for those whom the donor intended to benefit.¹³ And so the words, "it is my wish,"¹⁴ "it is my wish and will,"¹⁵ "having con-

¹ *Tibbits v. Tibbits*, Jac. 317; 19 Ves. 656; *Horwood v. West*, 1 Sim. & St. 387; *Paul v. Compton*, 8 Ves. 380; *Malim v. Keighley*, 2 Ves. Jr. 333, 529; *Malim v. Barker*, 3 Ves. 150; *Meredith v. Heneage*, 1 Sim. 543; *Kingston v. Lorton*, 2 Hog. 166; *Cholmondeley v. Cholmondeley*, 14 Sim. 590; *Hart v. Tribe*, 18 Beav. 215; *Meggison v. Moore*, 2 Ves. Jr. 630; *Sale v. Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Y. & Coll. 636; *Randal v. Hearle*, 1 Anst. 124; *Lefroy v. Flood*, 4 Ir. Ch. 1; *Cunliffe v. Cunliffe*, Amb. 686, distinguished in *Pierson v. Garnet*, 2 Bro. Ch. 46; *Malim v. Keighley*, 2 Ves. Jr. 333; *Pushman v. Filliter*, 3 Ves. 7; *Webster v. Morris*, 66 Wis. 366.

² *Harland v. Trigg*, 1 Bro. Ch. 142; *Paul v. Compton*, 8 Ves. 380.

³ *Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 Ves. & B. 378; *Malone v. O'Connor*, Lloyd & Goold, 465; *Sale v. Moore*, 1 Sim. 534.

⁴ *Macey v. Shurmer*, 1 Atk. 389; Anst. 520; *Ray v. Adams*, 3 M. & K. 237.

⁵ *Griffiths v. Evans*, 5 Beav. 241; *Shepherd v. Nottidge*, 2 J. & H. 766.

⁶ *Shovelton v. Shovelton*, 32 Beav. 143; *Wright v. Atkyns*, 17 Ves. 255; 19 id. 299; *G. Cooper*, 111; *T. & R.* 143; *Webb v. Wools*, 2 Sim. n. s. 267; *Palmer v. Simmonds*, 2 Dr. 225; *Warner v. Bates*, 98 Mass. 274.

⁷ *Wood v. Cox*, 1 Keen, 317; 2 My. & Cr. 684; *Pilkington v. Boughey*, 12 Sim. 114.

⁸ *Macnab v. Whitbread*, 17 Beav. 299.

⁹ *Barnes v. Grant*, 2 Jur. (n. s.) 1127; 26 L. J. Ch. 92.

¹⁰ *Bardswell v. Bardswell*, 9 Sim. 319; *Nowland v. Nelligan*, 1 Bro. Ch. 489; *Briggs v. Penny*, 3 Mac. & G. 546; 3 De G. & Sm. 525.

¹¹ *Robinson v. Smith*, 6 Madd. 124; *Lechmere v. Lavie*, 2 M. & K. 197.

¹² *Clifton v. Lombe*, Amb. 519.

¹³ *Warner v. Bates*, 98 Mass. 276; *Lambe v. Eames*, L. R. 10 Eq. 267.

¹⁴ *Brunson v. Hunter*, 2 Hill Ch. 490.

¹⁵ *McRee's Ad'r v. Means*, 34 Ala. 349.

fidence,"¹ "I desire that the donee should appropriate \$50 per year,"² "to be disposed of and divided among my children,"³ "with full confidence that they will dispose of such residue among our brothers and sisters according to their best discretion,"⁴ "intrusting to her the education and maintenance of his children out of the profits of the estate,"⁵ "I also *allow* my son to give her a support off my plantation during her life,"⁶ were held to create trusts in favor of the parties to be benefited. And so, where a testator gave a sum of money to trustees "to pay the income yearly to his son for the support of himself and family, and the education of his children," it was held that the income was taken in trust by the son, and that the wife and children could enforce its appropriation in part for their support.⁷ "To my

¹ *Dresser v. Dresser*, 46 Maine, 48; *Reid's Ad'r v. Blackstone*, 14 Grat. 363.

² *Erickson v. Willard*, 1 N. H. 217.

³ *Collins v. Carlisle*, 7 B. Mon. 14.

⁴ *Bull v. Bull*, 8 Conn. 47.

⁵ *Lucas v. Lockhart*, 10 Sm. & Mar. 466.

⁶ *Hunter v. Stembridge*, 12 Ga. 192. In this case the court construed the word *allow* as expressive of an *intention* — the testator being an illiterate man — that the son should support his mother out of the property given him, and that an absolute charge or trust was implied.

⁷ *Cole v. Littlefield*, 35 Maine, 439; *Wright v. Miller*, 8 N. Y. 9; 1 Sandf. 103; *Whiting v. Whiting*, 4 Gray, 240; *Chase v. Chase*, 2 Allen, 101; *Hadow v. Hadow*, 9 Sim. 438; *Jubber v. Jubber*, id. 503; *Longmore v. Elcum*, 2 Y. & C. Ch. 363; *Leach v. Leach*, 13 Sim. 304; *Hart v. Tribe*, 19 Beav. 149; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, 2 Phill. 555. Technical language is not necessary to create a trust. It is enough if such intention is apparent. Thus words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for those persons in favor of whom such expressions are used; provided that, from the construction of the whole will, such is the apparent intention of the testator, and provided that he has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust. Thus, in *Massey v. Sherman*, Amb. 520, a testator devised property to his wife, not doubting that she would dispose of the same to and among his children as she should please, it was held to be a trust for the children. See also *Macey v. Shurmer*, 1 Atk. 389; *Wynne v. Hawkins*, 1 Bro. Ch. 179; *Parsons v. Baker*, 18 Ves. 476; *Malone v. O'Connor*, 2 Lloyd & Goold, 465. And in *Pierson v.*

daughter A. I give [naming certain property] for the support of my daughter C." creates a trust.¹

Garnet, 2 Bro. Ch. 38, 226, a testator gave a residue to A., with his dying request that if A. died without issue he would dispose of it in a certain manner pointed out; but Lord Kenyon and Lord Thurlow held that, in the event, a trust was implied and created. And see *Re O'Bierne*, 1 Jon. & La. 352. And so in *Malim v. Keighley*, 2 Ves. Jr. 333, 359, a testator recommended a daughter, to whom he made a bequest, to dispose of it at her death in a certain manner, and it was held to create a trust. See also *Paul v. Comptom*, 8 Ves. 380; *Ford v. Fowler*, 3 Beav. 146; *Knott v. Cottee*, 16 Beav. 77; *Cholmondeley v. Cholmondeley*, 14 Sim. 590. But in *Meggison v. Moore*, 2 Ves. Jr. 630, the word "recommend," under the peculiar circumstances of the case, was held not to create a trust; but the case throws no particular light upon the principle. In *Bird v. Wade*, 3 Ves. & B. 198, 2 Ves. 467, the testator added to his bequest of a part of his property that it was his will and desire that the bequest be left entirely to her disposal among such of her relations as she may think proper. The devisee having died without disposing of the property, it was held to be a trust for her next of kin. See also *Brest v. Offley*, 1 Ch. R. 216; *Harding v. Glyn*, 1 Atk. 469; *Earl of Bute v. Stuart*, 2 Eden, 87; 1 Bro. P. C. Taml. 476; *Wright v. Atkyns*, 19 Ves. 299; *Cooper*, 111; *Cary v. Cary*, 2 Sch. & Lef. 173, 189; *Forbes v. Bale*, 3 Mer. 441; *Horwood v. West*, 1 Sim. & St. 387.

In *Prevost v. Clarke*, 2 Madd. 458, a testatrix gave property to her daughter, and "entreated" her son-in-law, husband of the daughter, if he should not have children by her daughter and should survive her, that he would leave any part of the property that came to him to her other children and grandchildren at his decease. These words were held to create a contingent trust for her other children and grandchildren. So in *Pilkington v. Boughey*, 12 Sim. 114, where a testator recited in his will that he had purchased an estate for a particular purpose, and then devised it to certain individuals in trust, and "trusted" that they would apply it to such purposes as they knew he would most approve of, it was held to be a trust. In *Foley v. Parry*, 2 My. & K. 138, a testator gave property to his wife for life, the remainder to his nephew for life, and then declared it to be his particular wish and request that his wife, or a third person, should superintend and take care of the education of his nephew; and it was determined that there was a trust in the life-estate given to the widow to maintain and educate the nephew until he was twenty-one. See also same case in 5 Sim. 138. So more doubtful expressions have been held to create trusts: as "I desire him to give," *Mason v. Limbury*, cited *Vernon v. Vernon*, Amb. 4; "I hereby request," *Nowlan v. Nelligan*,

¹ *Buffinton v. Maxam*, 140 Mass. 557.

§ 113. On the other hand, it has been held that no trust was implied when property was given to a donee connected

1 Bro. Ch. 489; "I empower and authorize her to settle and dispose of the estate to such persons as she shall think fit by her will, confiding in her not to alienate the estate from my family," *Griffiths v. Evans*, 5 Beav. 241 (see also *Brook v. Brook*, 3 Sim. & Gif. 280; *Alexander v. Alexander*, 2 Jur. (N. S.) 898; "I advise him to settle," *Parker v. Bolton*, 5 L. J. (N. S.) Ch. 98; "My last wish, my dear daughter, is that you do give my granddaughter £1000," *Hinxman v. Poynder*, 5 Sim. 546; "require and entreat," *Taylor v. George*, 2 Ves. & B. 378; "trusting that he will preserve the same, so that, after his decease, it will go and be divided," etc., *Baker v. Mosely*, 12 Jur. 740; "under the conviction that he will dispose," etc., *Barnes v. Grant*, 26 L. J. Ch. 92, 2 Jur. (N. S.) 1127; "to apply the same," *Saulsbury v. Denton*, 3 K. & J. 392; "the other children may be allowed to participate," etc., *Liddard v. Liddard*, 6 Jur. (N. S.) 459, 28 Beav. 266. As before said, however, such expressions will not create a trust, if by the context no trust is intended to arise; as if a trust is at one time created, but by a codicil is revoked on account of the inconvenience, and there is a direction that the "property be disposed of for the good of the family," *Alexander v. Alexander*, 2 Jur. (N. S.) 898. The question in all cases is, is the devisee or legatee a beneficiary or a trustee of the gift bestowed upon him; and that depends upon the intention of the testator. But parol evidence of the intention of the testator cannot be introduced, *Irvine v. Sullivan*, L. R. 8 Eq. 673. If there is a direct trust, there is no doubt; if there are precatory words, then it remains to determine whether there is an imperative trust, or whether the words are merely suggestions to guide the discretion of the devisee in disposing of the property, the testator having implicit confidence and reliance in him, and leaving him the sole judge whether he will follow the suggestions or not. If the testator supposed that he was creating an imperative trust, whether express or imperative from precatory words, a trust will be raised because such is the intention; and if such trust fails because the purposes of the trust are uncertain, or the amount of the property of the trust is uncertain, or for any other reason, it will still be a trust; but it will result to the heirs-at-law, next of kin, or residuary legatees. See *post*, §§ 153-161. But such uncertainty in the objects of the trust, or in the persons to be benefited, or in the amount of the property to be subjected to the trust, or in the manner of applying it, are facts and circumstances, if they exist in the will itself, which are to be taken into consideration in construing it. See *post*, § 116; *Barnard v. Minshall*, 1 Johns. 287, 1 Jarm. on Wills, 359 (3d Lond. ed.). There is also another consideration. If there is an absolute gift in the first instance to the donee, mere precatory words will not in general annex a trust to the gift: as in *Meredith v. Heneage*, 1 Sim. 542, 10 Price, 306, the bequest was to the

with expression of kindness and good-will towards other persons, as with a hope that "he would continue it in the

donee, "unfettered and unlimited," followed by precatory words, and they were held not to create a trust. In *Bonser v. Kinnear*, 2 Gif. 195, there was a gift to the wife "*for her sole use and benefit, she maintaining the children*;" it was held to be a trust, the words implying the trust being a part of the gift. But in *Wood v. Cox*, 1 Keen, 317, there was a gift to the devisee "for his own use and benefit," trusting and wholly confiding in his honor to act in strict conformity to the testator's wishes. There were some other circumstances, and Lord Langdale held it to be an implied trust; but Lord Cottenham said that, to make the devisee a trustee, the words "for his own use and benefit" must be expunged from the will: 2 My. & Cr. 686; and see the judgment in the case of *Irvine v. Sullivan*, L. R. 8 Eq. 673. In *Winch v. Brutton*, 14 Sim. 379, and in *Bardswell v. Bardswell*, 9 id. 319, there were gifts to the use, benefit, and disposal, absolutely of the devisees, "nevertheless earnestly *conjuring them*," to dispose of them in a certain manner; and it was held that, under the form of the gifts there, there were no trusts. See also *White v. Briggs*, 15 Sim. 33; *Fox v. Fox*, 27 Beav. 301. So in *Johnson v. Rowlands*, 2 De G. & S., a gift to be disposed of as she shall think proper, followed by a recommendation, was held not to create a trust. The case of *Williams v. Williams*, 1 Sim. (N. S.) 358, is nearly to the same effect; and see *Green v. Marsden*, 1 Drew. 646. In some of these cases the element of uncertainty enters into the construction: see *Bardswell v. Bardswell*, 14 Sim. 379; *Williams v. Williams*, 1 Sim. (N. S.) 358; *Webb v. Wools*, 2 Sim. (N. S.) 267, was a strong case in this respect. The gift was to the wife, her executors, administrators, and assigns, "to and for her and their sole use and benefit, upon the fullest trust and confidence that she will dispose of the same," &c. It was said that to allow the latter words to create a trust would be to counteract the former words. In other cases where the gift was in nearly the same words but "in full confidence that she will bestow it, *on her decease*, to my children," &c., *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414; *Curnick v. Tucker*, L. R. 17 Eq. 320, it was held that the widow took a life-estate, with a power to appoint among the children: *Ware v. Mallard*, 21 L. J. Ch. 355; 16 Jur. 492; *Gully v. Cregoe*, 24 Beav. 185. If the words of gift to the wife may be construed as making the gift to her sole and separate use, independent of her husband, the trust may be sustained: *Cholmondeley v. Cholmondeley*, 14 Sim. 590. See also *Stubbs v. Sargon*, 2 Keen, 255, 3 My. & Cr. 513; but see *Green v. Marsden*, 1 Drew. 646. If the expressions are mere statements of good-will towards other persons, a trust will not be implied: *Buggins v. Yeats*, 8 Vin. Ab. 72, Pl. 27; *Sale v. Moore*, 1 Sim. 534; *Hoy v. Master*, 6 Sim. 568; *Reeves v. Baker*, 18 Beav. 372; *Lechmere v. Lavie*, 2 My. & K. 197; *Abraham v. Almon*, 1 Russ. 509;

family;"¹ or, with a request, "to distribute it among such members of the donee's family" as he should deem most deserving;² or, "in full confidence that the donee would devise it to such heirs of the testator's father as she might think best deserved a preference;"³ or with a recommendation that the donee "would consider the testator's relations;"⁴ or, where the recommendation was "to consider certain persons,"⁵ "to be kind to them,"⁶ "to remember

Harland v. Trigg, 1 Bro. Ch. 142; *Curtis v. Rippon*, 5 Madd. 434. But where a testator gave property to his son, and ordered him to take care and provide for his daughter, it was held that she was entitled to a provision: *Broad v. Bevan*, 1 Russ. 511, n. It must be repeated, that in many cases the element of uncertainty as to the property to be affected by the words of recommendation has entered largely into the construction given to wills by courts; and in that, as in most other circumstances attending the construction of a will, each case must depend upon the particular words of the will and the context in which they are found. See *Lefroy v. Flood*, 4 Ir. Ch. 1, 12; *Wynne v. Hawkins*, 1 Bro. Ch. 179; *Horwood v. West*, 1 Sim. & St. 387; *Huskisson v. Bridge*, 15 Jur. 738; *Young v. Martin*, 2 Y. & C. Ch. 582, *Ex parte Payne*, id. 636; *Knight v. Knight*, 3 Beav. 148; *Knight v. Boughton*, 11 Cl. & Fin. 513; 12 Beav. 312; *Bonser v. Kinnear*, 2 Gif. 195; *Quayle v. Davidson*, 12 Moore, P. C. 268; *Maud v. Maud*, 27 Beav. 615. But see *Malone v. O'Connor*, 2 Lloyd & Goold, 465. Of course, if no trust is implied from the words of recommendation used in the will, the donee takes the absolute beneficial as well as legal interest to the extent to which it is limited. *Stubbs v. Sargon*, 2 Keen, 255; 3 My. & Cr. 507; *Gloucester v. Wood*, 3 Hare, 131; 1 H. L. Cas. 272; *Briggs v. Penny*, 3 De G. & S. 547; 3 Mac. & G. 546; *Fowler v. Garlike*, 1 R. & My. 232. But if a trust is intended, but it is so uncertain that it cannot be executed, it will result to the heir or next of kin, or residuary legatee or devisee, according to the circumstances.

¹ *Harland v. Trigg*, 1 Bro. Ch. 142; *Wright v. Atkins*, 19 Ves. 279; *G. Coop.* 121; *Woods v. Woods*, 1 M. & Cr. 401; *Parkinson's Trust*, 1 Sim. (N. S.) 242; *Williams v. Williams*, id. 358. See also *White v. Briggs*, 2 Phill. 583; *Liley v. Hey*, 1 Hare, 580.

² *Green v. Marsden*, 1 Drew. 646.

³ *Meredith v. Heneage*, 1 Sim. 542; and see *Wright v. Atkins*, *G. Coop.* 119; *Curnick v. Tucker*, L. R. 17 Eq. 320.

⁴ *Sale v. Moore*, 1 Sim. 534; *Macnab v. Whitbread*, 17 Beav. 299; *Wright v. Atkins*, *G. Coop.* 119.

⁵ *Ibid.*; *Hoy v. Master*, 6 Sim. 568.

⁶ *Buggins v. Yates*, 9 Mod. 122.

them,"¹ "to do justice to them,"² "to make ample provision for them,"³ "to use the property for herself and her children, and to remember the church of God and the poor,"⁴ "to give what should remain at his death, or what he should die seized or possessed of,"⁵ or, "to finally appropriate as he pleases;" with a recommendation "to divide among certain persons,"⁶ or, "to divide and dispose of the savings,"⁷ or the bulk of the property;⁸ or, where the testator "recommends, but does not absolutely enjoin;"⁹ or, where a testator gave all his property to his wife absolutely, and by a codicil, in the form of a letter to her, said it was his wish "that she should have everything, using her judgment when to dispose of it among her children, but that he should be unhappy if he thought that any one not of her family should be the better for what he felt confidence she would so well dispose of;"¹⁰ or, where everything was given to a "wife in the fullest trust and confidence reposed in her that she will dispose of the same for the joint benefit of herself and my children,"¹¹ or where an estate was given to a wife, "being fully satisfied that she will dispose of the same, by will or otherwise, in a fair and equitable manner to our united relatives, bearing in mind that my relatives are in better

¹ *Bardswell v. Bardswell*, 9 Sim. 319.

² *Le Maitre v. Bannister*, Pr. Ch. 200, and note; *Pope v. Pope*, 10 Sim. 1.

³ *Winch v. Brutton*, 14 Sim. 379; *Fox v. Fox*, 27 Beav. 301.

⁴ *Curtis v. Rippon*, 5 Madd. 434.

⁵ *Sprange v. Barnard*, 2 Bro. Ch. 585; *Green v. Marsden*, 1 Drew. 646; *Pushman v. Filliter*, 3 Ves. 7; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Madd. 118; *Wynne v. Hawkins*, 1 Bro. Ch. 179; *Lechmere v. Lavie*, 2 M. & K. 197; *Bland v. Bland*, 2 Cox, 349; *Att. Gen. v. Hall*, Fitzg. 314; and see *Meredith v. Heneage*, 1 Sim. 542; *Tibbits v. Tibbits*, 19 Ves. 655; *Pope v. Pope*, 10 Sim. 1.

⁶ *White v. Briggs*, 15 Sim. 33.

⁷ *Cowman v. Harrison*, 10 Hare, 234.

⁸ *Palmer v. Simmonds*, 2 Drew. 221.

⁹ *Young v. Martin*, 2 Y. & C. Ch. 582.

¹⁰ *Williams v. Williams*, 1 Sim. (N. S.) 358.

¹¹ *Webb v. Wools*, 2 Sim. (N. S.) 267; *Byne v. Blackburn*, 26 Beav. 41.

circumstances than hers;"¹ or, where all the testator's estate was given to his wife, recommending her "to give the same to his children, at such time and in such manner as she should think best;"² or, where a bequest of a house and an annuity was made to a niece, for the support of herself and her nephews and nieces whom she then had under her care, "and of such other persons as she from time to time might wish and request to be members of her family;"³ or, where property was given to a daughter, "to be hers forever, to be disposed of as she may think proper among her children and grandchildren, by will or otherwise;"⁴ or a devise to a wife of all a testator's property, recommending her "to make some small allowance, at her convenience, to each of his brothers and sisters: say, \$1000 to each;"⁵ or, a devise "of the use, benefit, and profits, to a wife absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among her children;"⁶ or, where the testator expressed an "earnest hope" and "particular request" that "the donee would give the property to some one bearing the family name."⁷ In a case where A. gave property to B. and directed that his daughter should reside with and be maintained by B., and she resided of her own accord in another place, it was held that there was no implied trust for her if she resided in another place.⁸

§ 114. It is an easy task to enumerate cases where trusts have been implied and where they have not been implied; but it is difficult to reconcile all the decisions. The words "will," "wish," "request," "hope," "desire," "trust," "have confidence," "recommend," "not doubting," and

¹ *Reeves v. Baker*, 18 Beav. 372.

² *Gilbert v. Chapin*, 19 Conn. 351.

³ *Harper v. Phelps*, 21 Conn. 257.

⁴ *Thompson v. McKisick*, 3 Humph. 631.

⁵ *Ellis v. Ellis*, 15 Ala. 296.

⁶ *Pennock's Estate*, 20 Pa. St. 268; reversing *Coate's Appeal*, 2 Barr, 129, and *McKonkey's Appeal*, 1 Harris, 253.

⁷ *Hood v. Oglander*, 34 Beav. 513.

⁸ *Wilson v. Ball*, L. R. 4 Ch. 581.

other similar words found so often in wills, express a state of mind in the testator, and they generally operate as a direct gift, devise, or bequest; but they are frequently so used that it is doubtful whether they are absolute directions, or mere suggestions to be acted on or not according to the discretion of the donee. Every case must depend upon the construction of the particular will under consideration.¹ (a) The

¹ *Negroes v. Palmer*, 18 Md. 165; *Meggison v. Moore*, 2 Ves. Jr. 633.

(a) In *Hill v. Hill*, [1897] 1 Q. B. 483, 486, Lord Esher, M. R., said: "I have the strongest conviction that, when the court is called upon to place a construction upon words spoken or written for the purpose of adjudicating upon them, the same rule applies in courts of equity as in courts of law, namely, that the words must have their ordinary signification, unless in the particular case there is something which obliges the court to give them a meaning other than their ordinary meaning. The words which we have to consider in this case are words of request. Words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind either at law or in equity. But in any particular case there may be circumstances which would oblige the court to say that such words have a meaning beyond their ordinary meaning, and import a legal obligation." Lord St. Leonards in his *Law of Property*, p. 375, says: "It is not an unwholesome rule, that if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a

considerable struggle." The recent authorities tend strongly to recognize this rule. In *Williams v. Williams*, [1897] 2 Ch. 12, 18, Lindley, L. J., said: "In each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist." . . . The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form. A request is often a polite form of command. . . . A condition of this kind is enforceable in equity, and need not amount to a common-law condition involving a forfeiture." In *Colton v. Colton*, 127 U.S. 300, 312, Mr. J. Matthews said: "If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it 'precatory.' The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and cir-

point really to be determined in all these cases is whether, looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion. It is doubtful if there exist any formula for bringing to a direct test the question, whether words of "request," "hope," or "recommendation," are or are not to

cumstances of the testator when he used them."

The statements of the author in the text (*supra*, §§ 112, 113), apart from the qualifications here stated, appear, in following the older authorities, to go too far in holding that particular words in a will created a trust. While confidence, if the context shows that a trust is intended, may make a trust, yet if, upon construing the whole will, the confidence is merely that the legatee will do what is right in disposing of the property, a binding trust is not imposed. See *In re Adams and Kensington Vestry*, 27 Ch. D. 394, 410; *In re Diggles*, 39 Ch. D. 253; *Booth v. Booth*, [1894] 2 Ch. 282; *In re Hamilton*, [1895] 2 Ch. 370; *Atkinson v. Atkinson*, 62 L. T. 735; *Hill v. Hill*, 78 id. 103; *Adams v. Lopdell*, 25 L. R. Ir. 311; *Dexter v. Evans*, 63 Conn. 58; *Bacon v. Ransom*, 139 Mass. 117; *Durant v. Smith*, 159 Mass. 229; *Aldrich v. Aldrich*, 172 Mass. 101; *Foose v. Whitmore*, 82 N. Y. 405; *Clay v. Wood*, 153 N. Y. 134; *In re Gardner*, 140 N. Y. 122; *Nunn v. O'Brien*, 83 Md. 198; *Pratt v. Trustees (Md.)*, 42 Atl. 51; *Boyle v. Boyle*, 152 Penn. St. 108; *Good v. Fichthorn*, 144 id. 287; *Eberhardt v. Perolin*,

49 N. J. Eq. 570; *Orth v. Orth*, 145 Ind. 184; *Stivers v. Gardner*, 88 Iowa, 307; *Bills v. Bills*, 80 id. 269; *Foster v. Willson (N. H.)*, 38 Atl. 1003; *Murphy v. Carlin*, 113 Mo. 112; *Sale v. Thornberry*, 86 Ky. 266; *Arnold v. Arnold*, 41 S. C. 291; *Hill v. Page (Tenn.)*, 36 S. W. 735; *Harrison v. Harrison (Va.)*, 44 Am. Dec. 365, and note; 1 Ames on Trusts (2d ed.) 93, 97, notes; 1 Jarman on Wills (Bigelow's 6th ed.), *356. In *Mussoorie Bank v. Raynor*, 7 App. Cas. 321, uncertainty as to the nature and amount of the property given over was held a strong indication that words of desire were not intended to be imperative. When an absolute ownership is clearly conferred, a trust will not be inferred; nor can a trust be implied merely from the words indicating the motives which induced the gift. *Giles v. Anslow*, 128 Ill. 187, 196; *Randall v. Randall*, 135 Ill. 398; *Bain v. Buff*, 76 Va. 371; *Seamonds v. Hodge*, 36 W. Va. 304. An expressed wish that a certain payment be made, if "convenient," as it does not depend upon choice or discretion, creates a trust. *Phillips v. Phillips*, 112 N. Y. 197.

be considered obligatory.¹ The most that can be done is to

¹ *Warner v. Bates*, 98 Mass. 276; *Williams v. Williams*, 1 Sim. (n. s.) 358, by Sir Knight Bruce. In *Wright v. Atkins*, 1 T. & R. 157, Lord Eldon said that in order to determine whether the words create a trust or not, it is matter of observation, — first, that the words should be imperative; secondly, that the subject must be certain; and thirdly, that the object must be as certain as the subject. See *Wood v. Cox*, 2 My. & Cr. 684; *Pope v. Pope*, 10 Sim. 1. In *Knight v. Knight*, 3 Beav. 148, Lord Langdale said, “It is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed and enforced as a trust; and in the infinite variety of expressions employed, and of cases which arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust. In the construction of wills it is the duty of the court to give effect to the intention of the testator, whenever it can be ascertained.” Then, after stating that in decreeing trusts wills have been made rather than executed, and that caution is necessary, his lordship goes on to say, “that as a general rule it has been laid down that when property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended or entreated or wished to dispose of the property in favor of another, the recommendation or entreaty or wish shall be held to create a trust: first, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.” Same case under the name of *Knight v. Boughton*, 11 Cl. & Fin. 548.

The learned editors to Hill on Trustees, p. 73 (4th Am. ed.), have examined the American and English cases, and state the following rules, which seem to be fairly deducible from the adjudged cases:—

1. Precatory words in a will, equally with direct fiduciary expressions, will create a trust; the wish of a testator, like the request of a sovereign, is equivalent to a command.

2. Discretionary expressions which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee, will prevent a trust from attaching; but a mere discretion in regard to the method of application of the subject, or the selection of the object, will not be inconsistent with a trust.

3. Precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise.

4. But failure or uncertainty will be an element to guide the court in construing words of doubtful significance adversely to a trust.

state a few general rules that lead to the construction of particular wills.

§ 115. However strong the language of recommendation or request may be, a trust will not be implied if the testator declare that such is not his intention, as if he declares that the gift shall be "unfettered or unlimited," or if he "recommends but does not enjoin."¹ And so a trust will not be implied if such a construction of the precatory words would render them repugnant to, or inconsistent with, other parts of the same instrument.² If construing a recommendation or the expression of a wish into a trust would contradict in terms the preceding bequest, a trust will not be implied.³ As if the gift is absolute, and of all the testator's property, and of both the legal and equitable interest in it, words of recommendation will not cut it down into a trust; or, in the words of Kindersley, V. C., "where the later words of a sentence in a will go to cut down an absolute gift contained in the first part of a sentence, and are inconsistent with such gift, the court will, if it can, give effect to the absolute gift."⁴ The same rule was stated by Lord Cottenham thus: "Though 'recommendation' may in some cases amount to a direction and create a trust, yet that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more."⁵ The flexible term must give way to the inflexible, if the two cannot stand together as they are expressed.

¹ Meredith v. Heneage, 1 Sim. 543; 10 Price, 230; Hoy v. Master, 6 Sim. 568; Young v. Martin, 2 Y. & C. Ch. 582; Huskisson v. Bridge, 4 De G. & Sm. 245; Warner v. Bates, 98 Mass. 277; Whipple v. Adam, 1 Met. 444; Eaton v. Witts, L. R. 4 Eq. 151; Barrett v. Marsh, 126 Mass. 213.

² Brunson v. Hunter, 2 Hill, Ch. 490; Knott v. Cottee, 2 Phill. 192.

³ Webb v. Wools, 2 Sim. (N. S.) 267; Bardswell v. Bardswell, 9 Sim. 319.

⁴ Webb v. Wools, 2 Sim. (N. S.) 267; Van Duyne v. Van Duyne, 1 McCarter, 397.

⁵ Knott v. Cottee, 2 Phill. 192; Second, etc. Church v. Desbrow, 52 Penn. St. 219.

§ 116. Again, a trust will not be implied from precatory words where it would be impracticable for a court to deal with and execute it; as if a testator should devise a house to his wife, and express a wish that his sister should live with her, for the sister takes no interest in the house, and a court cannot decree two persons to live together.¹ So where a testator devised a dwelling-house and an annuity to a niece, for the support of herself and her nephews and nieces then living with her, and of such other persons as she from time to time might request to be members of her family.² Nor will a trust be implied if there is uncertainty as to the property to be subjected to the trust,³ or as to the persons to be benefited by the trust,⁴ or as to the manner in which the property is to be applied. Lord Alvanley stated the rule to be "that a trust would be implied only where the testator points out the objects, the property, and the way in which it shall go."⁵ If the subjects and objects of the supposed trust are left uncertain by a testator, the court will infer that no obligation was intended to be imposed upon the donee, but that the whole disposition was left to his dis-

¹ *Graves v. Graves*, 13 Ir. Ch. 182; *Hood v. Oglander*, 34 Beav. 513.

² *Harper v. Phelps*, 21 Conn. 257.

³ *Lechmere v. Lavie*, 2 M. & K. 197; *Knight v. Knight*, 3 Beav. 148; *Meredith v. Heneage*, 1 Sim. 556; *Buggins v. Yates*, 9 Mod. 122; *Sale v. Moore*, 1 Sim. 534; *Anon.* 8 Vin. 72; *Tibbits v. Tibbits*, 19 Ves. 655; *Wynne v. Hawkins*, 1 Bro. Ch. 179; *Pierson v. Garnet*, 2 id. 45, 230; *Sprange v. Barnard*, id. 585; *Bland v. Bland*, 2 Cox, 349; *Le Maitre v. Bannister*, and *Eales v. England*, Pr. Ch. 200; *Pushman v. Filliter*, 3 Ves. 7; *Att. Gen. v. Hall*, Fitzg. 314; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Madd. 118; *Curtis v. Rippon*, id. 434; *Russell v. Jackson*, 10 Hare, 213; *Knight v. Boughton*, 11 Cl. & Fin. 513; *Flint v. Hughes*, 6 Beav. 342; *Lines v. Darden*, 5 Fla. 51.

⁴ *Harland v. Trigg*, 1 Bro. Ch. 142; *Wynne v. Hawkins*, id. 179; *Tibbits v. Tibbits*, 19 Ves. 655; *Richardson v. Chapman*, 1 Burns, Ecc. L. 245; *Pierson v. Garnet*, 2 Bro. Ch. 45, 230; *Knight v. Knight*, 3 Beav. 148; *Sale v. Moore*, 1 Sim. 534; *Cary v. Cary*, 2 Sch. & Lef. 189; *Meredith v. Heneage*, 1 Sim. 542; *Ex parte Payne*, 2 Y. & C. Ch. 636; *Knight v. Boughton*, 11 Cl. & Fin. 513; *Lines v. Darden*, 5 Fla. 51.

⁵ *Malim v. Keighley*, 2 Ves. Jr. 335; *Knight v. Boughton*, 11 Cl. & Fin. 548; *Warner v. Bates*, 98 Mass. 277; *Whipple v. Adams*, 1 Met. 444.

cretion.¹ So if a mere *power* to appoint is given to the first taker, to be exercised or not at his discretion, no trust will be implied.² And no trust will be implied, if, taking the whole instrument and all the circumstances together, it is more probable than otherwise that the testator intended to communicate a discretion and not an obligation.³

§ 117. There is another variety of cases, where trusts are sometimes implied from the words used, though an express trust is not declared, as where property is given to a parent or other person standing in the relation of parent, and some directions or expressions are used in regard to the maintenance of his family or children. The question to be decided in this class of cases is, as in the others, did the settlor intend to create a trust and impose an obligation, or did he merely state incidentally the motive which led to an absolute gift?⁴ In the following cases a trust was clearly implied by the court; where property was given, that "he may dispose thereof for the benefit of himself and children,"⁵ or, "for his own use and benefit, and the maintenance and education of his children,"⁶ "for the maintenance of himself and family,"⁷ "for the purpose of raising, clothing, and educating" the children of the legatee,⁸ "at the disposal of the legatee for herself and her children,"⁹ or "all overplus

¹ *Morice v. Bishop of Durham*, 10 Ves. 536.

² *Brook v. Brook*, 3 Sm. & Gif. 280; *Paul v. Compton*, 8 Ves. 380; *Howorth v. Dewell*, 29 Beav. 18; *Lines v. Darden*, 5 Fla. 51.

³ *Bull v. Hardy*, 1 Ves. Jr. 270; *Knott v. Cottee*, 2 Phill. 192; *Knight v. Knight*, 3 Beav. 174; 11 Cl. & Fin. 513; *Meggison v. Moore*, 2 Ves. Jr. 630; *Hill v. Bishop, &c.*, 1 Atk. 618; *Paul v. Compton*, 8 Ves. 380; *Lefroy v. Flood*, 4 Ir. Ch. 1; *Shepherd v. Nottidge*, 2 Johns. & Hem. 766.

⁴ *Paisley's App.* 70 Penn. St. 158.

⁵ *Raikes v. Ward*, 1 Hare, 445; *Whiting v. Whiting*, 4 Gray, 240.

⁶ *Longman v. Elcum*, 2 Y. & C. Ch. 369; *Carr v. Living*, 28 Beav. 644; *Berry v. Briant*, 2 Dr. & Sm. 1; *Bird v. Maybury*, 33 Beav. 351; *Andrews v. Bank of Cape Ann*, 3 Allen, 313.

⁷ *In re Robertson's Trust*, 6 W. R. 405; *Whelan v. Reilly*, 3 W. Va. 597; *Smith v. Wildman*, 37 Conn. 387.

⁸ *Rittgers v. Rittgers*, 56 Iowa, 218.

⁹ *Crockett v. Crockett*, 1 Hare, 451; 2 Phill. 461; *Bibby v. Thompson*, 32 Beav. 646.

towards her support and her family,"¹ or to "A. for the education and advancing in life of her children."² In *Byne v. Blackburn*, it was held that the fact that the property was given to a trustee instead of to the parent was sufficient to show that no sub-trust was intended;³ but this case is in conflict with other cases;⁴ and in *Chase v. Chase*, where property was given to trustees "to pay the income yearly to a son for the support of himself and family and the education of his children," it was held that the income was taken in trust by the son as sub-trustee, and that the wife and children could in equity enforce its appropriation in part for their support.⁵ Where a testator gave his wife the entire

¹ *Woods v. Woods*, 1 M. & Cr. 401.

² *Gilbert v. Bennett*, 10 Sim. 371.

³ *Byne v. Blackburn*, 26 Beav. 41.

⁴ *Gilbert v. Bennett*, 10 Sim. 371; *Longman v. Elcum*, 2 Y. & C. Ch. 363; *Carr v. Living*, 28 Beav. 644.

⁵ *Cole v. Littlefield*, 35 Maine, 435; *Loring v. Loring*, 100 Mass. 340; *Wilson v. Bell*, L. R. 4 Ch. 581; *Whiting v. Whiting*, 4 Gray, 240; *Chase v. Chase*, 2 Allen, 101. In this case Chief-Justice Bigelow said: "The intent of the testator to give the benefit of the income of the trust fund created by his will to the wife and children of his son Philip, as well as to his son, is clear and unequivocal. It was intended for their joint support, and for the education of the children. The only question arising on the construction of the will is, whether the income of the trust fund, when received by the son, is held absolutely by him to be disposed of at his discretion, or whether he takes it in trust so that the wife and children can seek to enforce its due appropriation, in part for their benefit, in a court of equity. We cannot doubt that the latter is the true construction; otherwise it would be in the power of the son to defeat the purpose of the testator, by depriving his family of the support and education which was expressly provided for by the will. The adjudicated cases recognize the rule that where income arising from property is left to a person for the maintenance of children, he will be entitled to receive it for that purpose only so long as he continues properly to maintain them. It can make no difference in the application of the principle, that the person who is to receive the income also takes a beneficial interest in it for his own support. He is not thereby authorized to appropriate the whole of it to his own use, and deprive the other beneficiaries of the share to which they are entitled. *Hadow v. Hadow*, 9 Sim. 438; *Jubber v. Jubber*, id. 503; *Longmore v. Elcum*, 2 Y. & C. Ch. 363; *Leach v. Leach*, 13 Sim. 804; *Hart v. Tribe*, 19 Beav. 149; *Raikes v. Ward*, 1 Hare, 445;

profit of his estate for life, "intrusting to her the education and maintenance of his children," and also providing for the education and maintenance of the children "out of the profits" of the estate, it was held that the widow was charged with the trust of educating and supporting the children;¹ and where a legacy was given to a wife to be applied to the maintenance of certain persons in such proportions and at such times as she should think proper, it was held to be an imperative trust.² Where a testator gave to his wife all his personal property for her benefit and support and the benefit of his son, it was held to be a trust in the widow, the income of one-half for her own benefit and of the other half for the support of the son.³ A trust for support is not

Crockett v. Crockett, 2 Phill. 553." See *Babbitt v. Babbitt*, 26 N. J. Eq. 44.

¹ *Lucas v. Lockhart*, 10 Sim. & Mar. 468. See also *Hunter v. Stembridge*, 12 Ga. 192; *Withers v. Yeadon*, 1 Rich. Eq. 324.

² *Hawley v. James*, 5 Paige, 318.

³ *Loring v. Loring*, 100 Mass. 340; *Jubber v. Jubber*, 9 Sim. 503. When a testator has stated the motive which leads to the gift, the inquiry arises, is the motive or purpose of the gift so stated that the donee is under an obligation to apply the gift, or any part of it, to the benefit of another person? There are three classes of cases: (1) When a complete and obligatory trust is created in the first donee; as a gift to A. "to dispose of among her children," or for bringing up her children, gives no interest to A., but creates a complete trust. *Blakeney v. Blakeney*, 6 Sim. 52; *Pilcher v. Randall*, 9 Week. R. 251; *Taylor v. Bacon*, 8 Sim. 100; *Chambers v. Atkins*, 1 Sim. & St. 382; *Fowler v. Hunter*, 3 Y. & Jer. 506; *In re Comac's Trust*, 12 Jur. 470; *Barnes v. Grant*, 26 L. J. Ch. 92; *Jubber v. Jubber*, 9 Sim. 503; *Wetherell v. Wilson*, 1 Keen, 80; *Wilson v. Maddison*, 2 Y. & C. Ch. 372; *Re Harris*, 7 Exch. 344; *Whiting v. Whiting*, 4 Gray, 420; *Chase v. Chase*, 2 Allen, 101; *Cole v. Littlefield*, 35 Maine, 439; *Wright v. Miller*, 8 N. Y. 9. (2) There is a large class of cases where the first donee has a discretion to apply a part or the whole of the gift to a third person. This discretion, if exercised in good faith, will not be interfered with by the court, and the property unapplied by the donee will belong beneficially to him. Thus in *Hornby v. Gilbert*, Jac. 354, where a gift was made to A., to be laid out and expended by her at her discretion, for or towards the education of her son, and that she should not be liable to account to her son or any other person, it was held that the property belonged to her beneficially, subject to a trust to apply a part to the education of the son during his minority. And so where

void for uncertainty, as the amount required to furnish maintenance suitable to the station of the *cestui* can be ascertained with reasonable certainty.¹

income is given for life, to be applied to the education and maintenance of children in the discretion of the donee, the income must be paid to the person named, and the part unexpended belongs to such person beneficially. *Gilbert v. Bennett*, 10 Sim. 371; *Hadow v. Hadow*, 9 Sim. 438; *Leach v. Leach*, 13 Sim. 304; *Brown v. Paul*, 1 Sim. (N. S.) 92; *Bowden v. Laing*, 14 Sim. 113; *Longmore v. Elcum*, 2 Y. & C. Ch. 363. And if the interest or income of legacies to the children is given to a parent, to be applied to the maintenance and education of the children, the parent will take the surplus beneficially if he performs his duty, unless a contrary intention is expressed: and providing for other trustees in case of the parent's death does not indicate a contrary intention. *Brown v. Paul*, 1 Sim. (N. S.) 103. Sometimes the gifts to a parent are so expressed that the parent takes the property in trust, subject to a large discretion; and sometimes the parent takes the property for life, subject to a power of appointment for the children. The latter construction is the more favored by the courts. See *Crockett v. Crockett*, 2 Phill. 553; *Gully v. Cregoe*, 24 Beav. 185; *Hart v. Tribe*, 18 Beav. 215; *Ware v. Mallard*, 21 L. J. Ch. 355, 16 Jur. 492. In *Raikes v. Ward*, 1 Hare, 445, a gift was made to a wife "to the intent she may dispose of the same for the benefit of herself and our children as she may deem most advantageous," and the court determined that the children had no absolute interest, but that their interests were subject to her honest discretion. *Connolly v. Farrell*, 8 Beav. 347; *Woods v. Woods*, 1 My. & Cr. 401; *Costababie v. Costababie*, 6 Hare, 410; *Cowman v. Harrison*, 10 Hare, 234; *Smith v. Smith*, 2 Jur. (N. S.) 907; *Cooper v. Thornton*, 3 Bro. Ch. 96; *Robinson v. Tickell*, 8 Ves. 142; *Wood v. Richardson*, 4 Beav. 174; *Pratt v. Church*, id. 177. (3) The third class of cases contains those in which it is held that the primary donee is absolutely entitled to the whole interest given, without any rights in third persons, as in *Brown v. Casamajor*, 4 Ves. 498, where a legacy was given to a father "the better to enable him to provide for his children." These and similar words merely express the motive of the gift, but import or imply no obligation or discretion which courts can enforce or control. *Hammond v. Neame*, 1 Swanst. 35; *Benson v. Whittam*, 5 Sim. 22; *Thorp v. Owen*, 2 Hare, 697; *Andrews v. Partington*, 3 Bro. Ch. 60. See also *Biddles v. Biddles*, 16 Sim. 1; *Berkley v. Swinbourne*, 6 Sim. 613; *Oakes v. Strachy*, 13 Sim. 414; *Leigh v. Leigh*, 12 Jur. 907; *Jones v. Greatwood*, 16 Beav. 528; *Hart v. Tribe*, 18 Beav. 215; *Wheeler v. Smith*, 1 Giff. 300. It may be said that

¹ *Johnson v. Billups*, 23 W. Va. 685.

§ 118. In cases where a trust for the maintenance of children is implied, the person bound by the trust is regarded in the same light as the guardian of a lunatic or of a minor:¹ he is entitled to receive the fund, and can give a valid receipt for it;² and, so long as he discharges the trust imposed upon him, he is entitled to the surplus for his own benefit, nor is he obliged to account for the past application of the fund.³ And the future application is very much according to his discretion, provided he educates and supports the children reasonably, according to their position in the world and the intention of the testator.⁴ The court, in cases where a question is raised, will order payment to be made to him, with liberty to the wife and children to apply for further orders;⁵ if he becomes unfit to educate the children, the court can apportion the fund, and prevent him from receiving the portion necessary for the children and family;⁶ and if he assigns his interest in the fund, the court can apportion it, and set apart what is needed for the support and education of the children, and give the remainder to his assignee.⁷ Of course, if there are no children, or if they die, the person bound by the trust takes the whole benefit of the fund.⁸ But if the devisee die before the chil-

latterly courts are not so astute to discover and enforce trusts from precatory words, and are more inclined to find in the words the mere statement of a motive, or the vesting of a discretion in the donee.

¹ *Jodrell v. Jodrell*, 14 Beav. 411.

² *Woods v. Woods*, 1 M. & Cr. 409; *Raikes v. Ward*, 1 Hare, 449; *Cooper v. Thornton*, 3 Bro. Ch. 186; *Robinson v. Tickell*, 8 Ves. 142; *Crockett v. Crockett*, 1 Hare, 451; 2 Phill. 553; *Webb v. Wools*, 2 Sim. (N. s.) 272.

³ *Leach v. Leach*, 13 Sim. 304; *Brown v. Paul*, 1 Sim. (N. s.) 92; *Carr v. Living*, 28 Beav. 644; *Hora v. Hora*, 33 Beav. 88; *Smith v. Smith*, 11 Allen, 423; *Berkley v. Swinbourne*, 6 Sim. 613; *Hadow v. Hadow*, 9 Sim. 438.

⁴ *Raikes v. Ward*, 1 Hare, 450.

⁵ *Hadow v. Hadow*, 9 Sim. 438; *Crockett v. Crockett*, 1 Hare, 451.

⁶ *Chase v. Chase*, 2 Allen, 101; *Castle v. Castle*, 1 De G. & Jon. 352.

⁷ *Chase v. Chase*, 2 Allen, 101; *Carr v. Living*, 2 Beav. 644.

⁸ *Hammond v. Neame*, 1 Swanst. 35; *Cape v. Cape*, 2 Y. & C. Ex. 543; *Bushnell v. Parsons*, Pr. Ch. 219; *Bowditch v. Andrew*, 8 Allen, 339; *Smith v. Smith*, 11 Allen, 423.

dren, the trust remains for them.¹ The trust also ceases as to children who become *forisfamiliated*, or cease to be members of the trustee's family, and, by marriage or otherwise, become members of another home or establishment; for it would not generally be implied that a testator intended² an income for the support and education of his family to be divided up into as many families as he left children.³ Whether a child's right to maintenance under such a will ceases by the fact of his attaining twenty-one years of age is in many cases an open question.⁴ On the one side it may be said that the trust ought not to continue after the child is of age, and is educated and prepared to acquire a livelihood for himself.⁵ On the other hand, if the child is willing to remain at home, and there is no reasonable objection to his so remaining, or if it is a female with no other protection and means of support, it would seem that the trust ought not to cease on the mere ground that the child has attained twenty-one.⁶ The great majority of cases will, of course, depend upon the particular words used in the particular will, and they will be so construed by the court as to carry out the intentions of the testator.⁷ If a trust is to a widow for life for the support of herself and the support and education of her children, and the property is to go to them absolutely upon her death, one of them, on coming of age, cannot call for his proportion, even with the concurrence of

¹ *Andrews v. Cape Ann Bank*, 3 Allen, 313.

² *Bowdoin v. Laing*, 14 Sim. 113; *Carr v. Living*, 28 Beav. 644; 33 Beav. 464; *Thorp v. Owen*, 2 Hare, 612; *Longmore v. Elcum*, 2 Y. & C. Ch. 370; *Manning v. Wopp*, 2 Dev. & Bat. Ch. 11; *Smith v. Wildman*, 37 Conn. 387; *Gardner v. Barker*, 2 Eq. R. 888, overruling *Soames v. Martin*, 10 Sim. 287; *Bayne v. Crowther*, 20 Beav. 400; *Brocklebank v. Johnson*, 29 Beav. 211; *Badham v. Mee*, 1 R. & M. 631.

³ *Ibid.*; *Baker v. Reel*, 4 Dana, 158; *Conolly v. Farrell*, 8 Beav. 350; citing *Camden v. Benson*, *Crockett v. Crockett*, 1 Hare, 457; 5 Hare, 326.

⁴ *Ibid.*

⁵ *McDonnell v. Black*, Riley, Ch. 152.

⁶ *Ibid.*; *Cloud v. Martin*, 2 Dev. & Bat. Ch. 274; *Carr v. Living*, 33 Beav. 464.

⁷ *Gardner v. Barker*, 18 Jur. 508; *Bowditch v. Andrew*, 8 Allen, 339; *Sargent v. Bourne*, 6 Met. 32.

the widow, if such transfer would so diminish the fund as to endanger the rights of the other children to support and education during the life of the widow. In such case the court has ordered a part of such child's share to be paid over on his undertaking to account for the income if needed, and on the footing that the residue should be retained for security, that the income should be paid over if required.¹ The children have such an interest in the fund given for their maintenance that it cannot be reached by a creditor's bill or trustee process against the parent or other person charged with the obligation of maintaining the children or family; that is, if the fund is given to a person for a particular purpose, it cannot be diverted from that purpose by creditors of the donee.²

§ 119. But no trust is implied where the words simply state the motive leading to the gift, as where the gift is to a person "to enable him to maintain the children,"³ or an absolute gift is made, and the motive stated "that he may support himself and children,"⁴ or a gift is made absolutely for her own use and benefit, "having full confidence in her sufficient and judicious provision for the children."⁵ When a testator gave to his wife "the use, benefit, and profits of his real estate for life, and all his personal estate, absolutely, having full confidence that she will leave the surplus to be divided justly among my children," it was held that the widow took the personal estate absolutely subject to no trust, and that the word "surplus" meant what was left consumed or undisposed of by her.⁶ And it may be added

¹ *Berry v. Briant*, 2 Dr. & Sm. 1.

² *Bramhall v. Ferris*, 14 N. Y. 41; *White v. White*, 30 Vt. 342; *Rife v. Geyer*, 59 Pa. St. 393; *Wells v. McCall*, 64 Penn. St. 207; *Clute v. Bool*, 8 Paige, 83; *Doswell v. Anderson*, 1 P. & H. (Va.) 185.

³ *Benson v. Whittam*, 5 Sim. 22; *Leach v. Leach*, 13 Sim. 304; *Burt v. Herron*, 66 Penn. St. 400; *Rhett v. Mason*, 18 Grat. 541; *Burke v. Valentine*, 52 Barb. 412.

⁴ *Thorp v. Owen*, 2 Hare, 607.

⁵ *Fox v. Fox*, 27 Beav. 301; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213.

⁶ *Pennock's Estate*, 20 Penn. St. 268, overruling the opinions in

that the mere expression of a purpose for which a gift is made does not render the purpose obligatory. Even if the purpose of the gift was to benefit the donee solely, he can claim the gift without applying it to the purpose named, whether the expression be obligatory in form or not. Thus if a gift be made to a person to purchase a ring,¹ or an annuity,² or a house,³ or to set him up in business,⁴ or for his maintenance and education,⁵ or to bind him apprentice,⁶ or towards the printing of a book, the profits of which to be for his benefit,⁷ the legatee may claim the money without applying, or binding himself to apply, it to the purpose specified, even although there is an express declaration that he shall not otherwise receive the money.⁸ These cases go upon the principle that a court of equity will not compel a legatee or other party to do what he may undo the next moment; for as soon as such party has received his ring, or house, or annuity, he may sell it or give up his business.⁹ And where money is given to trustees, and a discretion is given to them how much and in what manner they shall apply it, the *cestui que trust* has no right to more than the trustees see fit to apply.¹⁰

Coate's Appeal, 2 Barr, 129, and in McKonkey's Appeal, 1 Harris, 253; cases upon the same will under other names. And see Paisley's App. 70 Penn. St. 158, where the cases are discussed; Willard's App., 15 P. F. Smith, 265.

¹ Apreece v. Apreece, 1 Ves. & B. 364.

² Dawson v. Hearne, 1 R. & My. 606; Ford v. Battey, 17 Beav. 303; *Re Brown's Will*, 27 Beav. 324; Yates v. Compton, 2 P. Wms. 38.

³ Knox v. Hotham, 15 Sim. 82.

⁴ Gough v. Bult, 16 Sim. 45.

⁵ Webb v. Kelley, 9 Sim. 472; Young Husband v. Gisborne, 1 Gall. 400; Presant v. Goodwin, 1 Sm. & Tr. 544; Boyne v. Crowther, 20 Beav. 400; Twopenny v. Peyton, 10 Sim. 487.

⁶ Barlow v. Grant, 1 Vern. 255; Nevill v. Nevill, 2 Vern. 231; Wool-dredge v. Stone, 4 L. J. (o. s.) Ch. 56; Burton v. Cook, 5 Ves. 461; Luke v. Kelmory, T. & R. 207; Att.-Gen. v. Haberdashers' Co., 1 My. & Keen, 420; Lewes v. Lewes, 16 Sim. 266; Noel v. Jones, 16 Sim. 309; Lockhart v. Hardy, 9 Beav. 379; Lonsdale v. Berchtoldt, 3 K. & J. 185.

⁷ *Re Skinner's Trusts*, 1 J. & H. 102.

⁸ Stokes v. Cheek, 29 L. J. Ch. 922.

⁹ 1 Jarm. on Wills, 368 (3d Lond. ed.).

¹⁰ *In re Sanderson's Trusts*, 3 Kay & J. 497; Beevor v. Partridge, 11

§ 120. If a trust is implied, it is governed in some respects by rules entirely different from the rules that govern a direct trust. Generally in a direct trust the trustee takes no beneficial interest in himself, but in an implied trust the trustee may take the whole beneficial interest for life, with a right even to expend some part of the principal fund. Thus, where an estate was devised to A. and her heirs in the fullest confidence that at her decease she would devise the property to the heirs of the testator, Lord Eldon held that A. had all the rights in the estate of a tenant for life, and so it was also held in the House of Lords.¹ But where a testator devised an estate to his wife and her heirs, under the firm conviction that she would dispose of and manage the same for the benefit of her children, it was held that the widow was not entitled to a beneficial interest as tenant for life.²

§ 121. Trusts sometimes arise by implication from the provisions of a will, in order to carry out the testator's intention. As where a testator leaves property to A. with the request that he shall leave it to B., a trust in favor of B. is created, which is not affected by the death of A. before the testator.³ A direction to continue the testator's business creates a trust.⁴ So where a testator gave his wife an annuity of \$1000 a year, to be paid her by a trustee named, to enable her to live comfortably and to support and educate her children, and if in any year said sum were insufficient, the trustee was to pay her an additional sum not exceeding \$1000. The testator gave a few legacies, and then gave the remainder of his estate to his daughters, and gave nothing to the trustee in words, but he authorized the trustee to sell certain of his real estate, and also to sell the personal property not specifically devised. The personal property was only sufficient to pay the debts of

Sim. 229; *Rudland v. Crozier*, 2 De G. & J. 143; *Cowper v. Mantell*, 22 Beav. 231.

¹ *Wright v. Atkyns*, T. & R. 157; *Lawless v. Shaw*, Lloyd & Goold, Sugden, 154; *Shovelton v. Shovelton*, 32 Beav. 143.

² *Barnes v. Grant*, 2 Jur. (N. S.) 1127.

³ *Eddy v. Hartshore*, 34 N. J. Eq. 409.

⁴ *Ferry v. Laible*, 31 N. J. Eq. 566.

the testator, and the trustee had no funds from which to pay the annuity to the wife. It was held by the court that the trustee took the real estate in trust by implication, that the daughters took the remainder after the trusts were executed, and that the widow could enforce the payment of the annuity by bill in equity against the trustee.¹ So if a testator direct his real estate to be sold, or if he charge it with the payment of debts or legacies, it may descend to an heir, or pass to a devisee, but the court will consider the direction as an implied declaration of trust, and enforce its execution in the hands of those to whom it has come.² So a condition annexed to a devise which, being broken, might work a forfeiture of the estate, has in equity been construed into an implied trust, and enforced as such; as where a house was devised to A. for life, "he keeping the same in repair," or where an estate is given to one in fee, "he paying the testator's debts within a year."³ Sometimes it is very difficult to determine whether or no a trust ought to arise by implication, as where there is an absolute devise to C. and conjoined therewith expressions indicating a trust in E.⁴ Where a testator gave his wife a life estate and then left it to her discretion to give such aid to his relations as she might deem proper and just of her own will, it was held that there was no sufficient expression of desire to create a trust.⁵ So where a testator gave his estate to his daughter, saying, "I enjoin upon

¹ *Walker v. Whiting*, 23 Pick. 313; *Braman v. Stiles*, 2 Pick. 460; *Fay v. Taft*, 12 Cush. 448; *Watson v. Mayrant*, 1 Rich. Ch. 449; *Baker v. Reel*, 4 Dana, 158.

² *Pitt v. Pelham*, 2 Freem. 134; 1 Ch. R. 283; *Locton v. Locton*, 2 Freem. 136; *Auby v. Doyl*, 1 Ch. Cas. 180; *Tennant v. Brown*, id. 180; *Garfoot v. Garfoot*, id. 35; 2 Freem. 176; *Gwilliams v. Rowell*, Hard. 204; *Blatch v. Wilder*, 1 Atk. 420; *Carvill v. Carvill*, 2 Ch. R. 301; *Cook v. Fountain*, 3 Swanst. 529; *Bennett v. Davis*, 2 P. Wms. 318; *Wigg v. Wigg*, 1 Atk. 382; *Hoxie v. Hoxie*, 7 Paige, 187; *Withers v. Yeadon*, 1 Rich. Ch. 324; *McIntire Poor School v. Zan. Canal Co.*, 9 Ham. 203.

³ *Wright v. Wilkin*, 2 B. & Sm. 232; *Stanley v. Colt*, 5 Wall. 119; *Sohier v. Trinity Church*, 109 Mass. 1; *Re Skingley*, 3 M. & Gor. 221; *Gregg v. Coates*, 23 Beav. 33. And see *Kingham v. Lee*, 15 Sim. 396.

⁴ *Slater v. Hurlebut*, 146 Mass. 308, 314.

⁵ *Corby v. Corby*, 85 Mo. 371.

her to make such provision for my grandchild . . . in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate," it was held that there was no trust.¹ A gift "relying" on the donee to do so and so creates no trust.² Giving the wife the use or proceeds of property after expenses are paid, and providing for sale and distribution after her death, creates a trust, and gives the wife merely a life right to the rents and profits.³ An executor is always a trustee of the personalty, and the jurisdiction of equity courts over trusts gives them a right to construe wills whenever necessary to guide a trustee.⁴ Wherever the duties imposed on the executors are active, and render possession of the estate reasonably necessary, they will be deemed trustees.⁵ But merely calling an executor "trustee" in a will which creates no trust estate or duties will not make him a testamentary trustee.⁶

§ 122. Again, courts of equity will imply a trust from the contracts of parties, although there are no words of trust in the instrument;⁷ as if a person for a valuable consideration agrees to settle a particular estate upon another,⁸ or if he agrees to sell an estate to another,⁹ the settlor or vendor becomes a trust-

¹ *Lawrence v. Cooke*, 104 N. Y. 632; overruling same case in 32 Hun, 126.

² *Willets v. Willets*, 35 Hun, 401.

³ *Hathaway v. Hathaway*, 37 Hun, 265.

⁴ *Wager v. Wager*, 89 N. Y. 161.

⁵ *Ward v. Ward*, 105 N. Y. 68.

⁶ *In re Hawley*, 104 N. Y. 250.

⁷ *Taylor v. Pownal*, 10 Leigh, 183.

⁸ *Finch v. Winchelsea*, 1 P. Wms. 277; *Freemoult v. Dedire*, id. 429; *Kennedy v. Daley*, 1 Sch. & Le. 355; *Legard v. Hodges*, 1 Ves. Jr. 477; 3 Bro. Ch. 531; 4 Bro. Ch. 421; *Ravenshaw v. Hollier*, 7 Sim. 3; *Wellesley v. Wellesley*, 4 M. & C. 561; *Mornington v. Keane*, 2 De G. & J. 293; *Lyster v. Burroughs*, 1 Dr. & W. 149; *Stock v. Moyse*, 12 Ir. Ch. 246; *Lewis v. Madocks*, 8 Ves. 150; 17 id. 48; *Rowan v. Chute*, 13 Ir. Ch. 169; *Re McKenna*, 13 Ir. Ch. 239.

⁹ *Ackland v. Gaisford*, 3 Madd. 32; *Wilson v. Clapham*, 1 J. & W. 38; *Ferguson v. Tadman*, 1 Sim. 530; *Foster v. Deacon*, 3 Madd. 394; *Paine*

tee of the fee for the purposes of the settlement, or for the purchaser. Ante-nuptial contracts in regulation of the interest that each shall have in the property of the other then owned or subsequently to be acquired are favored, and will be enforced by imposing a trust on the property.¹ (a) A note given by one to

v. Meller, 6 Ves. 349; *Harford v. Purrier*, 1 Madd. 539; *Stent v. Bailis*, 2 P. Wms. 220; *Minchin v. Nance*, 4 Beav. 332; *Robertson v. Skelton*, 12 Beav. 260; *Paramore v. Greenslade*, 1 Sm. & Gif. 541; *Revell v. Hussey*, 2 B. & B. 287; *Spurrier v. Hancock*, 4 Ves. 667; *White v. Nutts*, 1 P. Wms. 61; *Wall v. Bright*, 1 J. & W. 494; *Tasker v. Small*, 3 M. & Cr. 70; *Pingree v. Coffin*, 12 Gray, 288; *Reed v. Lukens*, 44 Penn. St. 200; *Canning v. Kensworthy*, 21 Ark. 9; *Currie v. White*, 45 N. Y. 822; *Wimbish v. Montgomery Mut. Bldg. & Loan Assoc.* 69 Ala. 578; *Ricker v. Moore*, 77 Maine, 292; *Goodwin v. Rice*, 26 Minn. 20; *Randall v. Constans*, 33 Minn. 329.

¹ *Johnston v. Spicer*, 107 N. Y. 185.

(a) As to fraud upon marital death, cannot in equity obtain a rights, see *Hinkle v. Landis*, 131 reconveyance of property which Penn. St. 573; *Beere v. Beere*, 79 she received under his ante-nuptial Iowa, 555; *Nichols v. Nichols*, 61 contract. *Ogden v. McHugh*, 167 Vt. 426; *Bliss v. West*, 58 Hun, 71; Mass. 276. A husband who seeks *Dudley v. Dudley*, 76 Wis. 567; to enforce against the wife an ante-nuptial agreement in his favor will *Alkire v. Alkire*, 134 Ind. 350; be required to prove complete good *Tyler v. Tyler*, 126 Ill. 525; *Ferebee v. Pritchard*, 112 N. C. 83; faith in the making of the contract. *Graham v. Graham*, 143 N. Y. 573. A conveyance by a man about to marry of a reasonable part of his estate to his children by his first wife is not a fraud upon the second wife. *Kinne v. Webb*, 54 Fed. Rep. 34. In *Nance v. Nance*, 84 Ala. 375, an ante-nuptial settlement was held not voidable by creditors, even though the husband was then insolvent and intended to defraud them, it not being shown that the wife knew of his insolvency and fraudulent intention. But see *Flory v. Houck*, 186 Penn. St. 263; *Keady v. White*, 168 Ill. 76. Actual fraud is necessary to avoid such a settle-

his wife during coverture will be enforced as a trust, except as against creditors.¹ In case of a savings bank, where, after payment of expenses, the entire fund and its accumulations go to the depositors, the deposits are held in trust for the depositors.² Where money is deposited in a commercial bank, no trust in general arises, but only a relation of debtor and creditor; when, however, the money is paid into bank for a specified purpose other than that of a loan to the bank, a fiduciary relation is created, and some cases go so far as to hold that after the bank has gone into insolvency, money so paid may be recovered from the assignee in preference to the general creditors.¹ (a)

¹ *Templeton v. Brown*, 86 Tenn. 50.

² *Johnson v. Ward*, 2 Brad. (Ill.) 261.

³ See Parsons's edition of Morse on Banks & Banking, §§ 215, 565 c. See *Peak v. Ellicott*, 30 Kans. 156; *Ellicott v. Barnes*, 131 Kans. 170. And see also on this general subject *Nat'l Bank v. Ellicott*, 31 Kans. 173.

ment. *Clark v. McMahon*, 170 Mass. 91; *Hussey v. Castle*, 41 Cal. 239.

In an article upon Irrevocable Trusts, in 11 Jurid. Rev. 55, 65, A. M. Hamilton, Esq., says of the law of Scotland: "Of the obligatory and irrevocable nature of an ante-nuptial contract there is no room for doubt; but a post-nuptial settlement admittedly is less onerous, and in certain aspects is no substitute for an ante-nuptial contract. On this account it has been attempted to treat such contracts as equivalent in a question of revocability to a voluntary trust. But it may now be considered settled that while in a question with creditors it may be right to do so, *intra familiam* they have all the force of ante-nuptial contracts. A unilateral deed may be so referred to in a marriage contract as to become a part of it."

(a) In order to hold the banker liable for a breach of trust, as to money deposited with him by a trust-

tee, there must have been a misapplication of the trust funds, to which the banker is privy or of which he has notice, and, in general, it must also appear that there was some personal benefit to the banker designed or stipulated for, or that a special deposit was made. See *Coleman v. Bucks & Oxon Union Bank*, [1897] 2 Ch. 243, 248, and cases cited: *Thomson v. Clydesdale Bank*, 69 L. T. 156; *Union Bank v. Murray-Aynsley*, [1898] A. C. 693; *In re Ulster Building Co.*, 25 L. R. Ir. 24; *Manhattan Bank v. Walker*, 130 U. S. 267; *Kissam v. Anderson*, 145 U. S. 435; *Philadelphia Nat. Bank v. Dowd*, 38 F. R. 172; *Knight v. Fisher*, 58 id. 991; *Cecil Nat. Bank v. Thurber*, 59 id. 913; 52 id. 513; *Montagu v. Pacific Bank*, 81 id. 602; *Moreland v. Brown*, 86 id. 257; *Duckett v. National M. Bank*, 86 Md. 400; *Brooke v. King*, 104 Iowa, 713; *Smith v. Des Moines Nat. Bank*

Where the plaintiff placed certain money in the hands of the intestate to be repaid to him on her death, only the relation of debtor and creditor was created, and the plaintiff could not be preferred to other creditors.¹

§ 123. A direction to trustees that a certain person shall be employed as agent and manager for the trustees if there should be occasion for such services, gives no interest in the estate to such person, nor will any kind of trust be implied which equity can enforce;² and so when the trustees were recommended to employ a receiver.³

¹ *Kershaw v. Snowden*, 36 Ohio St. 183.

² *Finden v. Stephens*, 2 Phill. 142.

³ *Shaw v. Lawless*, Ll. & Goo., Sugden, 154; 5 Cl. & Fin. 129; Ll. & Goo., Plunket, 559. In *Tibbits v. Tibbits*, 19 Ves. 656, a testator made a devise to his son, recommending him to continue A. & B. in the occupation of their respective farms so long as they managed them well; and it was held to create a trust for them. And see *Quayle v. Davidson*, 12 Moore P. C. 268. In *Hibbert v. Hibbert*, 3 Mer. 681, a testator directed that H. should be appointed receiver of his estates in Jamaica, adding that he intended the appointment to benefit H. in a pecuniary point of view; and it was held that H. was entitled to be appointed agent, receiver, and consignee of said estates without giving security. And so when a testator appointed an auditor with a remuneration, it was held that the trustees could not remove him, there being no imputation upon his conduct. *Williams v. Corbet*, 8 Sim. 349. The case of *Shaw v. Lawless* was

(Iowa), 78 N. W. 238; *State v. Midland State Bank*, 52 Neb. 1; *Portland S. Co. v. Dana*, 172 Mass. 417; 52 N. E. 524. If trust-money deposited in a bank is withdrawn by the trustee for his own use with the bank's knowledge, the trustee cannot sue the bank to recover it for the trust estate, though the *cestui que trust* joins with him in the suit. *Munnerlyn v. Augusta S. Bank*, 88 Ga. 333; 94 Ga. 356. A bank is liable for the loss through its negligence of collateral security or special

deposits which it accepts. *Gray v. Merriam*, 148 Ill. 179. By the weight of authority, in the absence of fraud, the collection of a draft or check by a bank creates the relation of debtor and creditor, and not a trust. See *Hallam v. Tillinghast*, 19 Wash. 20, 27, and cases cited: *Little v. Chadwick*, 151 Mass. 109; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, overruling *McLeod v. Evans*, 66 Wis. 401; *Bruner v. First Nat. Bank*, 97 Tenn. 540.

a very severely contested case. Mr. Sugden, Chancellor for Ireland, was of opinion that the agent was entitled to the place ; but he was overruled, and the conclusion arrived at stated in the text. From the cases cited in this note it would appear that the question is not entirely settled ; or it may be that every such provision must depend upon the words and intention of each particular will.

CHAPTER V.

RESULTING TRUSTS.

- § 124. Creation and character of a resulting trust.
- § 125. Divisions of this kind of trust.
- § 126. Resulting trust where the purchase-money is paid by one, and deed is taken to another. See § 142.
- § 127. Resulting trust where trust funds are used to purchase property, and title taken in the name of another.
- § 128. In what cases a trust results, and when a trust does not result. See §§ 143, 156, 160.
- § 129. When a person uses his fiduciary relation to obtain an interest in, or affecting the trust property.
- § 130. Same rules apply to personal property unless it is of a perishable nature.
- § 131. Where a resulting trust will not be permitted as against law.
- § 136. No resulting trust in a joint purchase.
- § 132. Rules as to a resulting trust.
- §§ 133, 134. Time and circumstances in the creation of a resulting trust.
- § 135. Parol evidence as to a purchase by an agent not admissible.
- §§ 137, 138. Resulting trusts may be established by parol.
- § 139. May be disproved by parol — the burden of proof.
- § 140. Cannot be changed by parol after they arise.
- § 141. Will not be enforced after a great lapse of time.
- § 142. Resulting trusts under the statutes of New York and other States.
- § 143. A resulting trust does not arise if the title is taken in the name of wife or child.
- § 144. What persons it embraces.
- § 145. Doubts and overruled cases.
- § 146. When it will be presumed to be an advancement.
- § 147. The presumption may be rebutted.
- § 148. Is rebutted by fraud in the wife or child.
- § 149. Creditors may avoid such advancements. When and how.
- § 150. A resulting trust from the conveyance of the legal title without the beneficial interest.
- § 151. Every case must depend upon its particular writing and circumstances.
- § 152. Instances and illustrations.
- §§ 153, 154. If there is an intention to benefit the donee, there is no resulting trust.
- § 155. Gifts to executors may create resulting trusts.
- § 156. Resulting trusts do not arise upon gifts to charitable uses.
- § 157. A gift upon trust or to a trustee and no trust declared.

- § 158. Always a matter of intention to be gathered from the whole instrument.
- § 159. Where a special trust fails it will result.
- § 160. Where a special trust fails from illegality or lapses, it results.
- § 160 a. To whom it results.
- §§ 161, 162. Whether a trust results from a voluntary conveyance without consideration.
- § 163. Equity does not favor such conveyances; they may be void for fraud, but no trust results.
- § 164. Voluntary conveyances to wife or child.
- § 165. No trust results from a fraudulent transaction.
- § 165 a. How a resulting trust is executed.

§ 124. It has been seen from the preceding chapters that trusts are created by the express dispositions of parties, or they are implied by courts from the words used in such express dispositions. There is another class of trusts *which result in law* from the acts of parties, whether they intended to create a trust or not, and they are aptly designated as resulting trusts (a). They are sometimes called presumptive trusts, because the law presumes them to be intended by the parties from the nature and character of their transactions with each other, although the general foundation of this kind of trusts is the natural equity that arises when parties do certain things. Thus, if one pays the purchase-money of an estate, and takes the title-deed in the name of another, in the absence of all evidence of intention, the law presumes a trust, from the natural equity that he who pays the money for property ought to enjoy the beneficial interest. The statute of

(a) See *Albright v. Oyster*, 140 U. S. 493; *Lewis v. Wells*, 85 Fed. Rep. 896; *Dana v. Dana*, 154 Mass. 491; *Beringer v. Lutz*, 179 Penn. St. 1; *Converse v. Noyes*, 66 N. H. 570; *Hudson v. White*, 17 R. I. 519; *Security Inv. Co. v. Garrett*, 3 App. D. C. 69; *Cox v. Cox*, 95 Va. 173; *Claffin v. Ambrose*, 37 Fla. 78; *McGraw v. Daly*, 82 Mich. 500; *Ripley v. Seligman*, 88 id. 177; *Rice v. Rice*, 107 id. 241; *Champlin v. Champlin*, 136 Ill. 309; *Hagan v. Powers*, 103 Iowa, 593; *Lambert v. Stees*, 47 Minn. 141; *Puckett v. Benjamin*, 21 Oregon, 370; *Taylor v. Miles*, 19 id. 550; *Leader v. Tierney*, 45 Neb. 753; *Hawks v. Sailors*, 87 Ga. 234; *Davis v. Davis*, 89 id. 191; *Annis v. Wilson*, 15 Col. 236; *Campbell v. First Nat. Bank*, 22 id. 177; *Cobb v. Edwards* 117 N. C. 244; *Goforth v. Goforth*, 47 S. C. 126; *Plass v. Plass*, 122 Cal. 3; *Wacker v. Wacker* (Mo.), 48 S. W. 835; *Piedmont Land Co. v. Piedmont Foundry Co.*, 96 Ala. 389.

frauds does not affect the creation of these trusts, for the reason that, where there is no evidence of intention, it could not be expected that a declaration of intention in writing, properly signed, would be made or could be produced.

§ 125. Lord Chancellor Hardwicke said that a resulting trust arising by operation of law existed: (1) when an estate was purchased in the name of one person and the consideration came from another; (2) when a trust was declared only as to part, and nothing was said as to the residue, that residue remaining undisposed of, remained to the heir-at-law; and he observed that he did not know of any other instances, unless in case of fraud.¹ In this chapter resulting trusts will be examined under five heads: (1) when the purchaser of an estate pays the purchase-money and takes the title in the name of a third person; (2) where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; (3) where an estate is conveyed upon trusts, which fail, or are not declared, or are illegal; (4) when the legal title to property is conveyed, and

¹ *Lloyd v. Spillett*, 2 Atk. 150. In 2 Lomax, Dig. 200, resulting trusts are considered under the name of implied trusts, as arising: (1) out of the equitable conversion of land into money or money into land; (2) where an estate is purchased in the name of one person and the consideration is paid by another; (3) where there is a conveyance of land without any consideration or declaration of uses; (4) where a conveyance of land is made in trust as to part and the conveyance is silent as to the residue; (5) where a conveyance is made upon such trusts as shall be appointed, and there is default of appointment; (6) where a conveyance is made upon particular trusts which fail of taking effect; (7) where a purchase is made by a trustee with trust-money; (8) where a purchase of real estate is made by a partner in his own name with partnership funds; (9) where a renewal of a lease is obtained by a trustee or other person standing in a fiduciary relation; (10) where purchases are made of outstanding claims upon an estate by trustees or some of the tenants thereof connected by privity of estate with others having an interest therein; (11) where fraud has been committed in obtaining the conveyance; (12) where a purchase has been made without a satisfaction of the purchase-money to the vendor; (13) where a joint purchase has been made by several, and payments of the purchase-money to the vendor have been made beyond their proportion.

there is no reason to infer that it was the intention to convey the beneficial interest; and (5) where voluntary conveyances are made, or conveyances without consideration.

§ 126. Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration or a part of it is given or paid by another, not in the way of a loan to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction (unless it would be enforcing a fraud to raise a resulting trust¹), and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.² In a Minnesota case the court said

¹ *Almond v. Wilson*, 75 Va. 626.

² *Willis v. Willis*, 2 Atk. 71; *Lloyd v. Spillett*, 2 Atk. 150; *Rider v. Kidder*, 10 Ves. 360; *Ex parte Houghton*, 17 Ves. 253; *Trench v. Harrison*, 17 Sim. 111; *Redington v. Redington*, 3 Ridg. 177; *Crop v. Norton*, 9 Mod. 235; *Barn*, 184; 2 Atk. 75; *Hungate v. Hungate*, Toth. 120; *Ex parte Vernon*, 2 P. Wms. 549; *Ambrose v. Ambrose*, 1 id. 321; *Woodman v. Morrel*, 2 Freem. 33, 123; *Murless v. Franklin*, 1 Swanst. 17; *Finch v. Finch*, 15 Ves. 50; *Grey v. Grey*, 2 Swanst. 597; *Finch*, 340; *Groves v. Groves*, 3 Y. & J. 170; *Lade v. Lade*, 1 Wils. 21; *May v. Steele*, 2 V. & B. 390; *Lever v. Andrews*, 7 Bro. P. C. 288; *Pelly v. Maddin*, 21 Vin. Ab. 498; *Smith v. Camelford*, 2 Ves. Jr. 712; *Anon*, 2 Vent. 361; *Withers v. Withers*, Amb. 151; *Prankerd v. Prankerd*, 1 S. & S. 1; *Howe v. Howe*, 1 Vern. 415; *Clarke v. Danvers*, 1 Ch. Cas. 310; *Goodright v. Hodges*, 1 Watk. Cop. 227; *Lofft*, 230; *Smith v. Baker*, 1 Atk. 385; *Bartlett v. Pickersgill*, 1 Eden, 515; *Rothwell v. Dewees*, 2 Black. 613; *Buck v. Pike*, 11 Maine, 9; *Baker v. Vining*, 30 id. 126; *Kelley v. Jenness*, 50 id. 455; *Page v. Page*, 8 N. H. 187; *Hall v. Young*, 37 id. 134; *Pembroke v. Allenstown*, 21 id. 107; *Tebbetts v. Tilton*, 31 id. 283; *Dow v. Jewell*, 18 id. 340; *Tyford v. Thurston*, 16 id. 399; *Hopkinson v. Dumas*, 42 id. 296; *Hall v. Congdon*, 56 id. 270; *Pinney v. Fellows*, 15 Vt. 525; *Dewey v. Long*, 25 id. 564; *Clark v. Clark*, 43 id. 685; *Peabody v. Tarbell*, 2 Cush. 232; *Livermore v. Aldrich*, 5 id. 435; *Root v. Blake*, 14 Pick. 271; *McGowan v. McGowan*, 14 Gray, 121; *Kendall v. Mann*, 11 Allen, 15; *Powell v. Monson & Brimfield Manuf. Co.*, 3 Mason, 362; *Hoxie v. Carr*, 1 Sumn. 187; *Dean v. Dean*, 6 Conn. 285; *Jackson v. Sternberg*, 1 Johns. Cas. 153; 1 Johns. 45; *Jackson v. Matsdorf*, 11 id. 91; *Boyd v. McLean*, 1 Johns. Ch. 582; *Botsford v. Burr*, id. 408; *Steere v. Steere*, 5 id. 1; *White v. Carpenter*, 2 Paige, 218; *Kellogg v. Wood*, 4 id. 579; *Foot v. Colvin*, 3 Johns. 218; *Jackson v. Morse*, 16 id. 197; *Guthrie v. Gardner*, 19 Wend. 411;

that no resulting trust arose where land was bought by A. in the name of B., and B. sold the property in violation of his

Forsyth v. Clark, 3 id. 638; *Partridge v. Havens*, 10 Paige, 618; *Jackson v. Mills*, 13 Johns. 463; *Lounsbury v. Purdy*, 16 Barb. 376; *Jackson v. Woods*, 1 Johns. Cas. 163; *Gomez v. Tradesman's Bank*, 4 Sandf. S. C. 106; *Hempstead v. Hempstead*, 2 Wend. 109; *Hopk.* 288; *Harder v. Harder*, 2 Sand. Ch. 17; *Brown v. Cheney*, 59 Barb. 628; *Union College v. Wheeler*, 59 Barb. 585; *McCartney v. Bostwick*, 32 N. Y. 53; *Depeyster v. Gould*, 2 Green, Ch. 480; *Howell v. Howell*, 15 N. J. Eq. 75; *Stratton v. Dialogue*, 16 id. 70; *Johnson v. Dougherty*, 18 id. 406; *Stevens v. Wilson*, 18 id. 447; *Cutler v. Tuttle*, 19 id. 558; *Stewart v. Brown*, 2 Ser. & R. 461; *Jackman v. Ringland*, 4 Watts & S. 149; *Strimpfler v. Roberts*, 18 Penn. St. 283; *Edwards v. Edwards*, 39 id. 369; *Harrold v. Lane*, 55 id. 268; *Nixon's App.*, 63 id. 279; *Wallace v. Duffield*, 2 Serg. & R. 521; *Lloyd v. Carter*, 5 Harris, 216; *Beck v. Graybill*, 4 Casey, 66; *Kisler v. Kisler*, 2 Watts, 323; *Lynch v. Cox*, 11 Harris, 265; *Newells v. Morgan*, 2 Harr. 225; *Hollis v. Hollis*, 1 Md. Ch. 479; *Dorsey v. Clarke*, 4 Har. & J. 551; *Glenn v. Randall*, 2 Md. Ch. 221; *Farringer v. Ramsey*, 2 Md. 365; *Cecil Bank v. Snively*, 23 Md. 253; *Neal v. Haythrop*, 3 Bland, 551; *Bank of U. S. v. Carrington*, 7 Leigh, 566; *Henderson v. Hoke*, 1 Dev. & Bat. Eq. 119; *McGuire v. McGowen*, 4 Des. 491; *Dillard v. Crocker*, *Speers's Eq.* 20; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Garrett v. Garrett*, 1 Strob. Eq. 96; *Kirkpatrick v. Davidson*, 2 Kelly, 297; *Taliaferro v. Taliaferro*, 6 Ala. 404; *Foster v. Trustees of the Athenæum*, 3 Ala. 302; *Caple v. McCollum*, 27 Ala. 461; *Anderson v. Jones*, 10 Ala. 401; *Mahorner v. Harrison*, 13 Sm. & M. 65; *Walker v. Burngood*, id. 764; *Powell v. Powell*, 1 Freem. Ch. 134; *Leiper v. Hoffman*, 26 Miss. 615; *Runnells v. Jackson*, 1 How. (Miss.) 358; *Harvey v. Ledbetter*, 48 Miss. 95; *McCarroll v. Alexander*, 48 Miss. 128; *Hall v. Sprigg*, 7 Mar. (La.) 243; *Gaines v. Chew*, 2 How. 619; *McDonough Ex'rs v. Murdock*, 15 How. 367; *Tarpley v. Poaze*, 2 Tex. 139; *Long v. Steiger*, 8 Tex. 460; *Oberthier v. Strand*, 33 Tex. 522; *McGuire v. Ramsey*, 4 Eng. 519; *Ensley v. Ballentine*, 4 Humph. 233; *Thomas v. Walker*, 5 Humph. 93; *Smitheal v. Gray*, 1 Humph. 491; *Click v. Click*, 1 Heisk. 607; *Gass v. Gass*, id. 613; *Harris v. Union Bank*, 1 Cold. 152; *Perry v. Head*, 1 A. K. Marsh. 47; *Chaplin v. McAfee*, 3 J. J. Marsh. 513; *Letcher v. Letcher*, 4 id. 592; *Doyle v. Sleeper*, 1 Dana, 536; *Stark v. Canady*, 3 Litt. 399; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Williams v. Van Tuyl*, 2 id. 336; *McGovern v. Knox*, 21 id. 551; *Elliott v. Armstrong*, 2 Blackf. 198; *Jennison v. Graves*, id. 444; *Rhodes v. Green*, 36 Ind. 11; *Milliken v. Ham*, id. 166; *Church v. Cole*, id. 35; *Hampson v. Fall*, 64 id. 382; *Smith v. Sackett*, 5 Gilm. 534; *Prevo v. Walters*, 4 Scam. 33; *Bruce v. Roney*, 18 Ill. 67; *Seaman v. Cook*, 14 id. 501; *Williams v. Brown*, id. 200; *Nickols v. Thornton*, 16 id. 113; *Latham v. Henderson*, 47 id. 185; *Rankin v. Har-*

verbal promise to transfer to A., remarking that a resulting trust could arise only on a conveyance of land, not on a promise to convey. This is clearly too narrow a meaning to give the law, and the decision on the facts did not require it, as the court allowed A. to recover from B. the purchase-money as benefit received by B. voluntarily from A.¹ The burden is of course upon the one claiming the existence of the trust to establish the facts upon which it rests by clear and satisfactory evidence.² In New York and Wisconsin there are statute provisions that an absolute deed made with consent

per, 23 Mo. 579; *Paul v. Chouteau*, 14 Mo. 580; *Kelly v. Johnson*, 28 id. 249; *Baumgartner v. Guessfeld*, 38 id. 36; *Johnson v. Quarles*, 46 id. 423; *Russell v. Lode*, 1 Iowa, 566; *McLennan v. Sullivan*, 13 id. 521; *Tinsley v. Tinsley*, 52 id. 14; *Ragan v. Walker*, 1 Wis. 527; *Irvine v. Marshall*, 7 Minn. 286; *Millard v. Hathaway*, 27 Cal. 119; *Bayles v. Baxter*, 22 Cal. 575; *Case v. Coddington*, 38 id. 191; *Wilson v. Castro*, 31 id. 420; *Jenkins v. Frink*, 30 id. 586; *Settembre v. Putnam*, 30 id. 490; *Frederick v. Haas*, 5 Nev. 386; *Philips v. Crammond*, 2 Wash. C. C. 441; *Harden v. Darwin & Pulley*, 66 Ala. 55; *Lewis v. Building & Loan Assoc.*, 70 id. 276; *Rose v. Gibson*, 71 id. 35; *Shelby v. Tardy*, 84 id. 327; *Shelton v. A. & T. Co.*, 82 id. 315; *Barroilhet v. Anspacher*, 68 Cal. 116; *Murphy v. Peabody*, 63 Ga. 522; *Cottle v. Harrold*, 72 id. 830; *McNamara v. Garrity*, 106 Ill. 384; *Springer v. Springer*, 114 id. 550; *Harris v. McIntyre*, 118 id. 275; *Donlin v. Bradley*, 119 id. 420; *Bush v. Stanley*, 122 id. 406; *Cooper v. Cockrum*, 87 Ind. 443; *Boyer v. Libey*, 88 id. 235; *Witts v. Horney*, 59 Md. 584; *Forrester v. Moore*, 77 Mo. 651; *Bear v. Koenigstein*, 16 Neb. 65; *Gogherty v. Bennett*, 37 N. J. Eq. 87; *Syckle v. Kline*, 34 id. 332; *Ramage v. Ramage*, 27 S. C. 39; *Sexton v. Hollis*, 26 S. C. 231; *Richardson v. Mounce*, 19 id. 477; *Ex parte Trenholm*, id. 126, — an interesting case because of the decision that money drawn from a fund belonging to A. and B. together was to be considered as taken from the part that belonged to A., and no trust should result to B. in the land bought by the check, it appearing that on settlement of all the accounts B. was indebted to A.; *Laws v. Law*, 76 Va. 527; see also *Murray v. Sell*, 23 W. Va. 473; *Heiskell v. Powell*, 23 W. Va. 717. The rule applies where money is advanced to enable a former owner to *redeem* from a tax sale. *Eames v. Hardin*, 111 Ill. 645. In Michigan, the transaction or trust must appear upon the face of the deed, otherwise no trust results to the payer of the purchase-money. *Groesbeck v. Seeley*, 13 Mich. 329; *Campbell v. Campbell*, 21 Mich. 428.

¹ *Johnson v. Krassin*, 25 Minn. 118, see § 226.

² *Bibb v. Hunter*, 79 Ala. 351; *Carter Bros. v. Challen*, 83 id. 135; *Reynolds v. Caldwell*, 80 Ala. 232.

of the one who pays the purchase-money shall vest the title in the grantee¹ against the person paying the money;² but with this exception the clear result of all the cases is, that a trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the name of others, without that of the purchaser, whether in one or several, whether jointly or successively, results to the person who advanced the purchase-money,³ or on whose behalf it is advanced; as where the money is advanced by way of loan to the purchaser, and the title is taken in the name of the lender as security, a trust results to the purchaser.⁴ If only part of the purchase-money is paid by a third person, a trust results *pro tanto*⁵ (a). This

¹ *Schultze v. New York City*, 103 N. Y. 111; *Campbell v. Campbell*, 70 Wis. 311; R. S. § 2077; *Skinner v. James*, 69 id. 605. And the burden is on the person claiming the trust to disprove assent. *Knight v. Leary*, 54 Wis. 459. Even though the grantee subsequently acknowledges the trust in writing, it will not avail against one who has taken the land from the grantee for value, or even against his assignees in insolvency. *Stebbins v. Morris*, 23 Blatch. (U. S.) 181,—a case construing the New York statutes, the object of which is to prevent secret trusts; and for this purpose they destroy trusts resulting from the payment of purchase-money when the deed is made to another with consent of the payor, except that every such conveyance is deemed fraudulent as against the creditors of the person paying the purchase-money until fraudulent intent is disproved.

² As against his creditors the transaction is presumed fraudulent until fraudulent intent is disproved, and a trust results in their favor. *Niver v. Crane*, 98 N. Y. 40.

³ By Lord Ch. B. Eyre in *Dyer v. Dyer*, 2 Cox, 92.

⁴ *Bates v. Kelly*, 80 Ala. 142.

⁵ *Somers v. Overhulser*, 67 Cal. 237; *Lipscomb v. Nichols*, 6 Col. 290.

(a) A resulting trust arises from payment of a part of the purchase price of real estate only when the proportionate share is ascertainable and the payment was distinctly made for a specific part. In these cases the interest of the *cestui que trust* is determined by the proportion his contribution bears to the total sum paid. *Collins v. Corson* (N. J. Eq.), 30 Atl. 862; *Fay v. Fay*, 50 N. J. Eq. 260; *O'Donnell v. White*, 18 R. I. 659; *Rogers v. Tyley*, 144 Ill. 652; *Towle v. Wadsworth*, 147 Ill. 80; *Van Buskirk v. Van Buskirk*, 148 Ill. 9; *Strong v. Messenger*, id. 431; *Torrence v. Shedd*, 156 Ill. 194; *Obermiller v. Wylie*, 36 F. R. 641;

rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase-money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes,¹ and this rule is vindicated by the experience of mankind.² (*a*) Where the purchase-money is not already a trust fund it must be paid *at the time* the purchase is made in order to create a resulting trust proper (that is, the trust must arise at the time of the transfer of the title, and cannot be raised by the subsequent application of money of another to the satisfaction of the unpaid purchase-money³); and it must also be borne in mind that if one person advance the money by way of *loan* to the vendee, no trust results⁴ (*b*). Analogous to these cases where the money is paid to the vendor by or on behalf of some one other than the vendee of the legal title, are cases in which the deed is executed without intent of a gift or sale on time, and the purchase-money is not paid. In effect, the vendor himself pays the purchase-money in such cases, and a trust

¹ 2 Story's Eq. Jur. § 1201; *Glidewell v. Shaugh*, 26 Ind. 319; *Bostleman v. Bostleman*, 24 N. J. Eq. 103.

² *Edwards v. Edwards*, 39 Penn. St. 369.

³ *Milner v. Freeman*, 40 Ark. 62; see § 133.

⁴ *Whaley v. Whaley*, 71 Ala. 162; see § 133.

McGee v. Wells (S. C.), 30 S. E. 602; *Currence v. Ward*, 43 W. Va. 367; *Rogers v. Donnellan*, 11 Utah, 108; *Barton v. Magruder*, 69 Miss. 462; *Speer v. Burns*, 173 Penn. St. 77; *Baylor v. Hopf*, 81 Texas, 637; *Camden v. Bennett*, 64 Ark. 155. A wife's payment of a part of the consideration for a conveyance to her husband vests in her, in the absence of fraud, an estate in the land only when there is a definite intention that a specific interest shall vest in her 'n proportion to the sum paid. *Schierloh v. Schier-*

loh, 148 N. Y. 103, 107; *Clark v. Timmons* (Tenn.), 39 S. W. 534. The husband has the burden of proof if he claims that the money was transferred to him as a gift or loan. *Berry v. Wiedman*, 40 W. Va. 36; *Sing Bow v. Sing Bow*, (N. J. Eq.), 30 Atl. 867; *Kegerreis v. Lutz*, 187 Penn. St. 252; *Beringer v. Lutz*, 188 id. 364.

(*a*) *Smithsonian Institution v. Meech*, 169 U. S. 398, 407.

(*b*) *Fowler v. Webster*, 180 Penn. St. 610.

results to him.¹ These resulting trusts cannot affect a *bona fide* purchaser without notice.²

§ 127. If a person having a fiduciary character purchase property with the fiduciary funds in his hands, and take the title in his own name, a trust in the property will result to the *cestui que trust*, or other person entitled to the beneficial interest in the fund with which the property was paid for.³ As if a trustee purchase with the trust fund and take the title in his own name or in the name of another with notice of the trust, the trust results to the *cestui que trust*;⁴ if a guardian purchase with the money of his ward, a trust will result to the ward;⁵ and if an executor or administrator purchase property in his own name with money belonging

¹ Bennet v. Hutson, 33 Ark. 762.

² Gray v. Corbit, 4 Del. Ch. 135.

³ Schlaeper v. Corson, 32 Barb. 510; Rice v. Rice, 108 Ill. 199; Merket v. Smith, 33 Kans. 66, whether the title taken is absolute or only qualified or contingent; Weaver v. Fisher, 110 Ill. 146. In St. Patrick's Church v. Daly, 116 Ill. 79, the rule is not correctly stated, though the decision is right on the facts. Palmetto Co. v. Risley, 25 S. C. 309; Salinas v. Pear-sall, 24 S. C. 179; Kennedy v. Baker, 59 Tex. 151. An agent of an illiterate man, loaning his principal's money on note and mortgage payable to himself, who bids in the property at foreclosure sale, holds the title in trust for his principal. Cookson v. Richardson, 69 Ill. 137.

⁴ Freeman v. Kelly, 1 Hoff. 90; Harrisburgh Bank v. Tyler, 3 Watts & S. 373; Martin v. Greer, 1 Ga. Dec. 109; Moffitt v. McDonald, 11 Humph. 457; Kirkpatrick v. McDonald, 11 Penn. St. 387; Wilhelm v. Folmer, 6 id. 296; Thompson's App. 22 id. 16; Day v. Roth, 18 N. Y. 448; Lathrop v. Gilbert, 2 Stockt. 344; McLarren v. Brewer, 51 Me. 402; Pugh v. Pugh, 9 Ind. 132; Valle v. Bryan, 19 Mo. 423; Neill v. Keese, 13 Tex. 187; Hancock v. Titus, 33 Miss. 224; Whaley v. Whaley, 71 Ala. 161; Preston v. McMillan, 58 Ala. 84; Buck v. Paine, 75 Maine, 347; Bank v. Simonton, 86 N. C. 189.

⁵ Caplinger v. Stokes, Meigs, 175; Lee v. Fox, 6 Dana, 171; Pugh v. Pugh, 9 Ind. 132; Johnson v. Dougherty, 3 Green, Ch. 406; Bancroft v. Cousen, 13 Allen, 50. But if the guardian buy for the ward, but use his own money in payment, the ward cannot claim a trust in the land, for it is within the statute of frauds. Kisler v. Kisler, 2 Watts, 323; Johnson v. Dougherty, 18 N. J. Ch. 406; Snell v. Elam, 2 Heisk. 82. If a guardian receive a note in his own name in payment of a debt due the ward, the note is held by him in trust. Dorr v. Davis, 76 Maine, 301.

to the estate, a trust in the property will result to the heirs, legatees, or other persons entitled to the beneficial interest in the estate.¹ A purchase with trust funds is virtually a purchase for the *cestui*.² If the trustees of a corporation purchase lands in their own names, with the corporate funds, a trust will result to the corporation;³ or if a committee, guardians, or trustees of an insane person purchase property in their own names with the lunatic's money, a trust results to the lunatic;⁴ or if a trustee erect buildings on his own land with the trust funds,⁵ or if an agent with the money of his principal purchase lands and take the deeds to himself, a trust will result to the principal;⁶ or if a partner purchase lands with partnership funds, and take the title to himself, a trust will result to the partnership;⁷ (a) or if land is

¹ Wallace v. Duffield, 2 Ser. & R. 521; Buck v. Uhrich, 16 Penn. St. 499; Claussen v. Le Franz, 1 Clarke, 226; McCrory v. Foster, 1 Clarke, Iowa, 271; Harper v. Archer, 28 Miss. 212; Schaffner v. Grutzmacher, 6 Clarke, 137; Seaman v. Cook, 14 Ill. 501; Garrett v. Garrett, 1 Strob. Eq. 96; Williams v. Hollingsworth, 1 Strob. Eq. 103; White v. Drew, 42 Mo. 561; Stow v. Kimball, 28 Ill. 93; Dodge v. Cole, 97 Ill. 338; Barker v. Barker, 14 Wis. 131.

² Gale v. Harby, 20 Fla. 171.

³ Church v. Sterling, 16 Conn. 388; Church v. Wood, 5 Ham. 283.

⁴ Reid v. Fitch, 11 Barb. 399; Turner v. Pettigrew, 6 Humph. 438; Stratton v. Dialogue, 1 Green, Ch. 70; Buffalo R. R. Co. v. Lampson, 47 Barb. 533; Hamnett's App., 72 Penn. St. 337.

⁵ Brazel v. Fair, 26 S. C. 370.

⁶ Robb's App., 41 Penn. St. 45; Eshleman v. Lewis, 49 id. 410; Farmers' etc. Bank v. King, 57 id. 202; Church v. Sterling, 16 Conn. 388; Bank of America v. Pollock, 4 Edw. 215; Day v. Roth, 18 N. Y. 448; Bridenbecker v. Lowell, 32 Barb. 10; Moffitt v. McDonald, 11 Humph. 457; Hutchinson v. Hutchinson, 4 Des. 77; Follansbe v. Kilbreth, 17 Ill. 522; Chastain v. Smith, 30 Ga. 96; Wynn v. Sharer, 23 Ind. 253.

⁷ Philips v. Crammond, 2 Wash. C. C. 441; Baldwin v. Johnston, Saxt. 441; Freeman v. Kelly, Hoff. 90; Turner v. Pettigrew, 6 Humph.

(a) See Riddle v. Whitehill, finally paid, and sold a quarter interest on the basis of his representation, it was held to be a joint account relation, and the buyer was held entitled to the excess he paid. 135 U. S. 621; Ricketts v. Murray, 73 F. R. 690; Darrow v. Calkins, 154 N. Y. 503. Where one represented that the price to be paid for a mine was much larger than he Merino v. Munoz, 38 N. Y. S. 678.

bought by a firm for firm purposes with firm money, and the title is taken in their individual names, it is held in trust for the firm;¹ or if one take an estate for services rendered jointly by himself and another, the latter may elect to regard the first as a trustee;² (a) or if a husband purchase

438, 441; *Edgar v. Donnally*, 2 Munf. 387; *Smith v. Burnham*, 3 Sumner, 435; *Piatt v. Oliver*, 2 McLean, 267; *Coder v. Haling*, 27 Penn. St. 84; *Smith v. Ramsey*, 1 Gil. Ill. 373; *Barkley v. Tapp*, 87 Ind. 25; *Pugh v. Currie*, 5 Ala. 446; *Oliver v. Piatt*, 3 How. 401; *Evans v. Gibson*, 29 Mo. 223; *Mallory v. Mallory*, 5 Bush, 564; *Settembre v. Putnam*, 30 Cal. 490; *Jenkins v. Frink*, 30 Cal. 586; *Homer v. Homer*, 107 Mass. 85; *Richards v. Manson*, 101 Mass. 480; *Ebberts's App.* 70 Penn. St. 79; *Winkfield v. Brinkman*, 21 Kans. 682; *Trepbogen v. Burt*, 67 N. Y. 30; *Boyd v. McClure*, 1 Johns. Ch. 582.

¹ *Paige v. Paige*, 71 Iowa, 318.

² *Roberts v. Haley*, 65 Cal. 402.

(a) So when a tenant in common purchases an outstanding title or incumbrance upon the joint estate for his own benefit, the purchase is a trust for all the cotenants, and a bill in equity lies to enforce such trust. *Rector v. Gibson*, 111 U. S. 276, 291; *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *Turner v. Sawyer*, 150 U. S. 578, 586; *Virginia Coal Co. v. Kelly*, 93 Va. 332; *Brundy v. Mayfield*, 15 Mont. 201; *Kintner v. Jones*, 122 Ind. 148; *Allen v. Arkenburgh*, 37 N. Y. S. 1032; *Parker v. Brast*, (W. Va.) 32 S. E. 269. This applies when one of several joint lessees of land, to whom the lease gives the privilege of purchasing, buys it for himself. *Barbour v. Johnson*, 21 D. C. 40.

An agreement between two or more persons, not occupying fiduciary relations towards each other, to join in the purchase of land, the title to which is to be taken in the name of one who pays the entire

consideration, to be held for the benefit of all in proportion to their respective interests, is within the statute of frauds, and must be evidenced by some writing. *Parsons v. Phelan*, 134 Mass. 109; *Heiskell v. Trout*, 31 W. Va. 810; *Beulah Marble Co. v. Mattice*, 22 Col. 547; *Fisk v. Patton*, 7 Utah, 399; *Roby v. Colehour*, 135 Ill. 300; 146 U. S. 153; *Reese v. Murnan*, 5 Wash. 373; *Maxwell v. Barringer*, 110 N. C. 76; see *Wood v. Perkins*, 57 F. R. 258; *Bailey v. Hemenway*, 147 Mass. 326; *Dana v. Dana*, 154 Mass. 491; *Towle v. Wadsworth*, 147 Ill. 80; *Gunnison v. Erie Dime S. Co.*, 157 Penn. St. 303; *Turner v. Sawyer*, 150 U. S. 578; *Peterson v. Boswell*, 137 Ind. 211; *Doran v. Doran*, 99 Cal. 311; *Silvers v. Potter*, 48 N. J. Eq. 539.

When land agreed to be conveyed is exchanged for other land, the latter may be subject to a resulting trust as being purchased by the land agreed for. *Hallett v. Parker*

lands with the separate estate of his wife in his hands, or with the proceeds or accumulations from it, or money put into his hands to invest for his wife, and take the title in his own name, a trust results to the wife¹ (but not if the

¹ *Church v. Jaques*, 1 Johns. Ch. 450; 3 *id.* 77; *Brooks v. Dent*, 1 Johns. Md. Ch. 523; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Pinney v. Fellows*, 15 Vt. 525; *Barron v. Barron*, 24 Vt. 375; *Lathrop v. Gilbert*, 2 Stockt. 344; *Kline's App.*, 39 Penn. St. 463; *Davis v. Davis*, 46 *id.* 312; *Bigley v. Jones*, 114 *id.* 510; *Rupp's App.*, 100 *id.* 531; *Raybold v. Raybold*, 20 *id.* 308; *Fillman v. Divers*, 31 *id.* 429; *Darkin v. Darkin*, 23 L. J. Ch. 890; *Wallace v. McCullough*, 1 Rich. Eq. 426; *Pritchard v. Wallace*, 4 Sneed, 405; *Resor v. Resor*, 9 Ind. 347; *Lench v. Lench*, 10 Ves. 511; *Woodford v. Stephens*, 51 Mo. 443; *Tilford v. Torrey*, 53 Ala. 120; *Gainus v. Cannon*, 42 Ark. 503; *Slocum v. Slocum*, 9 Brad. (Ill.) 142; *Loften v. Witboard*, 92 Ill. 461; *Radcliff v. Radford*, 96 Ind. 482; *Derry v. Derry*, 98 Ind. 324; *Lord v. Bishop*, 101 Ind. 331; *Mitchell v. Colglazier*, 106 Ind. 466; *Broughton v. Brand*, 94 Mo. 169; *Bowen v. McKean*, 82 Mo. 594, *pro tanto*; *City Nat. Bank v. Hamilton*, 34 N. J.

(N. H.), 39 Atl. 433; *Francis v. Cline* (Va.), 31 S. E. 10. If a husband invests his wife's statutory separate estate in land without her assent, and takes the legal title jointly to himself and his wife, he also contributing to the purchase, it is a trust *pro tanto* for the wife to the extent of her contribution. *Jones v. Elkins*, 143 Mo. 647; *Martin v. Remington* (Wis.), 76 N. W. 614. Under an agreement between creditors to purchase their debtor's realty, and that only one of them bid at the sale thereof, a resulting trust arises in favor of the other creditors who do not bid, but tender their shares of the purchase-money. *Kennedy v. McCloskey*, 170 Penn. St. 354.

A constructive trust does not arise, under the statute of frauds, when one-half the purchase price is agreed to be paid by another upon examination of title, and the latter

does not then pay his share. *Taylor v. Kelly*, 103 Cal. 178.

In the West, an entry upon public lands made by one person, though it cannot be made for another's exclusive benefit, may be shown to be in trust for himself and another person. *Sweeney v. Sparling*, 81 Iowa, 433; *Reinhart v. Bradshaw*, 19 Nev. 255; *Robinson v. Jones*, 31 Neb. 20. A mining claim is real estate, and is transferable only by operation of law or by a written instrument; but when a part-owner secretly takes a patent therefor in his own name, it is held in trust for all the owners. *Brundy v. Mayfield*, 15 Mont. 201; *Moore v. Hamerstag*, 109 Cal. 122; *Hayes v. Carroll* (Minn.), 76 N. W. 1017. An agreement to locate a mining claim for another's benefit need not be in writing. *Book v. Justice M. Co.*, 58 F. R. 106, 119; *Reagan v. McKibben* (S. D.), 76 N. W. 943.

property used is such as the husband has a right to reduce to possession and make his own, and his conduct evinces an intent to do this¹); or if a man purchase an estate with the money of a woman with whom he cohabits, a trust results to her.² If a widow purchase an estate in her own name with funds of her deceased husband, a trust results to his children;³ and so if a father purchase in his own name or the name of a third person with funds of his children;⁴ and the rule is the same if purchases are made out of the savings of the wife's separate property; but if the purchase is made from savings out of an allowance made by the husband, or out of the wife's earnings, no trust will result.⁵ Even where the entry of land in the name of one for the use of another is contrary to statute, the person with whose money the land was bought, if innocent of the wrongful entry, may claim a resulting trust.⁶

§ 128. In all these cases the transaction is looked upon as a purchase paid for by the *cestui que trust*, as the beneficial interest in the money paid belonged to him;⁷ and the identity of the money does not consist in the specific pieces of money or bills, but in the general character of the fund out of which the payment is made, and the fund may be followed so long as its general character can be identified.⁸ But

Eq. 158; *Price v. Brown*, 98 N. Y. 388; *Cade v. Davis*, 96 N. C. 139; *McKamey v. Thorp*, 61 Tex. 648; *Parker v. Coop*, 60 Tex. 111, and cases cited; *John v. Battle*, 58 Tex. 591; *Heath v. Slocum*, 115 Pa. St. 549; *Holgate v. Eaton*, 116 U. S. 33.

¹ *Cummings v. Cummings*, 143 Mass. 340-342.

² *James v. Holmes*, 4 De G., F. & J. 470.

³ *Fox v. Doherty*, 30 Iowa, 334; *Roberts v. Opp*, 56 Ill. 34; *Musham v. Musham*, 87 Ill. 80.

⁴ *Robinson v. Robinson*, 22 Iowa, 427; *Eastham v. Roundtree*, 56 Tex. 110.

⁵ *Raybold v. Raybold*, 20 Penn. St. 308; *Merrill v. Smith*, 37 Maine, 394; *Henderson v. Warmack*, 27 Miss. 830; *Farley v. Blood*, 10 Foster, 354.

⁶ *Buren v. Buren*, 79 Mo. 538.

⁷ *Lench v. Lench*, 10 Ves. 517; *Trench v. Harrison*, 17 Sim. 111.

⁸ *United States v. Waterborough*, Davies, 154; *Goepp's App.*, 15

when the means of identification fail, as when an executor converts an estate into money and mixes it with the general mass of his own money, and there is no identifying the particular money of the trust, the distributees or legatees have no preference over his other creditors, but they must prove their claims.¹ If, however, a trustee purchase an estate with trust funds, and add funds of his own to the purchase-money, a trust will result to the *cestui que trust*; and the burden will be on the trustee to show the amount of his own funds in the purchase, otherwise the *cestui que trust* will take the whole.² If the purchase is partly with trust funds and partly not, the *cestui* has a lien on the whole property for the amount of the fund misapplied.³ It has been said in some cases that the *cestui que trust* has no interest in the property purchased with the trust fund in the name of the trustee, but *only a lien* on the property in the nature of a vendor's lien for the purchase-money, with a right to a decree for a sale to reimburse the trust fund.⁴ This is certainly one of the rights of the *cestui que trust*, if he elects to proceed in that manner, and he may hold the trustee responsible, if there is a loss on such sale. On the other hand, the trustee can make no profit to himself by dealing with the trust fund;⁵ and, if he makes a purchase with it, the *cestui que trust* can elect to treat the property as a part of the trust property, and he is entitled to all the advantages of the speculation or investment thus made with the property in

Penn. St. 428; Thompson's App., 22 id. 16; McLarren v. Brewer, 51 Maine, 402; De Bevoise v. Sandford, Hoff. 194; Campbell v. Walker, 5 Ves. 678; Downes v. Grazebrook, 3 Mer. 200; Sanderson v. Walker, 13 Ves. 601; Overseers of the Poor v. Bank of Virginia, 2 Gratt. 544.

¹ Thompson's App., 22 Penn. St. 16; McComas v. Long, 85 Ind. 552.

² Russell v. Jackson, 10 Hare, 209; McLarren v. Brewer, 51 Maine, 402; Seaman v. Cook, 14 Ill. 505; Farmers, &c. Bank v. King, 57 Penn. St. 202; Persch v. Quiggle, id. 247.

³ Munro v. Collins, 95 Mo. 42.

⁴ Wallace v. Duffield, 2 Ser. & R. 529; Wallace v. McCullough, 1 Rich. Ch. 426.

⁵ Landis v. Saxton, 89 Mo. 375; Ward v. Davidson, id. 445.

the name of the trustee.¹ No trust results to the holder of property (H.) from the fact that money has been given to B. by C. in order that B. may purchase the said property. H. cannot offer a deed and demand the money.² So where A. sells land in which he (A.) has an interest as well as E., A. giving a bond for the making of a future good title to the whole, and then investing the money received in other property, there is no trust for E. in this property; the purchase-money was obtained by A., not in consideration for E.'s interest in the land, but in consideration for the promise made by A. in his bond.³ And if trust-money is expended not in the purchase of land but in improvements upon it, no trust results to the owner of the money.⁴ If one who stands in no fiduciary relation to another appropriates the other's money, and invests it in real estate or other property, no trust results to the owner of the money.⁵ There is no doubt of this principle upon all the cases, but there is some question in the books as to what is a fiduciary relation, as where a clerk pilfered money from the store of his employer and invested it in real estate, it was held that there was no such resulting trust; that the employer could compel a conveyance of the land.⁶ But where a clerk in a bank embezzled money, and invested it in stocks in the names of his sisters as mere volunteers, it was held that a trust resulted to the owners of the money, and that equity would execute it by compelling a conveyance;⁷ and this would seem to be the better opinion, as a clerk certainly holds a confidential relation to his employer. In *Newton v. Porter*, it was held that the holders of the proceeds of stolen property might be charged as trustees for the owner, and there would seem to

¹ Hill on Trustees, 534; Lewin on Trusts, 227 (5th Lond. ed.); Lench v. Lench, 10 Ves. 511; 19 Ves. 58; Weaver v. Fisher, 110 Ill. 146; Bent v. Priest, 86 Mo. 475.

² Rogers v. Rogers, 63 Iowa, 92. ³ Hadley v. Stuart, 62 Iowa, 271.

⁴ Bodwell v. Nutter, 63 N. H. 446.

⁵ Hawthorne v. Brown, 3 Sneed, 462; Ensley v. Ballentine, 4 Humph. 233.

⁶ Campbell v. Drake, 4 Ired. 94; Pascoag Bank v. Hunt, 3 Edw. 583.

⁷ Bank of America v. Pollock, 4 Edw. 215; *post*, § 135.

be no principle to the contrary.¹ It may depend, however, upon the extent to which the clerk is trusted. In *Lehmann v. Rothbarth*² the husband of a trustee taking upon himself the management of the estate was held to account as trustee to the *cestui* for funds coming to him as self-constituted agent for the true trustee. (a)

§ 129. If a person standing in a fiduciary relation makes use of his position to purchase an interest in the trust property with his own funds, as a reversion, a junior or senior mortgage, or other interest from a third person; or if he purchase other property so immediately connected with the trust estate, that it must be used with the trust estate, and the independent ownership of which would seriously affect the use and value of the trust property, he cannot retain the same for his own benefit, but he must hold it upon a resulting trust for his beneficiary.³ The prohibition of the purchase of trust property by the trustee does not depend on any question of fraud, but is made absolute to avoid the possibility of fraud.⁴ The temptation of self-interest is too powerful and insinuating to be trusted. A trustee must put

¹ *Newton v. Porter*, 5 Lansing, 417; *Thompson v. Parker*, 3 Mason, 332; *Hoffman v. Canow*, 22 Wend. 285; *Bassett v. Spofford*, 45 N. Y. 387; *Silbury v. McCoon*, 3 Comst. 579.

² 111 Ill. 185.

³ *Holt v. Holt*, 1 Ch. Cas. 190; *Nesbitt v. Tredennick*, 1 Ball & B. 46; *Greenlaw v. King*, 3 Beav. 9; 10 L. J. (N. S.) Ch. 129; *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Tanner v. Elworthy*, 4 Beav. 487; *Waters v. Bailey*, 2 Y. & C. (N. C.) Ch. 219; *Geddings v. Geddings*, 3 Russ. 241; *Dickinson v. Codwise*, 1 Sandf. Ch. 226; *Settembre v. Putnam*, 30 Cal. 490; *Jenkins v. Frink*, 30 Cal. 586; *Hall v. Vanness*, 49 Penn. St. 457; *Harrold v. Lane*, 53 id. 269; *Heath v. Page*, 63 id. 108; *Campbell v. Campbell*, 21 Mich. 459; *King v. Cushman*, 43 Ill. 31; *Clark v. Cantwell*, 3 Head, 202; *Holmes v. Campbell*, 10 Minn. 40; *Wells v. Francis*, 7 Col. 396; *Shaw v. Shaw*, 86 Mo. 594.

⁴ *Downs v. Richards*, 4 Del. Ch. 416; *Munson v. S. G. & C. R. R. Co.*, 103 N. Y. 58.

(a) Fraud, as the foundation of a resulting trust, may be waived by the grantor's subsequent act or conveyance, and his equitable interest be thereby extinguished. *Thompson v. Marley*, 102 Mich. 476.

himself in a position where his private profit will oppose the interests of the estate.¹ If a trustee buys an outstanding claim against the trust property, the transaction will be treated as a payment only, and he will be allowed only what he gave.² Railway directors cannot deal with the property for their individual benefit, and a sale of it to any one of the board would be voidable in equity at the instance of any one interested in the road.³ A trustee may not buy for himself an outstanding title to the estate.⁴ One in a fiduciary position must not so conduct himself as to bring his private interests in conflict with the duties of his office. If an administrator buys land sold to pay a debt due his intestate, the heirs and distributees can elect to take the land and allow him his bid.⁵ A purchaser from a trustee who has acquired the trust property stands in no better position than the trustee, if said purchaser has notice of the facts.⁶ A mere agent, who purchases a reversion in the lands of his principal at a public sale from third persons with his own money, will not be held as a trustee, unless he purchase under some agreement to that effect;⁷ and the same rule applies to a tenant in common.⁸

§ 130. The rule embraces personal property as well as real estate; and if a man purchase a bond,⁹ annuity,¹⁰ stock,¹¹

¹ *Russell v. Peyton*, 4 Brad. (Ill.) 481.

² *Rankin v. Bancroft & Co.*, 114 Ill. 441; *Gilman v. Healey*, 49 Hun, 274.

³ *Little Rock & F. S. Ry. Co. v. Page*, 35 Ark. 304; *Duncomb v. N. Y. H. & No. R. R. Co.*, 84 N. Y. 190.

⁴ *Baker v. S. & W. Mo. R. Co.*, 86 Mo. 75.

⁵ *Jones v. Graham*, 36 Ark. 383.

⁶ *Cavagnaro v. Don*, 63 Cal. 231.

⁷ *Kennedy v. Keating*, 34 Mo. 25.

⁸ *Keller v. Auble*, 58 Penn. St. 410; *Mandeville v. Solomon*, 33 Cal. 38.

⁹ *Ebrand v. Dancer*, 2 Ch. Cas. 26; 1 Eq. Ab. 382.

¹⁰ *Rider v. Rider*, 10 Ves. 363, and cases cited; 2 Mad. Ch. Pr. 101.

¹¹ *Ibid.*; *Lloyd v. Read*, 1 P. Wms. 607; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Garrick v. Taylor*, 29 Beav. 79; 4 De G., F. & J. 159; *Beecher v. Major*, 2 Dr. & Sm. 431; *Ex parte Houghton*, 17 Ves. 253; *Creed v. Lancaster Bank*, 1 Ohio St. 1.

mortgage, or other personal interest,¹ in the name of a third person, the equitable ownership results to the person from whom the consideration moves; but it is said that a resulting trust cannot be set up in personal property perishable in its nature.²

§ 131. Nor can a resulting trust be set up if it would break in upon the policy of the law, or a public statute;³ as if an alien forbidden to hold land should pay the purchase-money and take the deed to a stranger, a resulting trust in his favor would not be enforced by the courts.⁴ (a) But a

¹ *Ibid.*; *Kelley v. Jenness*, 50 Maine, 455.

² *Union Bank v. Baker*, 8 Humph. 447.

³ *Ex parte Yallop*, 15 Ves. 67; *Ex parte Houghton*, 17 Ves. 251; *Redington v. Redington*, 3 Ridg. 181; *Groves v. Groves*, 3 Y. & J. 163; *Camden v. Anderson*, 5 T. R. 709; *Proseus v. McIntre*, 5 Barb. 425; *Ford v. Lewis*, 10 B. Mon. 127; *Baldwin v. Campfield*, 4 Halst. Ch. 891; *Cutler v. Tuttle*, 19 N. J. Eq. 562.

⁴ *Leggett v. Dubois*, 5 Paige, 114; *Hubbard v. Goodwin*, 3 Leigh, 492; *Philips v. Crammond*, 2 Wash. C. C. 441; *Taylor v. Benham*, 5 How. U. S. 270; *Farley v. Shippen*, Wythe, 135; *Alsworth v. Cordby*, 3 Miss. 32; *Childers v. Childers*, 1 De G. & J. 482; *Phillpotts v. Phillpotts*, 10 C. B. 85. But if such conveyance is not intended as a fraud upon the law, but is taken by an agent or attorney of the alien in his own name without authority, equity will protect the rights of the alien. *Austin v. Brown*, 6 Paige, 448; *McCow v. Galbrath*, 7 Rich. Law, 74.

(a) In Texas, it seems that a resulting trust does not arise for an alien whose money another invests in land, although he may recover a judgment for the money itself by suit, and such judgment may be a lien upon the land. *Zundell v. Gess*, 73 Tex. 144. Equity neither creates nor enforces a resulting trust contrary to the ascertained intent of the parties. *Morris v. Clare*, 132 Mo. 232, 236; *Ward v. Ward*, 59 Conn. 188; *Zimmerman v. Barber*, 176 Penn. St. 1. A resulting trust may, however, arise in a surplus remaining after the purposes of the trust have failed or are fully accomplished. See *Smith v. Cooke*, [1891] A. C. 297; *Bork v. Martin*, 132 N. Y. 280; *Buffington v. Maxam*, 152 Mass. 477; *Ripley v. Seligman*, 88 Mich. 177; *Meyer v. Holle*, 83 Texas, 623; *Cagwin v. Buerkle*, 55 Ark. 5. Thus, an assignment for creditors, which contains no ultimate declaration of trust for the assignors, gives rise to a resulting trust in the surplus in favor of the assignors, in case there is more than enough to pay the debts. *Smith v. Cooke*, *supra*; 45 Ch. D. 38; 62 L. T. 456. If the donee is dead when a

slave, who could not acquire property, purchased land in the name of a free person with the assent of his master, and afterwards becoming free, the resulting trust was enforced in his favor;¹ and so if the disability of the alien is removed by naturalization or otherwise, he may enforce a trust created while he was under disability.²

§ 132. Lord Hardwicke doubted whether the application of the rule was not confined to a single purchaser;³ but it has been expressly decided and long acted upon, that if several make the purchase, pay the consideration, but take the title in the name of a stranger, the trust will result to them jointly.⁴ The same rule applies if several pay the consideration, and take the title to one of their number. If the parties contribute unequally to the payment of the consideration, the trust results to each of them in proportion to the amount paid by each.⁵ In these cases it is settled that

¹ *Leiper v. Hoffman*, 26 Miss. 615.

² *Osterman v. Baldwin*, 6 Wall. 116.

³ *Crop v. Norton*, Barn. 179; 9 Mod. 233; 2 Atk. 74.

⁴ *Baumgartner v. Guessfeld*, 38 Mo. 36; *Wray v. Steele*, 2 V. & B. 388; *Ross v. Hegeman*, 2 Edw. 373; *Larkins v. Rhoades*, 5 Porter, 196; *Powell v. Monson and Brim. Manuf. Co.*, 3 Mason, 590; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Keaton v. Cobb*, 1 Dev. Ch. 439.

⁵ *Rigden v. Walker*, 3 Atk. 735; *Lake v. Gibson*, 1 Eq. Cas. Ab. 291; *Botsford v. Burr*, 2 Johns. Ch. 405; *Quackenbush v. Leonard*, 9 Paige, 334; *Jackson v. Moore*, 6 Cow. 706; *Stewart v. Brown*, 2 Serg. & R. 461; *Morey v. Herrick*, 18 Penn. St. 129; *Buck v. Swazey*, 35 Maine, 41; *Kelley v. Jenness*, 50 id. 455; *Powell v. Monson & Brim. Manuf. Co.*, 3 Mason, 347; *Pierce v. Pierce*, 7 B. Mon. 433; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Shoemaker v. Smith*, 11 Humph. 81; *Bernard v. Bongard*, Harr.

trust is created by deed, there is a resulting trust for the settlor. *Re Tilt*, 74 L. T. 163. So, when a trust is not sufficiently declared, there may be a resulting trust for the settlor's benefit. *Re Wilcock*; *Wilcock v. Johnson*, 62 L. T. 317; *Woodruff v. Marsh*, 63 Conn. 125; *Johnson v. Johnson*, 92 Tenn. 559. There is

no resulting trust when the legal estate does not pass because of the invalidity of the attempted conveyance, even when there is a valuable consideration therefor. *Churcher v. Martin*, 42 Ch. D. 312; *Trustees v. Jackson Square Church*, 84 Md. 173; *Moore v. Horsley*, 156 Ill. 36.

a general contribution towards a purchase is not sufficient; but the person claiming a resulting trust must show that he paid some specific sum, for some distinct interest in, or aliquot part of, the estate, as for a specific share, as one-half or one-quarter, or other particular fraction of the whole; or for a particular interest, as for an estate for life or years, or in remainder in the whole estate.¹ Where two contribute funds and the proportions do not appear, the presumption is that the proportions are equal.²

§ 133. The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself.³ (a) But if the transaction

Ch. 130; *Purdy v. Purdy*, 3 Md. Ch. 547; *Seaman v. Cook*, 14 Ill. 505; *Dow v. Jewell*, 18 N. H. 340; *Hall v. Young*, 37 N. H. 134; *Pinney v. Fellows*, 15 Vt. 525; *Brothers v. Porter*, 6 B. Mon. 106; *Bogert v. Perry*, 17 Johns. 351; *Jackson v. Bateman*, 2 Wend. 570; *Cloud v. Ivie*, 28 Mo. 578; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Union College v. Wheeler*, 5 Lans. 160; *McDonald v. McDonald*, 24 Ind. 68; *Frederick v. Haas*, 5 Nev. 389; *Case v. Coddling*, 38 Cal. 191; *Clark v. Clark*, 43 Vt. 685.

¹ *McGowan v. McGowan*, 14 Gray, 119; *Buck v. Warren*, id. 122, n. *Baker v. Vining*, 30 Maine, 121; *Sayre v. Townsends*, 15 Wend. 647; *White v. Carpenter*, 2 Paige, 217; *Perry v. McHenry*, 13 Ill. 227; *Crop v. Norton*, 2 Atk. 74; *Reynolds v. Morris*, 17 Ohio St. 510; *Cutler v. Tuttle*, 19 N. J. Ch. 561; 1 Lead. Ca. Eq. 276; *Billings v. Clinton*, 6 Rich. (S. C.) 90; *Olcott v. Bynum*, 17 Wall. 44.

² *Shoemaker v. Smith*, 11 Humph. 81.

³ See § 126; *Frickett v. Durham*, 109 Mass. 422; *Rogers v. Murray*, 3 Paige, 390; *Dudley v. Batchelder*, 53 Me. 403; *Connor v. Lewis*, 16

(a) To constitute a simple resulting trust, the money must be paid or secured at the time of the purchase; the trust arises from the payment, and not from the parol agreement. *Collins v. Carson* (N. J. Eq.), 30 Atl. Rep. 862; *Levi v. Evans*, 57 F. R. 677; *Osgood v. Eaton*, 62 N. H. 512; *Ryder v. Loomis*, 161 Mass. 161; *Champlin v. Champlin*, 136 Ill. 309; *Summers v. Moore*, 113 N. C. 394. But when a trustee invests trust funds in real estate, the *cestui que trust's* equity to charge the lands is not dependent upon payment at the time of the purchase, but the right may be enforced whether the payment is made

creates a trust, a subsequent act may enlarge its effect, as by removing a mortgage to which the trust was subject.¹ And where an administrator out of the assets in his hands pays the balance due on land bought by the deceased, and takes title to himself, the heirs can hold him as a trustee.²

Maine, 275; *Buck v. Swazey*, 35 id. 51; *Pinnock v. Clough*, 16 Vt. 500; *Taliaferro v. Taliaferro*, 6 Ala. 404; *McGowan v. McGowan*, 14 Gray, 119; *Barnard v. Jewett*, 97 Mass. 87; *Freeman v. Kelly*, 1 Hoff. 90; *Foster v. Trustees, &c.*, 3 Ala. 302; *Forsyth v. Clark*, 3 Wend. 637; *Steere v. Steere*, 5 Johns. Ch. 1; *Botsford v. Burr*, 2 Johns. Ch. 408; *Jackson v. Moore*, 6 Cow. 706; *White v. Carpenter*, 2 Paige, 218; *Niver v. Crane*, 98 N. Y. 40; *Page v. Page*, 8 N. H. 187; *Buck v. Pike*, 2 Fairf. 9; *Graves v. Dugan*, 6 Dana, 331; *Wallace v. Marshall*, 9 B. Mon. 148; *Gee v. Gee*, 2 Sneed, 395; *Kelly v. Johnson*, 28 Mo. 249; *Williard v. Williard*, 56 Penn. St. 119; *Nixon's App.*, 63 id. 279; *Cutler v. Tuttle*, 19 N. J. Eq. 561; *Wheeler v. Kirtland*, 23 id. 13; *Tunnard v. Littell*, id. 264; *Sheldon v. Harding*, 44 Ill. 68; *Westerfield v. Kimmer*, 82 Ind. 369; *Kendall v. Mann*, 11 Allen, 15; *Gerry v. Stimson*, 60 Me. 186; *Forsyth v. Clark*, 3 Wend. 657; *Davis v. Wetherell*, 11 Allen, 19, n.; *Miller v. Blose*, 30 Grat. (Va.) 744; *Billings v. Clinton*, 6 Rich. (S. C.) 90; *Boozar v. Teague*, 27 S. C. 349; *Richardson v. Day*, 20 S. C. 412; *Parker v. Coop*, 60 Tex. 111; *Du Val v. Marshall*, 3 Ark. 230; *Rhea v. Tucker*, 56 Ala. 450; *McClure v. Doak*, 6 Baxter (Tenn.), 364; *Sullivan v. Sullivan*, 86 Tenn. 376. A subsequent agreement will not raise such a trust. *Knox v. McFarran*, 4 Col. 586.

¹ *Leonard v. Green*, 34 Minn. 141.

² *Jones v. Slaughter*, 96 N. C. 541.

before or after the purchase, so long as the trust funds can be traced and *bona fide* purchasers have not acquired rights in the land. *Lehman v. Lewis*, 62 Ala. 129; *Moore v. Moore* (Miss.), 19 So. 953; *Maroney v. Maroney*, 97 Iowa, 711; *Webb v. Bailey*, 41 W. Va. 463. See *Bourke v. Callanan*, 160 Mass. 195; *Gray v. Jordan*, 87 Maine, 140; *Taylor v. Miles*, 19 Oregon, 550; *Barger v. Barger*, 30 id. 268; *Reeves v. Evans* (N. J. Eq.), 34 Atl. 477; *Gilchrist v. Brown*, 165 Penn. St. 275; *Keith v. Miller*, 174 Ill. 64; *Harris v. Elliott* (W. Va.), 32 S. E.

176; *Greensboro Nat. Bank v. Gilmer*, 117 N. C. 416; *Kelly v. McNeill*, 118 N. C. 349; *Jones v. Hughey*, 46 S. C. 193; *Bright v. Knight*, 35 W. Va. 40. A judgment creditor of the trustee, deriving title under an execution, is not such a purchaser for value. *Lewis v. Taylor*, 96 Ky. 556; *Cobb v. Trammell*, 9 Tex. Civ. App. 527. The same money that was paid need not, in general, have been invested in the land in order to establish a resulting trust. *Rarick v. Vandevier* (Col.), 52 Pac. 743.

And where the money of another in the hands of the purchaser is his only reliance for procuring the title, he cannot escape from a resulting trust by paying a little of his own money at the time, and the remainder in trust-money afterward.¹ If two agree to purchase, and one furnishes all the money and takes the title to himself, no trust results to the other.² And so if two agree to purchase, and one pays the whole consideration-money, and the title is taken to the two, no trust results to the one who paid the whole; he can only enforce repayment of one-half the consideration-money.³ There must be an actual payment from a man's own money, or what is equivalent to payment from his own money, to create a resulting trust.⁴ And the money must be advanced and paid in the character of a purchaser; for if one pay the purchase-money by way of *loan* for another, and the conveyance is taken to the other, no trust will result to the one who thus pays the purchase-money;⁵ on the other hand, if

¹ *McLaughlin v. Fulton*, 104 Penn. St. 161.

² *Brooks v. Fowle*, 14 N. H. 248; *Tebbetts v. Tilton*, 31 N. H. 273; *Edwards v. Edwards*, 39 Penn. St. 369; *Coppage v. Barnett*, 34 Miss. 621; *Cook v. Bronaugh*, 8 Eng. 183; *Fowke v. Slaughter*, 3 A. K. Marsh. 56.

³ 2 Sugd. V. & P. 575 (13th ed.); but see *Butler v. Rutledge*, 2 Cold. 4.

⁴ *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Tunnard v. Littell*, id.; *Roberts v. Ware*, 40 Cal. 634; *Page v. Page*, 8 N. H. 187; *Gomez v. Tradesman's Bank*, 4 Sandf. S. C. 106; *Coates v. Woodworth*, 13 Ill. 634; *Beck v. Graybill*, 4 Casey, 66; *Reeve v. Strawn*, 14 Ill. 94; *Ferguson v. Sutphen*, 3 Gil. 547; *Lounsbury v. Purdy*, 16 Barb. 380; *Runnells v. Jackson*, 1 How. (Miss.) 358; *Harrisburg Bank v. Tyler*, 3 Watts & S. 373; *Morey v. Herrick*, 18 Penn. St. 123; *Smith v. Sackett*, 5 Gilm. 534; *Kelly v. Johnson*, 28 Mo. 249; *Botsford v. Burr*, 2 Johns. Ch. 405; *Getman v. Getman*, 1 Barb. Ch. 499; *Wright v. King*, Harr. Ch. 12; *Bernard v. Bongard*, Harr. Ch. 130; *Dudley v. Batchelder*, 53 Me. 403; *Russell v. Allen*, 10 Paige, 249; *Kirkpatrick v. McDonald*, 1 Jones, 393; *Smith v. Burnham*, 3 Sumner, 435; *White v. Sheldon*, 4 Nev. 280; *Kendall v. Mann*, 11 Allen, 15.

⁵ *Bartlett v. Pickersgill*, 1 Eden, 516; *Crop v. Norton*, 9 Mod. 235; *White v. Carpenter*, 2 Paige, 217; *Henderson v. Hoke*, 1 Dev. & Bat. Ch. 119; *Dudley v. Batchelder*, 53 Maine, 403; *Gibson v. Toole*, 40 Miss. 788; *Whaley v. Whaley*, 71 Ala. 162; *Harvey v. Pennybacker*, 4 Del. Ch. 445; *Boehl v. Wadgymar*, 54 Tex. 589.

one should advance the purchase-money and take the title to himself, but should do this wholly upon the account and credit of the other, he would hold the estate upon a resulting trust for the other.¹ And if *partly* on the account and credit of another, he would hold as trustee *pro tanto*.²

§ 134. A trust results from the acts, and not from the agreements, of the parties, or rather from the acts accompanied by the agreements; but no trust can be set up by mere parol agreements, or, as has been said, no trust results merely from the breach of a parol contract; as if one agrees to purchase land and give another an interest in it, and he purchases and pays his own money, and takes the title in his own name, no trust can result.³ And so if a party

¹ *Aveling v. Knipe*, 19 Ves. 441; *Page v. Page*, 8 N. H. 187; *Runnells v. Jackson*, 1 How. (Miss.) 358; *Lounsbury v. Purdy*, 18 N. Y. 515; 16 Barb. 380; *Buck v. Pike*, 2 Fairf. 9; *Morey v. Herrick*, 18 Penn. St. 123; *Stucky v. Stucky*, 30 id. 546; *Kelly v. Johnson*, 28 Mo. 249; *Cutler v. Tuttle*, 19 N. J. Eq. 562; *Dryden v. Hanaway*, 3 Md. 254; *Fleming v. McHale*, 47 Ill. 282; *Honore v. Hutchins*, 8 Bush, 687; *Bates v. Kelley*, 80 Ala. 112; *Ward v. Matthews*, 73 Cal. 13; *Caruthers v. Williams*, 21 Fla. 485; *Green v. Dietrich*, 114 Ill. 636; *Bradley v. Luce*, 99 Ill. 234. As where the lender takes the title merely as security for his advance. *Wright v. Gay*, 101 Ill. 233; *Powell v. Powell*, 114 Ill. 329. See also *Weekly v. Ellis*, 30 Kans. 507; *Tenny v. Simpson*, 37 Kans. 353; *Wiggin v. Wiggin*, 58 N. H. 235.

² *Marvin v. Brooks*, 94 N. Y. 71; *Leggett v. Leggett*, 88 N. C. 108; *Brown v. Cave*, 23 S. C. 251; *Mims v. Chandler*, 21 S. C. 480; *Cook v. Sherman*, 4 McCrary, 20.

³ *Kisler v. Kisler*, 2 Watts, 323; *Williard v. Williard*, 56 Pa. St. 119; *Loomis v. Loomis*, 60 Barb. 22; *Stover v. Flack*, 41 Barb. 162; *Thorner v. Thorner*, 18 Ind. 462; *Rogers v. Simmons*, 55 Ill. 66; *Loomis v. Loomis*, 28 Ill. 454; *Green v. Cook*, 2 Ill. 196; *Duffy v. Masterson*, 44 N. Y. 557; *Whetham v. Clyde*, 1 Pa. Leg. Gaz. R. 55. But see *Hidden v. Jordan*, 21 Cal. 92; *Green v. Drummond*, 3 Md. 71; *Meason v. Kaine*, 63 Penn. St. 335; *Smith v. Hollenback*, 53 Ill. 223; *Lantry v. Lantry*, 51 Ill. 451; *Robinson v. Robinson*, 45 Ark. 481; *Hunt v. Freedman*, 63 Cal. 510; see § 209. *Ward v. Spivey*, 18 Fla. 847; *Follett v. Badeau*, 26 Hun, 253; *Lawrence v. Lawrence*, 14 Oregon, 77. A trust resulting from the acts of the parties will not be converted into an express trust by the agreement of the parties; that is, it will not be any the less a resulting trust, and it will not be within the statute of frauds. *Cotton v. Wood*, 25 Iowa, 43.

makes no payment, and none is made on his account, either actually or constructively, he cannot claim a resulting trust.¹ As where a father made a deed to a son-in-law, in consideration of love and affection for his daughter, no trust resulted.² And so a mere parol declaration by one that he is buying land for another is not sufficient to establish a resulting trust; there must be some proof of an actual or constructive payment by the person claiming such a trust.³ The rule is otherwise if the promise led the plaintiff to take action he would not otherwise have taken. Then the breach of the promise becomes a *fraud*, and a trust may exist.⁴

§ 135. Again, parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by his own funds, no money of the principal being used for the payment; for the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement, and not from the transaction, and where a trust arises from an agreement, it is within the statute of frauds, and must be in writing.⁵

¹ Jackson v. Ringland, 4 Watts & S. 149; Botsford v. Burr, 2 Johns. Ch. 408; Lathrop v. Hoyt, 7 Barb. 60; Dorsey v. Clark, 4 Har. & J. 551; Smith v. Smith, 3 Casey, 180; Fischili v. Dumaresly, 3 Marsh. 23; Sharp v. Long, 4 Casey, 434; Thompson v. Branch, Meigs, 390; Walker v. Brungard, 13 S. & M. 723; Ensley v. Ballentine, 4 Humph. 233; Lynn v. Lynn, 5 Gil. 602; Sample v. Coulson, 9 Watts & S. 62; Peebles v. Reading, 8 Ser. & R. 484.

² Thompson v. Thompson, 18 Ohio St. 73.

³ Ibid.; Kisler v. Kisler, 2 Watts, 323; Williard v. Williard, 56 Penn. St. 119.

⁴ See § 171 *et seq.*

⁵ Kennedy v. Keating, 34 Mo. 25; Woodhull v. Osborne, 2 Edw. Ch. 615; Lathrop v. Hoyt, 7 Barb. 60; 2 Story, Eq. Jur. § 1201 a; Bartlett v. Pickersgill, 1 Eden, 515; 4 Burr. 22; 1 Cox, 15; 4 East, 577; Rastel v. Hutchinson, 1 Dick. 44; Lamas v. Bayly, 2 Vern. 627; Atkins v. Rowe, Mose. 39; O'Hara v. O'Neil, 2 Bro. P. C. 39; Jackman v. Ringland, 4 Watts & S. 149; Peebles v. Reading, 8 Ser. & R. 492; Pinnoek v. Clough, 16 Vt. 507; Flagg v. Mann, 2 Sum. 546; Walker v. Brungard, 13 Sm. & M. 765; Taliaferro v. Taliaferro, 6 Ala. 406; Moore v. Green, 3 B. Mon. 407; Fowke v. Slaughter, 3 A. K. Marsh. 57; Dorsey v. Clarke, 4 Har. & J. 551; Pearson v. East, 36 Ind. 28; Minot v. Mitchell, 30 Ind.

This rule is so inflexible, that though the agent may be indicted, and convicted of perjury in denying his character as agent in his answer under oath, the court cannot decree and establish the trust.¹ But if an agent invest his principal's money in real estate without his knowledge, or if, investing the money with his knowledge, he take the deed in his own name without his consent, or take a deed in a form contrary to the understanding, there will be a resulting trust.² (a) But if one standing in no fiduciary relation obtains another's property wrongfully, and invests it in land in his own name, or if a clerk appropriates his master's money and buys real estate in his own name, there is no resulting trust.³

§ 136. In England, if two persons join in a purchase and contribute equally, and take the title in their own names, there is no reason to presume a resulting trust, and the two are joint tenants, the survivor taking the whole *jure accrescendi*.⁴ And so if two contract for a purchase to them

228; *Arnold v. Cord*, 16 Ind. 177; *Graves v. Ward*, 2 Duv. 301; *Heacock v. Coatesworth*, Clarke, 84; *Burden v. Sheridan*, 36 Iowa, 125; *Nestal v. Schmid*, 29 N. J. Eq. 460. But where an attorney purchased property sold upon an execution in favor of his client at a grossly inadequate price, it was held that he was a trustee for his principal. *Howell v. Baker*, 4 Johns. Ch. 118. See *Wade v. Pettibone*, 11 Ohio, 57; 14 Ohio, 557.

¹ *Bartlett v. Pickersgill*, 1 Eden, 515; *King v. Boston*, 4 East, 572.

² *Day v. Roth*, 18 N. Y. 448; *Bridenbecker v. Lowell*, 32 Barb. 9; *Pugh v. Pugh*, 9 Ind. 132; *Rothwell v. Dewees*, 2 Black, 613; *Bruce v. Ronly*, 18 Ill. 67; *Follansbe v. Kilbreth*, 17 Ill. 522; *Squire's App.*, 70 Penn. St. 268; *Seichrist's App.*, 66 id. 237. So if he take the deed in his wife's name, a knowledge by the principal that the deed is so made will not affect the trust. *Bostleman v. Bostleman and Wife*, 24 N. J. Eq. 103.

³ *Ensley v. Ballentine*, 4 Humph. 233; *Campbell v. Drake*, 4 Ired. Eq. 91. But where A. embezzled B.'s money and invested it in stock in the name of C., a mere volunteer, a resulting trust was enforced against C. in favor of B. *Bank of America v. Pollock*, 4 Edw. Ch. 415; and see *Pascoag Bank v. Hunt*, 3 Edw. 215; *ante*, § 128. See also *Newton v. Porter*, 5 Lans. 417.

⁴ *Robinson v. Preston*, 4 K. & J. 505; *Bone v. Pollard*, 24 Beav. 288;

(a) See *infra*, § 206, note (a).

and their heirs, paying equal proportions, and one dies, the court will order a specific performance by a conveyance to the survivor alone.¹ But the court lays hold of every circumstance to defeat the joint tenancy and convert it into a tenancy in common.² Thus, where two tenants in common of a joint mortgage term purchase the equity of redemption,³ or several engage in a joint undertaking, or partnership, or trade, or speculation,⁴ or several purchase an estate and pay equally, but one improves the estate at his own cost,⁵ equity will construe them to be tenants in common and not joint tenants. In this country, title by joint tenancy is very much reduced in extent, and the incident of survivorship is almost entirely destroyed by statutes, except in the case of trustees, executors, and others, in whom such a tenancy is necessary for the execution of their trusts.⁶

§ 137. The transaction out of which a trust results may be proved by parol.⁷ The statute of frauds extends to and

Moyse v. Gyles, 2 Vern. 385; *Hayes v. Kingdome*, 1 Vern. 33; *York v. Eaton*, 2 Freem. 23; *Aveling v. Knipe*, 19 Ves. 441; *Rigden v. Vallier*, 3 Atk. 735; *Lake v. Gibson*, 1 Eq. Cas. Ab. 291; *Anon.*, Carth. 15; *Rea v. Williams*, Sugd. V. & P. (14th ed.) p. [697]; *Thicknesse v. Vernon*, 2 Freem. 84.

¹ *Aveling v. Knipe*, 19 Ves. 441.

² *Robinson v. Preston*, 4 K. & J. 505; *Tompkins v. Mitchell*, 2 Rand. 428; *Brothers v. Porter*, 6 B. Mon. 106; *Barribeau v. Brant*, 17 How. 43.

³ *Edwards v. Fashion*, Pr. Ch. 332; *Morly v. Bird*, 3 Ves. 631; *Rigden v. Vallier*, 3 Atk. 734; *Vickers v. Cowell*, 1 Beav. 629; *Partridge v. Pawlett*, 1 Atk. 467; *Anon.*, Carth. 16; *Petty v. Styward*, 1 Ch. R. 57; *Randall v. Phillips*, 3 Mason, 378.

⁴ *Lake v. Gibson*, 1 Eq. Cas. Ab. 290; 3 P. Wms. 158; *York v. Eaton*, 2 Freem. 23; *Jackson v. Jackson*, 9 Ves. 597, n.; *Lyster v. Dolland*, 1 Ves. Jr. 434; *Jeffreys v. Small*, 1 Vern. 217; *Caines v. Grant*, 5 Binn. 119; *Duncan v. Forrer*, 6 Binn. 193; *Sigourney v. Munn*, 7 Conn. 11; *Overton v. Lacy*, 6 Monroe, 13; *Deloney v. Hutcheson*, 2 Rand. 183; *Cuyler v. Bradt*, 2 Caines' Cas. 326; *Pugh v. Currie*, 5 Ala. 446; *McAllister v. Montgomery*, 3 Hayw. 94; *Farley v. Shippen*, Wythe, 135. See *Appleton v. Boyd*, 7 Mass. 131; *Kinsley v. Abbott*, 19 Maine, 430.

⁵ *Lake v. Gibson*, 1 Eq. Cas. 291.

⁶ See 4 Kent Com. 396 (11th ed.).

⁷ *Livermore v. Aldrich*, 5 Cush. 435; *Boyd v. McLean*, 1 Johns. Ch.

embraces only trusts created or declared by the parties, and does not affect trusts arising by operation of law.¹ (a) Indeed, such trusts are specially excepted in the statute of frauds of most States. The exception, however, was omitted in the statute of Rhode Island; but Mr. Justice Story held that the omission was immaterial, as such trusts were excepted in the nature of things.² It follows that a party setting up a resulting trust may prove by parol the agreements under which the estate was purchased, and he may prove by parol the actual payment of the purchase-money by himself, or in his behalf, although the deed states it to have been paid by the grantee in the conveyance.³ (b) And

582; *Verplank v. Caines*, id. 57; *Botsford v. Burr*, 2 id. 405; Ch. 57; *Page v. Page*, 8 N. H. 187; *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397; *Gardner Bank v. Wheaton*, 8 Greenl. 373; *Powell v. Monson & Brim. Manuf. Co.*, 3 Mason, 347; *Elliott v. Armstrong*, 3 Blackf. 199; *Jennison v. Graves*, id. 441; *Blair v. Bass*, 4 id. 550; *Sneling v. Utterback*, 1 Bibb, 609; *Foote v. Bryant*, 47 N. Y. 544; *McGinity v. McGinity*, 6 Penn. St. 38; *Peiffer v. Lytle*, 58 id. 386; *Nixon's App.*, 63 id. 277; *Byers v. Wackman*, 16 Ohio, 80, 440; *Faris v. Dunn*, 7 Bush, 276; *Caldwell v. Caldwell*, 7 Bush, 515; *Morgan v. Clayton*, 61 Ill. 35; *Knox v. McFarran*, 4 Col. 586; *Learned v. Tritch*, 6 Col. 432. Otherwise in Michigan. *Groesbeck v. Seeley*, 13 Mich. 329; and see *Barbin v. Gasford*, 15 La. An. 539.

¹ *Ibid.*; *Ross v. Hegeman*, 2 Edw. Ch. 373; *Larkin v. Rhodes*, 5 Porter, 196; *Enos v. Hunter*, 4 Gil. 211; *Smith v. Sackett*, 5 Gilm. 544; *Foote v. Bryant*, 47 N. Y. 544; *Black v. Black*, 4 Pick. 238; *Bryant v. Hendricks*, 5 Iowa, 256; *Judd v. Haseley*, 22 Iowa, 428; *Ward v. Armstrong*, 84 Ill. 151; *Gale v. Harby*, 20 Fla. 171.

² *Hoxie v. Carr*, 1 Sum. 187.

³ *De Peyster v. Gould*, 2 Green, Ch. 474; *Dismukes v. Terry*, Walk. 197; *Peabody v. Tarbell*, 2 Cush. 232; *Barron v. Barron*, 24 Vt. 375; *Smith v. Burnham*, 3 Sum. 438; *Malin v. Malin*, 1 Wend. 626; *Harder v. Harder*, 2 Sandf. Ch. 17; *Peirce v. McKeegan*, 3 Barr, 136; *Lloyd v. Carter*, 17 Pa. St. 216; *Peebles v. Reading*, 8 Serg. & R. 484; *Millard v. Hathaway*, 27 Cal. 119; *Lyford v. Thurston*, 16 N. H. 399; *Bayles v. Baxter*, 22 Cal. 575; *Cooper v. Skeelee*, 14 Iowa, 578. In *Kirk v. Webb*, Pr. Ch. 84, the court refused to admit parol evidence to control the recitals of

(a) This applies to that clause be performed within a year. *Rayl*
of the statute which prohibits suits *v. Rayl*, 58 Kansas, 585.
upon unwritten agreements not to (b) *Boyd v. Boyd*, 163 Ill. 611;

Bancroft v. Russell, 157 Mass. 47.

although the holder of the legal title has fraudulently or by mistake made a declaration that he holds the property for some other person,¹ or states it to be for the use of the grantor,² and although the trust, and all the circumstances out of which it arises, may be denied under oath in the answer, yet the facts may all be proved by parol in opposition to the answer.³ In such case the trust must be clearly alleged in the bill, not only in terms, but all the facts must be set out from which the trust is claimed to result.⁴ General vague statements of a testator that the land he owned was the "security or property held in trust by him for the payment of the trust fund," will not be sufficient to impress a trust on the property in the absence of clear evidence that trust funds were used in the purchase of the land.⁵ The

the deed as to the payment of the consideration, and this decision was followed in *Heron v. Heron*, Pr. Ch. 163; *Freem.* 248; *Skitt v. Whitmore*, *Freem.* 280; *Kinder v. Miller*, Pr. Ch. 172; *Newton v. Preston*, id. 103; *Hooper v. Eyles*, 2 Vern. 480; *Cox v. Bateman*, 2 Ves. 19; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Deg v. Deg*, 2 id. 414; but the rule has been changed, and the doctrine stated in the text is now established beyond controversy. *Bartlett v. Pickersgill*, 1 Eden, 515; *Lench v. Lench*, 10 Ves. 517; *Groves v. Groves*, 3 Y. & J. 163. See 2 Story, Eq. Jur. § 1201, and notes; *Livermore v. Aldrich*, 5 Cush. 435; *Connor v. Follansbee*, 59 N. H. 125.

¹ *Hanson v. First Presbyterian Church*, 1 Stock. 441.

² *Cotton v. Wood*, 25 Iowa, 43.

³ *Cooth v. Jackson*, 6 Ves. 39; *Buck v. Pike*, 2 Fairf. 24; *Baker v. Vining*, 30 Me. 121; *Page v. Page*, 8 N. H. 187; *Moore v. Moore*, 38 N. H. 382; *Boyd v. McLean*, 1 Johns. Ch. 582; *Botsford v. Burr*, 2 id. 405; *Swinburne v. Swinburne*, 28 N. Y. 568; *Snelling v. Utterback*, 1 Bibb, 609; *Lloyd v. Lynch*, 28 Pa. St. 419; *Letcher v. Letcher*, 4 J. J. Marsh. 590; *Miller v. Stokely*, 5 Ohio St. 194; *Elliott v. Armstrong*, 2 Blackf. 198; *Jenison v. Graves*, id. 440; *Blair v. Bass*, 4 id. 540; *Larkins v. Rhodes*, 5 Porter, 196; *Farringer v. Ramsey*, 2 Md. 365; *Greer v. Baughman*, 13 Md. 257; *Ensley v. Ballentine*, 4 Humph. 233; *Paine v. Wilcox*, 16 Wis. 202; *Olive v. Dougherty*, 3 Iowa, 371; *Vanderaver v. Freeman*, 20 Tex. 333; *Pugh v. Bell*, 1 J. J. Marsh. 399.

⁴ *Rowell v. Freese*, 23 Maine, 182; *Hickey v. Young*, 1 J. J. Marsh. 1; *Gascoigne v. Thwing*, 1 Vern. 366; *Rider v. Kidder*, 10 Ves. 364; *Groves v. Groves*, 3 Y. & J. 163; *Halcott v. Morkant*, Pr. Ch. 168; *Goodright v. Hodges*, 1 Watk. Corp. 229; *Willis v. Willis*, 2 Atk. 71.

⁵ *Cuming v. Robins*, 39 N. J. Eq. 46.

facts in all cases must be proved with great clearness and certainty,¹ especially when the claim depends upon mere statements;² and facts that only base a *conjecture* that the conditions of a resulting trust existed, are insufficient.^{3(a)}

¹ *Cuming v. Robins*, 39 N. J. Eq. 46; *Slocumb v. Marshall*, 2 Wash. C. C. 397; *Newton v. Preston*, Pr. Ch. 103; *Wright v. King*, Harr. Ch. 12; *Enos v. Hunter*, 4 Gilm. 211; *Carey v. Callan*, 6 B. Mon. 44; *O'Hara v. O'Neil*, 2 Eq. Cas. Ab. 475; *Cottingham v. Fletcher*, 2 Atk. 155; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Hyden v. Hyden*, 6 Baxter (Tenn.), 406; *Thomas v. Sandford*, 49 Md. 181; *Johnson v. Richardson*, 44 Ark. 365; *Harvey v. Pennybacker*, 4 Del. Ch. 445; *Green v. Dietrich*, 114 Ill. 636; *Witts v. Horney*, 59 Md. 584; *Philpot v. Penn.*, 91 Mo. 38; *Rogers v. Rogers*, 87 Mo. 257; *Shaw v. Shaw*, 86 Mo. 594; *Modrell v. Riddle*, 82 Mo. 31; *Parker v. Snyder*, 31 N. J. Eq. 164; *Brickell v. Earley*, 115 Penn. St. 473. As to what facts are competent and necessary to be proved, see *Hunter v. Marlboro'*, 2 Wood. & M. 168; *Morey v. Herrick*, 18 Penn. St. 128; *Blyholder v. Gibson*, 18 Pa. St. 134; *Farringer v. Ramsey*, 4 Md. Ch. 33; *Malin v. Malin*, 1 Wend. 626; *Harder v. Harder*, 1 Sandf. 17; *Snelling v. Utterback*, 1 Bibb, 609; *Freeman v. Kelly*, 1 Hoff. 90; *Baker v. Vining*, 30 Me. 128; *Clarke v. Quackenboss*, 27 Ill. 260; *Nelson v. Warrall*, 20 Iowa, 409; *White v. Weldon*, 4 Nev. 280; *Stall v. Cincinnati*, 16 Ohio St. 169; *Browne v. Stamp*, 21 Md. 328; *Holder v. Nunnally*, 2 Cold. 288; *Childs v. Gramold*, 19 Iowa, 362; *Cutler v. Tuttle*, 19 N. J. Eq. 560; *Parmlee v. Sloan*, 37 Ind. 469; *Phelps v. Seeley*, 22 Grat. 573; *Shepard v. Pratt*, 32 Iowa, 296.

² *Heneke v. Floring*, 114 Ill. 554; *McKeown v. McKeown*, 33 N. J. Eq. 384.

³ *Railsback v. Williamson*, 88 Ill. 497.

(a) The evidence to establish a resulting trust in such cases, especially when the trust arises *ex maleficio*, must be clear, unequivocal, and convincing; the burden of proof is upon the person seeking to establish the trust; and the presumption is strong in favor of the legal title and possession. *Howland v. Blake*, 97 U. S. 624; *Brickell v. Earley*, 115 Penn. St. 473; *Martin v. Baird*, 175 id. 540; *Francis v. Roades*, 146 Ill. 635; *McGinnis v. Jacobs*, 147 Ill. 24; *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120; *Myers v. Jackson*, 135 Ind. 136; *Pillars v. McConnell*, 141 Ind. 670; *Logan v. Johnson*, 72 Miss. 185; *Gaines v. Drakeford*, 51 S. C. 37; *Rogers v. Rogers*, 87 Mo. 257; *Reed v. Painter*, 129 Mo. 674; *Roche v. George*, 93 Ky. 609; *Parker v. Logan*, 82 Va. 376; *Snider v. Johnson*, 25 Oregon, 328; *Sherman v. Sandell*, 106 Cal. 373; *Woodside v. Hewel*, 109 Cal. 481; *Mullen v. McKim*, 22 Col. 468; *Marshall v. Fleming* (Col.), 53 Pac. 620; *Spencer v. Terrel*, 17 Wash. 514; *Chambers v. Emery*, 13 Utah, 374. This

The certainty required, however, is only such as is sufficient to satisfy the jury of the existence of the trust; and it is error to charge that the "clearest and most positive proof" must be given.¹ For this purpose all competent evidence is admissible, as the admissions of the nominal purchaser and grantee in the deed, recitals in the deed and other proper documents, and even circumstantial evidence, as that the means of the nominal purchaser were so limited that it was impossible for him to pay the purchase-money.² (a) But loose and equivocal facts ought not to control the evidence of deeds; and two witnesses, or one witness with corroborating circumstances, are required to control an answer under oath. And proof of mere admissions of one that he purchased for another, without proof of some previous arrangement or advance of money by such other, is insufficient to create a resulting trust.³ (b)

§ 138. It has been stated by some writers that *after the death of the supposed nominal purchaser*, parol proof alone

¹ *Neyland v. Bendy*, 69 Tex. 711.

² *Willis v. Willis*, 2 Atk. 71; *Wilkins v. Stevens*, 1 Y. & C. Ch. 431; *Lench v. Lench*, 10 Ves. 518; *Benger v. Drew*, 1 P. Wms. 780; *Strimpfler v. Roberts*, 18 Penn. St. 283; *Farrell v. Lloyd*, 69 id. 239; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Brown v. Petney*, 3 Ill. 468; *Sayre v. Frederick*, 16 N. J. Eq. 205; *Gascoigne v. Thwing*, 30 N. J. L. 366; *Graves v. Graves*, 3 Y. & J. 170; *Mitchell v. O'Neil*, 4 Nev. 504.

³ *Sidle v. Walter*, 5 Watts, 389; and see *Sample v. Coulson*, 9 W. & S. 62. The admission of a trustee that he purchased certain property with the trust fund is competent evidence to raise a resulting trust for the *cestui que trust* in that property. *Harrisburg Bank v. Tyler*, 3 Watts & S. 373.

is analogous to the general rule in equity that an instrument will not be reformed on the ground of mistake, except upon full, clear, and decisive proof of the mistake. *Loud v. Barnes*, 154 Mass. 344; *Richardson v. Adams*, 171 Mass. 447. When the evidence showing a resulting trust is clear, it may be estab-

lished even after the lapse of many years, and by oral evidence, though denied by an answer in chancery. *Cooksey v. Bryan*, 2 App. D. C. 557; *Condit v. Maxwell*, 142 Mo. 266.

(a) *Salisbury v. Clarke*, 61 Vt. 453.

(b) *Springer v. Kroeschell*, 161 Ill. 358.

could not be admitted to control the express declaration of the deed;¹ but the cases relied upon are the cases before cited to the point that parol proof is inadmissible, both before and after the death of the supposed nominal purchaser. These cases are overruled; and it would seem upon principle that the death of the nominal purchaser cannot affect the admissibility of parol testimony, whatever effect it may have upon its weight.² Analogous to this matter is the question whether *trust-money* can be followed into land by parol evidence; and it is clearly established that it may, on the ground that a purchase with trust-money is virtually a purchase paid for by the *cestui que trust*, and such a purchase is a trust by operation of law, and not within the statute of frauds.³ And if a trustee pay for property out of the trust fund, and take the deed in the name of another, the trust results to the *cestui que trust*, and not to the trustee.⁴

§ 139. It follows that as a resulting trust may be shown by parol proof, as a presumption of law arising out of the transaction, so the presumption may be rebutted by parol proof showing that no trust was intended by the parties at the time of the transaction,⁵ and that it was the intention to confer the beneficial interest upon the supposed nominal purchaser. As the resulting trust is mere matter of equitable

¹ Sanders on Uses and Trusts, 259; note to Lloyd v. Spillett, 2 Atk. 150; Roberts on Statute of Frauds, 99.

² Lewin on Trusts, 138 (5th Lond. ed.), 2 Mad. Ch. Pr. 141; Sugd. V. & P. 136 (9th ed.); Lench v. Lench, 10 Ves. 517; 2 Story, Eq. Jur. § 1201, n.; Livermore v. Aldrich, 5 Cush. 435; Unitarian So. v. Woodbury, 14 Me. 281; De Peyster v. Gould, 2 Green, Ch. 474; Harrisburg Bank v. Tyler, 3 W. & S. 373; Harder v. Harder, 2 Sand. Ch. 17; McCammon v. Pettitt, 3 Sneed, 242; Fausler v. Jones, 7 Ind. 277; Neill v. Keese, 5 Tex. 23; Freeman v. Kelly, 1 Hoff. 90; Richardson v. Taylor, 45 Ark. 472.

³ Lench v. Lench, 10 Ves. 517; Trench v. Harrison, 17 Sim. 111; ante, §§ 127, 128.

⁴ Russell v. Allen, 10 Paige, 249; Wynn v. Sharer, 23 Ind. 573.

⁵ Warren v. Steer, 112 Penn. St. 635; declarations made afterwards and not bearing on the intent at the time of purchase cannot affect the title.

presumption, it may be rebutted by facts that negative the presumption; and whatever facts appear tending to prove that it was intended that the nominal purchaser should take the beneficial interest as well as the legal title, negatives the presumption.¹ The presumption may be negated as to part of the estate, and prevail in part.² The presumption, however, is in favor of the trust resulting to the party paying the consideration, and the burden of proof is upon the mere nominal purchaser to show that he was intended to have some beneficial interest.³ The burden of proof on the whole case, however, rests on the one who seeks to establish a resulting trust, to show by clear evidence the necessary facts.⁴

§ 140. And when a clear understanding is had at the time the purchase is made, the money paid, and the deed taken, by which understanding the nominal purchaser was to have both the legal and the beneficial interest, it is incompetent for the person who paid the purchase-money to put a different construction upon the transaction at a subsequent time, and claim a resulting trust in the estate contrary to the under-

¹ *Rider v. Kidder*, 10 Ves. 364; *Benbow v. Townsend*, 1 M. & K. 508; *Goodright v. Hodges*, 1 Watk. Cop. 227; *Lofft*, 230; *Rundle v. Rundle*, 2 Vern. 252; *Taylor v. Taylor*, 1 Atk. 386; *Redington v. Redington*, 3 Ridg. 106; *Beecher v. Major*, 2 Drew. & Sm. 431; *Garrick v. Taylor*, 29 Beav. 79; 4 De G., F. & J. 159; *Bellasis v. Compton*, 2 Vern. 294; *Madison v. Andrew*, 1 Ves. 58; *Bake v. Vining*, 30 Maine, 126; *Page v. Page*, 8 N. H. 189; *Botsford v. Burr*, 2 Johns. Ch. 405; *Steere v. Steere*, 5 id. 18; *White v. Carpenter*, 2 Paige, 217; *Jackson v. Feller*, 2 Wend. 465; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Sewell v. Baxter*, 2 Md. Ch. 448; *Hays v. Hollis*, 8 Gill, 369; *McGuire v. McGowen*, 4 Des. 487; *Elliott v. Armstrong*, 2 Blackf. 199; *Philips v. Crammond*, 2 Wash. C. C. 441; *Myers v. Myers*, 1 Casey, 100; *Squire v. Harder*, 1 Paige, 494; *Ledge v. Morse*, 16 Johns. 199; *Smith v. Howell*, 3 Stockt. 122; *Bayles v. Baxter*, 22 Cal. 375; *McCue v. Gallagher*, 23 Cal. 51; *Byers v. Danley*, 27 Ark. 77; *Hays v. Quay*, 68 Penn. St. 263; *Murphy v. Peabody*, 63 Ga. 522; *Kelsey v. Snyder*, 118 Ill. 544.

² *Benbow v. Townsend*, 1 M. & K. 506; *Rider v. Kidder*, 10 Ves. 360; *Lane v. Dighton*, Amb. 409; *Pinney v. Fellows*, 15 Vt. 525.

³ *Dudley v. Bosworth*, 10 Humph. 12; 2 Sugd. V. & P. 139 (9th ed.).

⁴ *Philpot v. Penn*, 91 Mo. 44; *Jackson v. Wood*, 88 Mo. 76; *Johnson v. Quarles*, 46 Mo. 423.

standing and intention at the time.¹ And if the nominal purchaser, under such circumstances, should afterwards agree to hold in trust for, or to execute a conveyance to the person who paid the money, courts would not enforce the agreement, if it was without a new consideration or voluntary.² So if the trust is declared in writing at the time of the transaction there can be no resulting trust, as the one precludes the other;³ or if the nominal purchaser stipulates for something out of the transaction inconsistent with the trust.⁴

§ 141. Courts will not enforce a resulting trust after a great lapse of time,⁵ or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate.⁶ But if the trust is admitted, and there has been no adverse holding, lapse of time is no bar,⁷ and laches will not be allowed to avail as a defence, where fraud has been practised on the *cestui* to keep her in ignorance of her rights until just before filing the bill. Any excuse for delay that takes hold of the

¹ Groves *v.* Groves, 3 Y. & J. 172; Hunt *v.* Moore, 6 Cush. 1; White *v.* Sheldon, 4 Nev. 280; Robles *v.* Clarke, 25 Cal. 317.

² Ibid.

³ Clark *v.* Burnham, 2 Story, 1; Anstice *v.* Brown, 6 Paige, 448; Leggett *v.* Dubois, 5 Paige, 114; Alexander *v.* Warrance, 17 Mo. 230; Mercer *v.* Stark, 1 Sm. & M. 479; Dennison *v.* Goehring, 7 Barr, 175.

⁴ Dow *v.* Jewell, 21 N. H. 470.

⁵ James *v.* James, 41 Ark. 303 (more than 20 years).

⁶ Delane *v.* Delane, 7 Bro. P. C. 279; Clegg *v.* Edmonson, 8 De G., M. & G. 787; Groves *v.* Groves, 3 Y. & J. 172; Peebles *v.* Reading, 8 Ser. & R. 484; Graham *v.* Donaldson, 5 Watts, 471; Haines *v.* O'Conner, 10 Watts, 315; Lewis *v.* Robinson, id. 338; Buckford *v.* Wade, 17 Ves. 97; Robertson *v.* Macklin, 3 Hayw. 70; Strimpfler *v.* Roberts, 18 Penn. St. 283; Best *v.* Campbell, 62 id. 478; Douglass *v.* Lucas, 63 id. 11; Sunderland *v.* Sunderland, 19 Iowa, 325; Brown *v.* Guthrie, 27 Texas, 610; Hall *v.* Doran, 13 Iowa, 368; Trafford *v.* Wilkinson, 3 Tenn. Ch. 701; Newman *v.* Early, id. 714. And see Miller *v.* Blose, 30 Grat. 744; Jennings *v.* Shacklett, id. 765; King *v.* Purdee, 96 U. S. 90; Midmer *v.* Midmer, 26 N. J. Eq. 299; Smith *v.* Patton, 12 W. Va. 541; McGivney *v.* McGivney, 142 Mass. 156, 160.

⁷ Dow *v.* Jewell, 18 N. H. 340.

conscience of the chancellor and makes it inequitable to interpose the bar is sufficient.¹

§ 142. The legislature of New York has abolished trusts resulting from the payment of the consideration by one and the taking the title in the name of another, except in cases where the nominal grantee has taken the deed without the knowledge and consent of the party paying the money, or except the purchase is made with another's money in violation of some duty or trust.² (a) But the statute saves the rights of creditors of the party paying the purchase-money and taking the title in the name of another.³ If such a purchase

¹ *Harris v. McIntyre*, 118 Ill. 275.

² *Linsley v. Sinclair*, 24 Mich. 380.

³ Rev. Stat. 1859, Part II. (Vol. III. p. 15), c. 1, art. 6, §§ 52, 53, 57; *Bodine v. Edwards*, 10 Paige, 504; *Brewster v. Power*, 10 Paige, 562; *Wil-link v. Vanderveer*, 1 Barb. 599; *Norton v. Storer*, 8 Paige, 222; *Reid v. Fitch*, 11 Barb. 399; *Lounsbury v. Purdy*, 16 Barb. 376; 18 N. Y. 515; *Jencks v. Alexander*, 11 Paige, 619; *Watson v. Le Row*, 6 Barb. 481; *Russell v. Allen*, 10 Paige, 250; *Siemon v. Schurek*, 29 N. Y. 598; *Swin-*

(a) This statute applies only to secret trusts; it does not apply to an express agreement with the person supplying the consideration that the party taking the title in his own name shall hold it for both of them. *McArthur v. Gordon*, 126 N. Y. 597; *Gage v. Gage*, 43 N. Y. S. 810; *Bullenkamp v. Bullenkamp*, 54 id. 482. See *Woerz v. Rademacher*, 120 N. Y. 62; *Watt v. Watt* (Ky.), 39 S. W. 48; *Pope v. Dapray*, 176 Ill. 478, 484; *Smith v. Mason* (Cal.), 55 Pac. 143; *Lee v. Tinken*, 41 N. Y. S. 979. Sect. 53 of the New York statute, which preserves the right to a resulting trust when the grantee named in a conveyance, "in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to an-

other person," does not include the grantee's breach of promise to take the deed in the name of another who has furnished the consideration. *Schierloh v. Schierloh*, 148 N. Y. 103. Under the statutes of New York, when a trust has been created by a third person for a debtor, his creditors can reach the surplus income only after providing for the *cestui's* proper support, but the creditors may resort to the entire reserved interest when the trust is created by the debtor. *Schenck v. Barnes*, 156 N. Y. 316, 321. In this State, one who executes an invalid oral trust, by conveying land and receiving the proceeds, is a trustee of personality for the *cestui que trust*, who may by action recover from him such proceeds. *Bork v. Martin*, 132 N. Y. 280.

is a fraud upon creditors, they may enforce the trust in equity, though the original purchaser and payer of the money would have no remedy;¹ but if the debt is barred by a discharge in bankruptcy, the creditor's lien is gone.² In Kentucky, trusts resulting from the payment of the money and the purchase in the name of another are abolished, but an action is given for the recovery of the money paid.³ In Massachusetts, the creditors of such a purchaser, taking the title in the name of a third person, may levy their execution upon the land, in the same manner as if the purchaser had taken the title directly to himself.⁴ And so in New Hampshire.⁵ The statute of New York has been strictly construed, and therefore if A. makes a purchase, and pays the money, and takes the title in the name of B., upon a parol trust for C., it is not within the statute; and C. may enforce the trust as against B.⁶ Statutes similar to the statute of New York have been passed in Michigan⁷ and Wisconsin.⁸ (a) In Louisiana, express

burne v. Swinburne, 28 N. Y. 568; *Stover v. Flock*, 21 Barb. 162; *Safford v. Hind*, 39 Barb. 625; *Buffalo R. R. Co. v. Lampson*, 47 Barb. 533; *Gilbert v. Gilbert*, 1 Keyes (N. Y.), 159. See the comments of Church, Ch. J., upon this last case, in *Foote v. Bryant*, 47 N. Y. 561; and see *Gilbert v. Gilbert*, 2 N. Y. Dec. 256; *Farrell v. Lloyd*, 69 Penn. St. 239.

¹ *Ibid.*; *Jackson v. Forrest*, 2 Barb. Ch. 576; *McCartney v. Bostwick*, 32 N. Y. 53.

² *Ocean Nat. Bank v. Alcott*, 46 N. Y. 12.

³ *Martin v. Martin*, 5 Bush, 47; as to the rule in Minnesota, see *Durpee v. Pavitt*, 14 Minn. 424.

⁴ Gen. Stat. 1860, c. 103, § 1; Stat. 1844, c. 107; *Foster v. Durant*, 2 Gray, 538; amending the law as ruled in *How v. Bishop*, 3 Met. 26; *Clark v. Chamberlain*, 12 Allen, 257.

⁵ *Hutchins v. Heywood*, 50 N. H. 591.

⁶ *Siemon v. Austin*, 33 Barb. 9; *Siemon v. Schurck*, 29 N. Y. 598; *Foote v. Bryant*, 44 N. Y. 544.

⁷ R. S. 1846, c. 63, § 4; *Groesbeck v. Seeley*, 13 Mich. 329; *Fisher v. Fobes*, 22 Mich. 454.

⁸ R. S. 1858, c. 84, §§ 7-9.

(a) See *Strong v. Gordon*, 96 Wis. 219; *Graham v. Selbie*, 8 S. D. 604; 476; *Gee v. Thraillkill*, 45 Kansas, 173; *Connolly v. Keating*, 102 Mich. 1; *Tiffany v. Tiffany*, 110 Mich. 476; *Haaven v. Hoass*, 60 Minn. 313. Under the Ala. Code, § 1845, which declares void all parol trusts

trusts have been abolished ; but trusts arising from the nature of transactions, or by implication of law, are still enforced by the courts.¹

§ 143. As before stated, if a purchaser of an estate pays the consideration-money, and takes the title in the name of a stranger, the presumption is that he intended some benefit for himself, and a resulting trust arises for him ;² but if the purchaser take the conveyance in the name of a wife or child or other person, for whom he is under some natural, moral, or legal obligation to provide, the presumption of a resulting trust is rebutted, and the contrary presumption arises, that the purchase and conveyance were intended to be an advancement for the nominal purchaser.³ The transaction will be regarded *prima facie* as a settlement upon the nominal

¹ *Gaines v. Chow*, 2 How. 619; *McDonough's Ex'rs v. Murdock*, 15 How. 367.

² *Ante*, § 126.

³ *Murless v. Franklin*, 1 Swanst. 17; *Grey v. Grey*, 2 Swanst. 597; *Finch*, 340; *Dyer v. Dyer*, 2 Cox, 93; 1 *Watk. Cop.* 219; *Redington v. Redington*, 2 *Ridg.* 176; *Elliot v. Elliot*, 2 *Ch. Cas.* 231; *Sidmouth v. Sidmouth*, 2 *Beav.* 451; *Thomas v. Chicago*, 55 *Ill.* 403; *Graff v. Rohrer*, 35 *Md.* 327; *Christy v. Courtenay*, 13 *Beav.* 96; *Lamplugh v. Lamplugh*, 1 *P. Wms.* 111; *Goodright v. Hodges*, 1 *Watk. Cop.* 228; *Pole v. Pole*, 1 *Ves.* 76; *Woodman v. Morrell*, 2 *Freem.* 33; *Finch v. Finch*, 15 *Ves.* 50; *Mumma v. Mumma*, 2 *Vern.* 19; *Skeats v. Skeats*, 2 *Younge & C. Ch.* 9; *Wait v. Day*, 4 *Denio*, 439; *Wilton v. Devine*, 20 *Barb.* 9; *Jackson v. Matsdorf*, 11 *Johns.* 91; *Prossers v. McIntire*, 5 *Barb.* 424; *Partridge v. Havens*, 10 *Paige*, 678; *Guthrie v. Gardner*, 19 *Wend.* 414; *Reid v. Fitch*, 11 *Barb.* 399; *Page v. Page*, 8 *N. H.* 187; *Astreen v. Flanagan*, 3 *Edw. Ch.* 279; *Bodine v. Edwards*, *id.* 504; *Dennison v. Goehring*, 7 *Barr*, 182, n.; *Knouff v. Thompson*, 16 *Penn. St.* 357; *Shaw v. Read*, 47 *id.* 96; *Fleming v. Donahoe*, 5 *Ohio*, 255; *Tremper v. Burton*, 18 *Ohio*, 418; *Stanley v. Brannon*, 6 *Blackf.* 193; *Whitten v. Whitten*, 3 *Cush.* 194;

in land, the oral promise of the grantee in an absolute deed of real estate to hold it for the grantor's use, is void, and the trust will not be enforced in equity on the ground that the grantee's repudiation of such trust is a fraud. *Brock v. Brock*, 90 *Ala.* 86. See *Ward v.*

Ward, 59 *Conn.* 188; *Mannix v. Purcell*, 46 *Ohio St.* 102; *Robertson v. Rentz* (*Minn.*), 74 *N. W.* 133; *Kelso v. Kelso*, 16 *Ind. App.* 615; *Gowdy v. Gordon*, 122 *Ind.* 533; *Feeney v. Howard*, 79 *Cal.* 525; *Champlin v. Champlin*, 136 *Ill.* 309; *Harris v. Daugherty*, 74 *Texas*, 1.

grantee; and if the payer of the money claims a resulting trust he must rebut this presumption by proper evidence.¹ (a) Lord Ch. B. Eyre stated the doctrine thus: "The circumstance of one or more of the nominees being a child or children of the purchaser is held to operate by *rebutting the resulting trust*; and it has been determined in so many cases that the nominee being a child shall have such operation, as a *circumstance of evidence*, that it would be disturbing landmarks if we suffered either of these propositions to be called into question; viz., that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. It would have been a more simple doctrine if children had been considered as *purchasers for valuable consideration*. That way of considering it would have shut out all the circumstances of evidence which have found their way into the cases, and would have prevented some very nice distinctions, not very easily understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. *Thus the question is resolved into one of intent*, which was getting into a very wide sea without very certain guides."² (b) And Lord Nottingham pointed out that the

Fatherree v. Fletcher, 31 Miss. 265; Welton v. Devine, 20 Barb. 9; Butler v. Ins. Co., 14 Ala. 777; Douglass v. Price, 4 Rich. Eq. 322; Taylor v. James, 4 Des. 9; Thompson v. Thompson, 1 Yerg. 97; Dudley v. Bosworth, 10 Humph. 12; Alexander v. Warrance, 2 Bennett, 230; Cartwright v. Wise, 14 Ill. 417; Shepherd v. White, 10 Tex. 72; Baker v. Leathers, 3 Ind. 557; Hill v. Pine River Bank, 45 N. H. 300; Dickenson v. Davis, 44 N. H. 647; Miller v. Blose, 30 Grat. 744; Kelly v. Karsner, 72 Ala. 106; Schuster v. Schuster, 93 Mo. 438; Seibold v. Chrisman, 75 Mo. 308; Read v. Huff, 40 N. J. Eq. 229; Newman v. Early, 3 Tenn. Ch. 716.

¹ Jackson v. Matsdorf, 11 Johns. 91; Shepherd v. White, 10 Texas, 72; Proseus v. McIntire, 5 Barb. 425; Butler v. Ins. Co., 14 Ala. 777; Hill v. Pine River Bank, 45 N. H. 300.

² Dyer v. Dyer, 2 Cox, 94. Where land is purchased with money

(a) See Walston v. Smith, 70 Vt. 19. ton, 50 N. J. Eq. 500; Beeman v. Beeman, 88 Hun, 14; Francis v.

(b) A moral consideration, such as love and affection for one's children or relatives, does not establish a resulting trust. Landon v. Hut-

Wilkinson, 147 Ill. 370; Noe v. Roll, 134 Ind. 115; Higbee v. Higbee, 123 Mo. 287.

law of resulting trusts, in this respect, was analogous to uses before the statute, "for the feoffment of a stranger, before the statute, without consideration, raised a use in the feoffor; but a feoffment by a father to a son, without other consideration, raised no use by implication in the father, for the consideration of blood settled the use in the son, and made it an advancement."¹ Where the husband purchases land for his wife with his own funds, taking the obligation of the vendor to execute a deed to the wife, the latter, or after her death her children, can enforce a conveyance of the legal title, although the said obligation had been pledged to the vendor by the husband as a security for a loan to himself.²

§ 144. This rule embraces all persons for whom the purchaser is under any obligation, legal or moral, to provide. It embraces daughters as well as sons,³ although a distinction was once attempted, on the ground that it is not so common to settle lands upon daughters as upon sons.⁴ It embraces estates bought in the name of a wife,⁵ and in the joint names

of the wife and the deed taken in name of the husband, it is a question of fact and intention whether the husband reduced the money to possession before paying it over for the deed. *Moulton v. Haley*, 57 N. H. 184.

¹ *Grey v. Grey*, 2 Swanst. 598.

² *Morris v. Hanson*, 78 Ala. 230.

³ *Lady Gorge's Case*, Cro. Car. 550; 2 Swanst. 600; *Clarke v. Danvers*, 1 Ch. Cas. 310; *Woodman v. Morrell*, 2 Freem. 33; *Jennings v. Selleck*, 1 Vern. 467; *Bedwell v. Froome*, 2 Cox, 97; *Back v. Andrew*, 2 Vern. 120; *Baker v. Leathers*, 3 Ind. 558; *Murphy v. Nathaus*, 46 Penn. St. 508; *Astreen v. Flanagan*, 3 Edw. Ch. 279, was the case of an adopted daughter.

⁴ *Gilb. Lex. Præc.* 272.

⁵ *Glaister v. Hewer*, 8 Ves. 199; *Dummer v. Pitcher*, 2 M. & K. 262; *Kingdom v. Bridges*, 2 Vern. 67; *Christ's Hospital v. Budgin*, id. 683; *Back v. Andrew*, id. 120; *Benger v. Drew*, 1 P. Wms. 780; *Wallace v. Bowens*, 28 Vt. 138; *Guthrie v. Gardner*, 19 Wend. 414; *Welton v. Devine*, 20 Barb. 9; *Garfield v. Hatmaker*, 15 N. Y. 475; *Jencks v. Alexander*, 11 Paige, 619; *Astreen v. Flanagan*, 3 Edw. Ch. 279; *Kline's App.* 39 Penn. St. 463; *Alexander v. Warrance*, 2 Bennett, 230; *Drew v. Martin*, 32 L. J. Ch. 367; *Graff v. Rohrer*, 35 Md. 327; *Johnson v. Johnson*, 16 Minn. 512; *Thomas v. Chicago*, 55 Ill. 403. But if there is no

of the wife and the purchaser;¹ also, in the names of the wife and children.² So, in the names of a son and a stranger, in which case the moiety to the son will be an advancement,³ but the moiety in the name of the stranger will be presumed to be in trust for the purchaser.⁴ And if a grandparent purchase in the name of a grandchild, whether the father is or is not dead, it will be presumed to be an advancement, and not a trust;⁵ and so a purchase by a person who has placed himself *in loco parentis* to the nominal grantee will be presumed to be a settlement, and not a trust, for the purchaser.⁶ And if the nominal grantee is an illegitimate child of the purchaser, the same presumption will arise;⁷ or if the nominal grantee be an idiot,⁸ or a son-in-law.⁹ But if the nominal grantee be a brother of the purchaser, the law will presume a trust and not an advancement, on the ground that there is no such obligation on one brother to support or provide for another, that the purchase can be presumed to be made for such a purpose;¹⁰ so if one sister pay the money, and take the convey-

legal marriage, the conveyance will be presumed to be a trust, and not an advancement. *Soar v. Foster*, 4 K. & J. 152.

¹ *Ibid.*

² *Dummer v. Pitcher*, 2 M. & K. 262; 5 Sim. 35; *Kingdom v. Bridges*, 2 Vern. 67; *Back v. Andrew*, id. 120; *Stevens v. Stevens*, 78 Maine, 92.

³ *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Kingdom v. Bridges*, 2 Vern. 67; *Rumboll v. Rumboll*, 1 Eden, 17.

⁴ *Ibid.*

⁵ *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Lloyd v. Read*, 1 P. Wms. 607; *Currant v. Jago*, 1 Coll. 265, n. (c); *Tucker v. Burrow*, 2 Hem. & M. 525; *Kilpin v. Kilpin*, 1 M. & K. 520.

⁶ *Ibid.* But it is said that such purchase will not be presumed to be an advancement if the conveyance is taken to a remote relative, or to a stranger, although the real purchaser may have placed himself *in loco parentis*. *Tucker v. Burrow*, 2 Hem. & M. 515; *Powys v. Mansfield*, 3 My. & Cr. 359; *Miller v. Blose*, 30 Grat. 744.

⁷ *Beckford v. Beckford*, Lofft. 490; *Kilpin v. Kilpin*, 1 M. & K. 556, Anon., 1 Wal. Jr. 107; *Kimmel v. McRight*, 2 Barr, 38; *Soar v. Foster*, 4 K. & J. 160. But it is said that this rule will not apply to the illegitimate child of a legitimate child. *Tucker v. Burrow*, 2 Hem. & M. 525.

⁸ *Cartwright v. Wise*, 14 Ill. 417.

⁹ *Baker v. Leathers*, 3 Porter, 558.

¹⁰ *Maddison v. Andrew*, 1 Ves. 58; *Edwards v. Edwards*, 39 Penn. St. 369; *Foster v. Foster*, 34 L. J. Ch. 428.

ance in the name of another sister.¹ And where the nominal grantee stands in the relation of *mother* or *nephew* to the real purchaser, no presumption of an advancement or settlement will arise, but it will be presumed to be a trust, unless the purchaser stands *in loco parentis* to the nominal grantee.² And if the son stands in the relation of solicitor to his mother, a purchase made by her, in his name, will be presumed to be a trust, as the relation of solicitor and client rebuts the presumption of an advancement,³ and so, it is said, the rule does not apply to any purchase made by a mother in the name of a child.⁴ A purchase by a wife in the name of her husband may be shown to be a trust.⁵ The rule applies to personal as well as real property.⁶

§ 145. The general principle is, that a purchase by the parent, in the name of a child, is presumed to be an advancement, and not a trust. (a) This presumption is one of fact,

¹ Keaton v. Cobb, 1 Dev. Ch. 439; Field v. Lonsdale, 14 Jur. 995; 13 Beav. 78.

² Currant v. Jago, 1 Coll. C. C. 263; Lamplugh v. Lamplugh, 1 P. Wms. 111; Taylor v. Alston, 2 Cox, 97; Edwards v. Field, 3 Mad. 237; Jackson v. Feller, 2 Wend. 465.

³ Garrett v. Wilkinson, 2 De G. & Sm. 244.

⁴ *In re* De Visme, 2 De G., J. & Sm. 17.

⁵ McGovern v. Knox, 21 Ohio St. 552.

⁶ Devoy v. Devoy, 3 Sm. & Gif. 403; Dummer v. Pitcher, 2 M. & K. 262; Bone v. Pollard, 24 Beav. 283; Sidmouth v. Sidmouth, 2 Beav. 447; Fox v. Fox, 15 Ir. Ch. 89.

(a) An advancement, and not a trust, is presumed when the person who pays for property purchased is under a natural or moral obligation to provide for the person receiving the conveyance. Danforth v. Briggs, 80 Maine, 316; Whitley v. Ogle, 47 N. J. Eq. 67; Olipant v. Liversidge, 112 Ill. 160; Brownell v. Stoddard, 42 Neb. 177; Klamp v. Klamp, 51 Neb. 17; Roberts v. Remy, 56 Ohio St. 249; Paddock v. Adams, *id.* 242; Kobarg v. Greeder, 51 Neb. 365;

Handlan v. Handlan, 42 W. Va. 309; Deck v. Tabler, 41 W. Va. 332. Thus, a gift to the donor's child, if reasonable and provident, especially if made during the child's minority, is presumed to be valid and irrevocable, even though a supposed claim for services is not legally valid. Molyneux v. Fletcher, [1898] 1 Q. B. 648; Yeakel v. McAttee, 156 Penn. St. 600; Parker v. Parker, 45 N. J. Eq. 224; Cohen v. Parish (Ga.), 31 S. E. 205; Walker v. Brown (Ga.), 30

and may be rebutted by evidence or circumstances ; and some courts have been astute in finding circumstances and subtle

id. 867. "In such cases the presumption of intention to become the owner of the property arising from the payment of the purchase-money is rebutted by the stronger counter presumption of an intention to make an advancement to the child or wife." *Long v. King* (Ala.), 23 So. 534 ; *Smithsonian Inst'n v. Meech*, 169 U. S. 398 ; *Walston v. Smith*, 70 Vt. 19. Acceptance by such beneficiaries is presumed ; if minors, the law puts in an acceptance for them. *Brunson v. Henry*, 140 Ind. 455, 465. Such presumption does not arise when the relationship does not obligate to support, as when the grantee in the deed is the purchaser's brother. *Camden v. Bennett*, 64 Ark. 155 ; *Teegarden v. Lewis*, 145 Ind. 98 ; *Hall v. Kappenberger*, 97 Mo. 509. And the presumption, when existing, is only a rebuttable presumption of fact. *Smithsonian Inst'n v. Meech*, 169 U. S. 398 ; *Hallenback v. Rogers* (N. J. Eq.), 40 Atl. 576 ; *Jaquith v. Mass. Bap. Convention*, 172 Mass. 439. A parent's legacy to his child in his will is not to be reduced because of his previous gifts to such child, in the absence of any agreement to that effect. *Jacques v. Swasey*, 153 Mass. 596. A husband, though embarrassed, may convey to a trustee for his family his interest in her real estate when there is no fraud and there is a consideration which can be fairly regarded in equity as valuable. *Hitz v. National Met. Bank*, 111 U. S. 722 ; *Mattoon v. McGrew*, 112 U. S. 713. It is held that money received by a wife from her father's estate, and by her delivered to her husband without any promise, is not held by him under a resulting trust because he afterwards told her he has invested it for her, but in fact took the title in his own name. *Nashville Trust Co. v. Lannom* (Tenn.) 36 S. W. 977 ; *Acker v. Priest*, 92 Iowa, 610. If the wife's father simply conveys property to his son-in-law, as an advancement, in consideration of love and affection for her, the husband's title is not charged with a trust for the wife or her heirs. *Higbee v. Higbee*, 123 Mo. 288 ; *Noe v. Roll*, 134 Ind. 115 ; *Lewis v. Stanley*, 148 Ind. 351 ; *Heath v. Carter*, 20 Ind. App. 83 ; 50 N. E. 318 ; *Rogers v. Rogers* (S. C.), 29 S. E. 812. When a husband invests his wife's money in land, and takes the title in his own name, there is a resulting trust in the land which she can enforce to the extent that her money is clearly shown to have been invested therein. See *Light v. Zeller*, 144 Penn. St. 570, 582 ; *Miller v. Baker*, 160 id. 172 ; 166 id. 414 ; *Lloyd v. Woods*, 163 id. 63 ; *Lau's Estate*, 176 id. 100 ; *Weymouth v. Sawtelle*, 14 Wash. 32 ; *Barger v. Barger*, 30 Oregon, 268 ; *Fawcett v. Fawcett*, 85 Wis. 332 ; *Shupe v. Bartlett* (Iowa), 77 N. W. 455 ; *Shelby v. Tardy*, 84 Ala. 327 ; *Bell v. Stewart*, 98 Ga. 669 ; *Bean v. Bridgers*, 103 N. C. 276 ; *Grantham v. Grantham*, 34 S. C. 504 ; *Hill v. Meinhard*, 39 Fla. 111, 117 ; *Throckmorton v. Throckmorton*, 91 Va. 42. In such

distinctions to rebut this presumption. Thus, if the child was an infant, it was thought that a parent would not confer upon it an absolute property, which it was incapable of managing,¹ and so, if the interest was reversionary, and not capable of present enjoyment, it was said that the father could not have intended it as a provision and settlement, or advancement.² Again, if a father took the conveyance in his own name jointly with his son, it was supposed that the presumption of an advancement was rebutted, on the ground that the father had some interest in one-half, and might have the whole by survivorship, while the son could not sever the joint tenancy till he arrived at age.³ And if a father took a grant to himself and sons upon *successive* lives, it was thought that, as the father must use some names beside his own, those of his sons, being used from prudential and family reasons, rebutted the presumption of an advancement and raised the presumption of a trust;⁴ and so the circumstance that a child was already provided for was held to rebut the presumption of a further advancement.⁵ Again, if a father purchased in

¹ *Binion v. Stone*, 2 Freem. 169; Nels. 68; 2 Freem. 128, c. 151.

² *Rumboll v. Rumboll*, 2 Eden, 17; *Finch v. Finch*, 15 Ves. 43; *Murless v. Franklin*, 1 Swanst. 13.

³ *Stileman v. Ashdown*, 2 Atk. 480; *Pole v. Pole*, 1 Ves. 76.

⁴ *Dyer v. Dyer*, 2 Cox, 95; 1 Watk. Cop. 221; *Dickinson v. Shaw*, 2 Cox, 95.

⁵ *Elliot v. Elliot*, 2 Ch. Cas. 231; *Pole v. Pole*, 1 Ves. 76; *Grey v. Grey*, 2 Swanst. 600; *Finch*, 341; *Lloyd v. Read*, 1 P. Wms. 608; *Redington v. Redington*, 3 Ridg. 190.

case the husband has the burden of proof to show that the wife made a loan or gift of the money to him. *Berry v. Wiedman*, 40 W. Va. 36; *Printup v. Patton*, 91 Ga. 422; *Lofitis v. Loftis*, 94 Tenn. 232; *Benbow v. Moore*, 114 N. C. 263. The wife may be estopped in equity from claiming such land when her husband's creditors are permitted to contract with him on the understanding that it is his property. *Hews v. Kenney*, 43 Neb. 815; *Cleghorn v. Obernalte*, 53 Neb. 687, 690; *Smith v. Willard*, 174 Ill. 538. See *Moore v. Moore*, 165 Penn. St. 464. But the wife's interest will be protected in equity, when her conduct is free from suspicion, against such of his creditors as did not rely upon his apparent ownership of the property. *Besson v. Eveland*, 26 N. J. Eq. 468; *Hews v. Kenney*, *supra*.

the name of an adult son, and kept the actual possession of the estate, and received the rents and profits, the presumption of an advance was supposed to be rebutted, and the presumption of a trust created.¹

§ 146. But these objections have all been overruled, and from the manner these distinctions are disposed of, a general principle applicable to every case may be stated, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout,"² and Lord Eldon added, that this principle of law, that a purchase is presumed *prima facie* to be an advancement, is not to be frittered away by mere refinements.³ Therefore it is now established that a purchase in the name of an infant child is *prima facie* an advancement,⁴ and the purchase of a reversionary interest in the name of a child falls within the same rule;⁵ so a purchase by a father, in the joint names of himself and son,⁶ or in the joint names of a son and a stranger,⁷ and so if a father take an estate for successive lives, as his own and his sons'.⁸ If a child in whose name the purchase is made is already provided for, it will be a circumstance to be considered with other evidence; but it will not of itself rebut the presumption of an advancement. Lord Loughborough said, "that a purchase under such circum-

¹ Gilb. Lex Præt. 271.

² By Ch. B. Eyre, *Dyer v. Dyer*, 2 Cox, 98.

³ *Finch v. Finch*, 15 Ves. 50.

⁴ *Ibid.*; *Mumma v. Mumma*, 2 Vern. 19; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Lady Gorge's Case*, 2 Swanst. 600; *Collinson v. Collinson*, 3 De G., M. & G. 403; *Skeats v. Skeats*, 2 Y. & C. Ch. 9; *Christy v. Courtenay*, 13 Beav. 19.

⁵ *Rumboll v. Rumboll*, 2 Eden, 17; *Murless v. Franklin*, 1 Swanst. 13; *Finch v. Finch*, 15 Ves. 43.

⁶ *Dummer v. Pitcher*, 2 M. & K. 272; *Grey v. Grey*, 2 Swanst. 599; *Back v. Andrew*, 2 Vern. 120; *Scroope v. Scroope*, 1 Ch. Cas. 27; *Thompson v. Thompson*, 1 Yerg. 97.

⁷ *Hayes v. Kingdom*, 1 Vern. 34; *Kingdom v. Bridges*, 2 id. 67; *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

⁸ *Dyer v. Dyer*, 2 Cox, 95.

stances by a father in the name of a son *was not*, but *might* be, a trust for the father."¹ If a father purchase in the name of a son, whether an infant or an adult, and keep the actual possession of the estate, and receive the profits, it will be presumed that the purchase was an advancement;² for if the son was an infant, the father would be its natural guardian, or *quasi* guardian, and protector, and thus receive the rents of the estate.³ And if the son was an adult, the natural reverence and submission due from children to their parents would account for the circumstances.⁴ But any contemporaneous acts wholly inconsistent with the intention of an advancement to the child will make him a trustee for the father. Thus, if there is any circumstance accompanying the purchase which explains why it was taken in the wife's or child's name, and shows that it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted, and the inference of a trust will be established.⁵

§ 147. Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention,

¹ Ibid. 93; *Redington v. Redington*, 3 Ridg. 190; *Sidmouth v. Sidmouth*, 2 Beav. 456; *Kilpin v. Kilpin*, 1 M. & K. 542.

² *Grey v. Grey*, 2 Swanst. 600; *Redington v. Redington*, 3 Ridg. 190; *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

³ *Mumma v. Mumma*, 2 Vern. 19; *Fox v. Fox*, 15 Ir. Ch. 89; *Taylor v. Taylor*, 1 Atk. 386; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Lloyd v. Read*, id. 608; *Lady Gorge's Case*, Cro. Car. 550; 2 Swanst. 600; *Stileman v. Ashdown*, 2 Atk. 480; *Christy v. Courtenay*, 13 Beav. 96; *Paschall v. Hinderer*, 28 Ohio St. 568.

⁴ *Grey v. Grey*, 2 Swanst. 600; *Dyer v. Dyer*, 2 Cox, 95; *Woodman v. Morrell*, 2 Freem. 32, note by Hovenden; *Shales v. Shales*, id. 252; *Seawen v. Seawen*, 1 Y. & C. Ch. 65; *Murless v. Franklin*, 1 Swanst. 17; *Redington v. Redington*, 3 Ridg. 190; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Elliot v. Elliot*, 2 Ch. Cas. 231; *Williams v. Williams*, 32 Beav. 370; *Lloyd v. Read*, 1 P. Wms. 607.

⁵ *Prankerd v. Prankerd*, 1 S. & S. 1; *Baylis v. Newton*, 1 Vern. 28; *Birch v. Blagrove*, Amb. 264; *Farr v. Davis*, 8 East, 354; *Perkins v. Nichols*, 11 Allen, 512; *Balford v. Crane*, 1 Greene, Ch. 265; *Skillman v. Skillman*, 2 McCarter, 478; *Gibson v. Foote*, 40 Miss. 788; *Cook v. Bremond*, 27 Tex. 457; *Sunderland v. Sunderland*, 19 Iowa, 325; *Clark v. Clark*, 43 Vt. 685.

though presumed in the first instance to be a provision and settlement; therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption,¹ and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose.² (a) And so the declara-

¹ *Christy v. Courtenay*, 13 Beav. 96; *Baylis v. Newton*, 2 Vern. 28; *Shales v. Shales*, 2 Freem. 252; *Tucker v. Burrow*, 2 Hem. & M. 524; *Collinson v. Collinson*, 3 De G., M. & G. 409; *Murless v. Franklin*, 1 Swanst. 19; *Lloyd v. Read*, 1 P. Wms. 607; *Taylor v. Alston*, cited 2 Cox, 96; *Grey v. Grey*, 2 Swanst. 600; *Williams v. Williams*, 32 Beav. 370; *Redington v. Redington*, 3 Ridg. 177; *Rawleigh's Case*, cited Hard. 497; *Prankerd v. Prankerd*, 1 S. & S. 1; *Swift v. Davis*, 8 East, 354, n. (a); *Hall v. Hall*, 1 Connor & Law, 120; *Taylor v. Taylor*, 4 Gilm. 303; *Slack v. Slack*, 26 Miss. 290; *Johnson v. Matsdorf*, 11 Johns. 91; *Butler v. M. Ins. Co.*, 14 Ala. 777; *Dudley v. Bosworth*, 10 Humph. 12; *Hayes v. Kindersley*, 2 Sm. & Gif. 194; *Peer v. Peer*, 3 Stockt. 432; *Persons v. Persons*, 25 N. J. Eq. 250; *Milner v. Freeman*, 40 Ark. 62.

² *Jeans v. Cooke*, 24 Beav. 521; *Redington v. Redington*, 3 Ridg. 196; *Prankerd v. Prankerd*, 1 S. & S. 1; *Murless v. Franklin*, 1 Swanst. 17; *Swift v. Davis*, 8 East, 354, n. (a); *Robinson v. Robinson*, 45 Ark. 481.

(a) A resulting trust arises when a husband pays with his wife's funds for property purchased in his own name, even though the payment is made after the purchase, in instalments, or to pay off a mortgage for the purchase price or other incumbrance; but in general a resulting trust is not established by a payment or agreement subsequent to the purchase. *Irick v. Clement*, 49 N. J. Eq. 590; *Gilchrist v. Brown*, 165 Penn. St. 275; *Howard v. Howard*, 52 Kansas, 469; *Hamilton v. Buchanan*, 112 N. C. 463; *Taylor v. Miles*, 19 Oregon, 550; see *Milner v. Stanford*, 102 Ala. 277; *Greaves v. Atkinson*, 68 Miss. 598; *Moorman v. Arthur*, 90 Va. 455; *Barlow v. Barlow*, 47 Kansas, 676; *supra*, § 145, n. (a). A payment from the wife's separate estate to her husband is presumably a gift. *Bennett v. Bennett*, 37 W. Va. 396; *Clark v. Patterson*, 158 Mass. 388; *Jewell v. Clay* (Iowa), 77 N. W. 511; *Beecher v. Wilson*, 84 Va. 813. The rule that a conveyance by a husband to his wife is presumed to be a gift or advancement does not apply when his entire estate is thus conveyed. In such case a resulting trust will be more readily inferred. *Pool v. Phillips*, 167 Ill. 432. See *Bacon v. Devinney*, 55 N. J. Eq. 449; *Goelz v. Goelz*, 157 Ill. 33; *Fay v. Morrison*, 159 Ill. 244; *Gruhn v. Richardson*, 128 Ill. 178; *Lane v. Lane*, 80 Maine, 570; *Whitley v. Ogle*, 47 N. J. Eq. 67; *Gilliland v. Gilliland*, 96 Mo. 522; see *Moore v. Crawford*, 130 U. S.

tions of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust.¹ Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time. They are parts of the transaction, or words accompanying an act.² The real purchaser, if otherwise competent, may be a witness to state what his objects, purposes, and intentions were in making the purchase and in taking the title in the name of his wife or child.³ Of course, declarations made by the husband or father after the purchase are incompetent to control the effect of the prior transaction.⁴ But such declarations may be used by the wife or child against the purchaser to show that it was a settlement and not a trust.⁵ And the after declarations of the nominal grantee may be used against him, but not in his favor.⁶ But the declarations must be direct and certain, and where possible should be corroborated by other facts and circumstances; for courts will not act upon

¹ *Devoy v. Devoy*, 3 Sm. & Gif. 403; *Grey v. Grey*, 2 Swanst. 594; *Kilpin v. Kilpin*, 1 M. & K. 520; *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawen v. Scawen*, 1 Y. & C. Ch. 65.

² *Ibid.*; *Baker v. Leathers*, 3 Ind. 558.

³ *Devoy v. Devoy*, 3 Sm. & Gif. 403; *Stone v. Stone*, 3 Jur. (N. S.) 708.

⁴ *Tremper v. Burton*, 18 Ohio, 418; *Christy v. Courtenay*, 13 Beav. 96; *Williams v. Williams*, 32 Beav. 32; *Sidmouth v. Sidmouth*, 2 Beav. 456; *Elliot v. Elliot*, 2 Ch. Cas. 231; *Woodman v. Morrell*, 2 Freem. 33; *Finch v. Finch*, 15 Ves. 51; *Birch v. Blagrove*, Amb. 266; *Skeats v. Skeats*, 2 Y. & C. Ch. 9; *Gilb. Lex Præc.* 271; *Murless v. Franklin*, 1 Swanst. 13; *Crabb v. Crabb*, 1 M. & K. 519; *Prankerd v. Prankerd*, 1 S. & S. 1; *Hubble v. Osborne*, 31 Ind. 249.

⁵ *Redington v. Redington*, 3 Ridg. 106; *Sidmouth v. Sidmouth*, 2 Beav. 455.

⁶ *Scawen v. Scawen*, 1 N. C. C. 65; *Jeans v. Cook*, 24 Beav. 521; *Sidmouth v. Sidmouth*, 2 Beav. 455; *Pole v. Pole*, 1 Ves. 76; *Murless v. Franklin*, 1 Swanst. 20; *Willard v. Willard*, 56 Penn. St. 119.

122. By the weight of authority a voluntary conveyance made without fraud by a husband to his wife can be avoided only by creditors who were such at the date of the conveyance. *Adams v. Collier*, 122 U. S. 382, 391; *Metropolitan Nat. Bank v. Rogers*, 47 F. R. 148, 151; *Pierce v. Hower*, 142 Ind. 626.

mere declarations, if they are conflicting, vague, or inconsistent with themselves.¹

§ 148. If a father pays the purchase-money, and the wife or child, by fraud, or any wrongful act, and against the intention of the real purchaser, obtains the conveyance in her or its name, the presumption of an advancement would be rebutted, and the presumption of a trust would arise for the father.² So if a son pay the purchase-money and the deed is made to his father by mistake, a trust results to the son.³

§ 149. If a purchaser and payer of the money take the conveyance in the name of a wife or child, for the purpose of delaying, hindering, or defrauding his creditors, the conveyance is void, or a trust results which creditors can enforce to the extent of their debts.⁴ It makes no difference by the better opinion that the *intent* was not fraudulent. A man must be just before he is generous; and if the property given to the wife was bought with funds that ought to have gone to pay creditors, the property is liable to them.⁵ A parallel decision was reached where a wife bought land with her own money, had it deeded to her husband, and the latter contracted debts on the faith of being the owner of the land.⁶ If the par-

¹ *Grey v. Grey*, 2 Swanst. 597; *Scawen v. Scawen*, 1 N. C. C. 65; *Cartwright v. Wise*, 14 Ill. 417; *Cairns v. Colburn*, 104 Mass. 247.

² *Peer v. Peer*, 3 Stockt. 432; *Hall v. Doran*, 13 Iowa, 368; *Perkins v. Nichols*, 11 Allen, 542; *Persons v. Persons*, 25 N. J. Eq. 250.

³ *Fairhurst v. Lewis*, 23 Ark. 435.

⁴ *Christ's Hospital v. Budgin*, 2 Vern. 684; *Lush v. Wilkinson*, 5 Ves. 384; *Townshend v. Westacott*, 2 Beav. 340; *Stileman v. Ashdown*, 2 Atk. 477; *Guthrie v. Gardner*, 19 Wend. 414; *Jencks v. Alexander*, 11 Paige, 619; *Watson v. Le Row*, 6 Barb. 487; *Newell v. Morgan*, 2 Harr. 225; *Bell v. Hallenback*, *Wright*, 751; *Edgington v. Williams*, id. 439; *Parrish v. Rhodes*, id. 339; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Demaree v. Driskill*, 3 Blackf. 115; *Doyle v. Sleeper*, 1 Dana, 531; *Rucker v. Abell*, 8 B. Mon. 566; *Crozier v. Young*, 3 Mon. 158; *Gowing v. Rich*, 1 Ired. 553; *Croft v. Arthur*, 3 Des. 223; *Elliott v. Hart*, 10 Ala. 348; *Abney v. Kingsland*, id. 355; *Cutter v. Griswold*, Walk. Ch. 437; *Kimmel v. McRight*, 2 Barr. 38; *McCartney v. Bostwick*, 32 N. Y. 53; *Bartlett v. Bartlett*, 13 Neb. 460, quoting the text.

⁵ *Bridgers v. Howell*, 27 S. C. 431. ⁶ *Roy v. McPherson*, 11 Neb. 197.

ent or husband was not indebted at the time, subsequent creditors could not defeat the title nor enforce the trust,¹ unless the settlement or conveyance was made for the purpose of afterwards running in debt and defrauding creditors. In some States, as in Pennsylvania and Massachusetts, an execution against the debtor can be levied directly upon the land in the hands of the trustee; in other States the land can only be reached in equity. In Minnesota, a purchase by a husband and a deed to the wife creates no trust as to him, but the wife holds in trust for creditors unless fraudulent intent is disproved.²

§ 150. A very common case of a resulting trust is where the owner of both the legal and equitable estate conveys the legal title only, without conveying the equitable interest.³ The general rule in such case is, that wherever it appears, upon a conveyance, devise, or bequest, that it was intended that the grantee, devisee, or legatee should take the legal estate only, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself or his heirs; if out of his personal estate, to himself, his executors, or administrators.⁴ Whether the conveyance was intended to convey the beneficial as well as the legal estate is sometimes a matter of presumption by the court from all the circumstances of the case, and sometimes it is expressed upon the instrument itself in such manner that no doubts can arise. When it is matter of presumption, parol evidence may be received to rebut or sustain the presumption.⁵ But

¹ *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Knouff v. Thompson*, 16 Penn. St. 357; *Dillard v. Dillard*, 3 Humph. 41; *Cutler v. Tuttle*, 19 N. J. Ch. 556.

² *Leonard v. Green*, 30 Minn. 496.

³ *Morice v. Bishop of Durham*, 10 Ves. 537; *Paice v. Canterbury*, 14 Ves. 370.

⁴ *Lewin on Trusts*, 115 (5th ed. Lond.); *Levet v. Needham*, 2 Vern. 138; *Wych v. Packington*, 3 Bro. Ch. 44; *Sewell v. Denny*, 10 Beav. 315; *Halford v. Stains*, 16 Sim. 488; *Barrett v. Buck*, 12 Jur. 771; *Cooke v. Dealy*, 22 Beav. 196; *Fletcher v. Ashburner*, 1 Bro. Ch. 501; *Re Cross's Estate*, 1 Sim. (N. S.) 260; *Hogan v. Staghorn*, 65 N. C. 279.

⁵ *Cook v. Hutchinson*, 1 Keen, 50; *Docksey v. Docksey*, 2 Eq. Cas. Ab. 506; 3 Bro. P. C. 39; *North v. Crompton*, 1 Ch. Cas. 196; 2 Vern. 253;

where the trust results by force of the written instrument, it cannot be controlled, rebutted, or defeated by parol evidence of any kind.¹

§ 151. No general rule can be stated, that will determine when a conveyance will carry with it a beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument.² A conveyance to a wife or child will be presumed to carry a beneficial interest,³ but such consideration is only a circumstance of evidence.⁴ It has been said, that if a man transfer property to another, it must be presumed that it proceeded from an intention to benefit the other by making the gift and conferring the beneficial interest;⁵ but if such intention cannot be inferred consistently with all the circumstances attending the transaction, a trust will result.⁶ The heir is not to be excluded

Mallabar v. Mallabar, Cas. t. Talb. 78; *Petit v. Smith*, 1 P. Wms. 7; *Nourse v. Finch*, 1 Ves. Jr. 344; *Walton v. Walton*, 14 Ves. 318; *Langham v. Sanford*, 17 Ves. 435; *Gladding v. Yapp*, 5 Mod. 56; *Lake v. Lake*, 1 Wils. 313; *Amb. 126*; *Trimmer v. Bayne*, 7 Ves. 520; *Williams v. Jones*, 10 Ves. 77; *Barnes v. Taylor*, 27 N. J. Eq. 265.

¹ *Langham v. Sanford*, 17 Ves. 435, 442; 19 Ves. 643; *Rachfield v. Careless*, 2 P. Wms. 158; *Gladding v. Yapp*, 5 Mod. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322; *Petit v. Smith*, 1 P. Wms. 7; *Nourse v. Finch*, 1 Ves. Jr. 344; *Ralston v. Telfair*, 2 Dev. Eq. 255; *Hughes v. Evans*, 13 Sim. 496; *White v. Williams*, 3 V. & B. 72; *Love v. Gaze*, 8 Beav. 472.

² *Hill v. Bishop of London*, 1 Atk. 620; *Walton v. Walton*, 14 Ves. 322; *Starkey v. Brooks*, 1 P. Wms. 391; *King v. Dennison*, 1 Ves. & B. 279; *Ellis v. Selby*, 1 M. & K. 298.

³ *Christ's Hospital v. Budgin*, 2 Vern. 683; *Jennings v. Selleck*, 1 Vern. 467; *Grey v. Grey*, 2 Swanst. 598; *Elliot v. Elliot*, 2 Ch. Cas. 232; *Hayes v. Kingdom*, 1 Vern. 33; *Baylis v. Newton*, 2 Vern. 28; *Cook v. Hutchinson*, 1 Keen, 42; *Cripps v. Jee*, 4 Bro. Ch. 472; *Rogers v. Rogers*, 3 P. Wms. 193; *Lloyd v. Spillett*, 2 Atk. 566; *Robinson v. Taylor*, 2 Bro. Ch. 594; *Smith v. King*, 16 East, 283; *Coningham v. Melish*, Pr. Ch. 31.

⁴ *Huggins v. Yates*, 9 Mod. 122; *Wych v. Packington*, 2 Eq. Cas. Ab. 507; *King v. Dennison*, 1 Ves. & B. 474.

⁵ *George v. Howard*, 7 Price, 651.

⁶ *Custance v. Cunningham*, 13 Beav. 363.

from a resulting trust upon bare conjecture;¹ there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that none was intended for the heir; for the beneficial interest results to the heir, not from the intention of the ancestor, but because he has expressed no intention.² Thus, a trust may result upon a legacy given to the heir;³ but the circumstance of being heir, with other circumstances, will be strong evidence that no trust was intended.⁴ But in no case will the court permit the grantee to retain the beneficial interest, if there was any mistake on the part of the grantor,⁵ or any fraud on the part of the grantee.⁶ If the grantor intended a fraud upon the law, there can be no resulting trust;⁷ however, even in this case, if the grantee admits the trust, the court will enforce it.⁸ If a conveyance has been made upon a valuable consideration, there can be no resulting trust to the grantor, as the payment of a valuable consideration imports an intention to benefit the grantee in case the trusts declared fail, or are imperfectly declared, or do not take effect for any other reason.⁹

¹ *Halliday v. Hudson*, 3 Ves. 211; *Kellett v. Kellett*, 3 Dow, 243; *Amphlett v. Parke*, 2 R. & M. 227; *Phillips v. Phillips*, 1 M. & K. 661; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668.

² *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Tregonwell v. Sydenham*, 3 Dow, 211; *Lloyd v. Spillett*, 2 Atk. 151; *Habergham v. Vincent*, 2 Ves. Jr. 225.

³ *Randall v. Bookey*, 2 Vern. 425; Pr. Ch. 162; *Starkey v. Brooks*, 1 P. Wms. 390, overruling *North v. Crompton*, 1 Ch. Cas. 196; *Killett v. Killett*, 1 Ball & B. 543; 3 Dow, P. C. 248.

⁴ *Rogers v. Rogers*, 5 P. Wms. 193; Sel. Ch. Ca. 81; *Mallabar v. Mallabar*, Cas. t. Talb. 78; and other cases above cited.

⁵ *Birch v. Blagrove*, Amb. 264; *Woodman v. Morrell*, 2 Freem. 33; *Childers v. Childers*, 1 De G. & Jon. 482; *Att. Gen. v. Poulden*, 8 Sim. 472.

⁶ *Lloyd v. Spillett*, 2 Atk. 150; Barn. 388; *Hutchins v. Lee*, 1 Atk. 488; *Young v. Peachy*, 2 Atk. 254-257; 2 Vern. 307; *Tipton v. Powell*, 2 Cold. 119.

⁷ *Cottington v. Fletcher*, 2 Atk. 156; *Chaplin v. Chaplin*, 3 P. Wms. 233; *Muckleston v. Brown*, 6 Ves. 68.

⁸ *Ibid.*

⁹ *Kerlin v. Campbell*, 15 Penn. St. 500; *Gibson v. Armstrong*, 7 B. Mon. 481; *Brown v. Jones*, 1 Atk. 158; *Ridout v. Dowding*, 1 Atk. 419.

§ 152. Thus, if upon a conveyance, devise, or bequest, a trust is declared of a part of the estate only, or the purposes of the trust do not exhaust the whole beneficial interest, the trust in the remaining part or interest will result to the settlor or his heirs;¹ for the reason that a declaration of trust as to part is considered sufficient evidence that the settlor did not intend the donee to take the beneficial interest in the whole, and that the creation of the trust was the sole object of the transaction. But a distinction must be observed between a devise to a person for a particular purpose, with no intention of conferring upon him any beneficial interest, and a devise with a view of conferring the beneficial interest, but subject to a particular charge, wish, or desire. Thus, if a gift be made to one and his heirs, charged with the payment of debts, it is a gift for a particular purpose, but not for that purpose only; and if it is the intention to confer upon the donee of the legal estate a beneficial interest after the particular purpose is satisfied without exhausting the whole estate, the surplus goes to the donee and does not result.² But if the gift is *upon a trust to pay debts*, that is a gift for a particular purpose and nothing more. If the whole estate is given for that one purpose, and that purpose does not exhaust the whole estate, the remainder results to

¹ *Northen v. Carnegie*, 4 Drew. 587; *Lloyd v. Spillett*, 2 Atk. 150; *Barn. 388*; *Cottingham v. Fletcher*, id. 155; *Culpepper v. Aston*, 2 Ch. Cas. 115; *Cook v. Gwavas*, cited *Roper v. Radcliffe*, 9 Mod. 187; *Sherard v. Harborough*, Amb. 165; *Hobart v. Suffolk*, 2 Vern. 644; *Bristol v. Hungerford*, id. 645; *Halliday v. Hudson*, 3 Ves. 210 a; *Killett v. Killett*, 3 Dowl. P. C. 248; *Davidson v. Foley*, 2 Bro. Ch. 203; *Levet v. Needham*, 2 Vern. 138; *Kiricke v. Bransbey*, 2 Eq. Cas. Ab. 508; *Robinson v. Taylor*, 2 Bro. Ch. 589; *Mapp v. Elcock*, 2 Phill. 793; 3 H. L. Cas. 492; *Read v. Stedman*, 26 Beav. 495; *Dawson v. Clarke*, 18 Ves. 254; *Wych v. Packington*, 3 Bro. Ch. 44; *Hill v. Cook*, 1 V. & B. 173; *Mullen v. Bowman*, 1 Coll. N. C. 197; *Loring v. Elliott*, 16 Gray, 568.

² *Hill v. London*, 1 Atk. 619; *King v. Dennison*, 1 V. & B. 260; *Southouse v. Bate*, 2 V. & B. 396; *Mullen v. Bowman*, 1 Coll. C. C. 197; *Dawson v. Clarke*, 18 Ves. 247; *Walton v. Walton*, 14 Ves. 318; *Wood v. Cox*, 1 Keen, 317; 2 M. & Cr. 684; *Downer v. Church*, 44 N. Y. 647; *Clarke v. Hilton*, L. R. 2 Eq. 810; *Irvine v. Sullivan*, L. R. 8 Eq. 673.

the donor or his heirs.¹ Or, as Vice-Chancellor Wood stated the rule: (1) where there is a gift to one to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is given to him being stated; (2) where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus after satisfying a trust for his own benefit; (3) where a charge is created by the will, the devisee takes the surplus for his own benefit, and no trust is implied.²

§ 153. If from the whole instrument there can be gathered an intention to benefit the donee, no trust in the remainder will result, as where a man made *his dearly beloved wife his sole heiress and executrix* to pay his debts and legacies, and there was a residue after paying debts and legacies, there was no resulting trust, for the expressions in the will indicated an intention to benefit the donee.³ So any other expressions that indicate an intention that the donee shall be benefited after the particular purposes are satisfied, will prevent a trust from resulting.⁴ So expressions of affection

¹ King v. Dennison, 1 V. & B. 272; McElroy v. McElroy, 113 Mass. 509.

² Barrs v. Fewke, 2 Hem. & M. 60; 11 Jur. (N. S.) 669; Sanderson's Trust, 3 K. & J. 497; Saltmarsh v. Barrett, 29 Beav. 474; 3 De G., F. & J. 279; Pollard's Trusts, 32 L. J. Ch. 657; Henderson v. Cross, 17 Jur. (N. S.) 177; Hale v. Horne, 21 Grat. 112. In Cooke v. Stationers' Co., 3 My. & K. 262, Sir John Leach said: "If the devise to a particular, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure." Thus if lands be devised to A. charged with a legacy to B. if he attain the age of twenty-one, the devise will become absolute in A. if B. dies before he becomes twenty-one. And the will is to read as if B. was not named in it. Tregonwell v. Sydenham, 3 Dow, 210; Sprigg v. Sprigg, 2 Vern. 394; Cruse v. Barley, 3 P. Wms. 20; Att Gen. v. Milner, 3 Atk. 112; Croft v. Slee, 4 Ves. 60; Sutcliffe v. Cole, 3 Drew. 185; Jackson v. Hurlack, 2 Eden, 263; Tucker v. Kayess, 4 K. & J. 339.

³ Rogers v. Rogers, 3 P. Wms. 193; Cook v. Hutchinson, 1 Keen, 42.

⁴ Meredith v. Heneage, 1 Sim. 555; Wood v. Cox, 2 M. & Cr. 692; Cook v. Hutchinson, 1 Keen, 42.

or relationship will be evidence upon the question whether a trust was intended to result after the particular trusts are satisfied.¹ If the donee is an infant incapable of executing a trust, or a married woman, it will be evidence upon the same question.² But if from the whole will it is apparent that the donee shall not take a beneficial interest, all such circumstances go for nothing.³

§ 154. If the donee, to whom an estate is given upon a trust declared as to part, is also the heir, or other person to whom the trust for the remainder would result, or if he is one of a class, such gift to him will not prevent him from taking by the resulting trust the part that may come to him.⁴ So a legacy or other beneficial gift to him will not exclude him from the resulting interest,⁵ even if the interest given him is to arise out of the declared trust.⁶

§ 155. The doctrine of resulting trusts, where a trust is declared as to part only, was formerly much discussed in cases of gifts to executors for the payment of debts and legacies. In such cases at common law the appointment of the executor entitled him, both at law and equity, to all the remainder of the personal property after the payment of debts and legacies, unless it was specially disposed of by the testator in the will. Courts were always astute to find circumstances to repel the beneficial interest in the executor, and to raise a resulting trust for the next of kin, or heir-at-law; and it was finally enacted, 1 Will. IV., c. 40, that such executors should be trustees of any residue, unless it

¹ *Rogers v. Rogers*, 3 P. Wms. 193; *Coningham v. Mellish*, Pr. Ch. 31; *King v. Dennison*, 1 V. & B. 274; *Hobart v. Suffolk*, 2 Vern. 644.

² *Williams v. Jones*, 10 Ves. 77; *Blinkhorn v. Feast*, 2 Ves. Sr. 27.

³ *King v. Mitchell*, 8 Pet. 349; *King v. Dennison*, 1 V. & B. 275.

⁴ *Hennershotz's Estate*, 16 Pa. St. 435.

⁵ *Farrington v. Knightly*, 1 P. Wms. 545; *Rutland v. Rutland*, 2 P. Wms. 213; *Andrews v. Clark*, 2 Ves. Sr. 162; *North v. Pardon*, 2 Ves. Sr. 495.

⁶ *Starkey v. Brooks*, 1 P. Wms. 390; *Randal v. Bookey*, 2 Vern. 425; Pr. Ch. 162; *Killett v. Killett*, 1 B. & B. 543; 3 Dowl. P. C. 248.

plainly appeared by the will that they were intended to take the residue beneficially.¹ In the United States the rule never prevailed, but executors always took as trustees for those entitled to the distribution of the personal estate, unless it was expressly disposed of to some other persons, or unless it was expressly given to the executor beneficially.²

§ 156. In this connection an important exception to the general doctrine of resulting trusts should be stated. If property is given to trustees by grant or devise for charitable uses *generally*, and the particular purpose is not declared at all, or, if declared, does not exhaust the whole estate, there will be no resulting trust for the donor, his heirs, or next of kin, in either case; nor will the donees take any beneficial interest, but the court will direct the trustees to administer the whole estate under some scheme for charitable purposes.³

§ 157. If a gift is made by deed or will upon *trust*, and no trust is declared,⁴ or a bequest is made to one named, as executor, "to enable him to carry into effect the trusts of the will," and none are declared,⁵ or a gift is made upon

¹ See 2 Story, Eq. Jur. § 1208, and the elaborate note cited from Fon. Eq. B. 2, c. 5, § 3, note (k).

² Hill on Trustees, 1234 (Am. ed.); 2 Story, Eq. Jur. §§ 1208, 1209; as the doctrine has never prevailed in America, it is not worth while to state all the learning and nice distinctions of the courts. They will be found in Hill, Story, and Fonblanque as above cited.

³ Cook v. Dunkenfield, 2 Atk. 567; Metford School, 8 Co. 130; Moggridge v. Thackwell, 7 Ves. 73; Att. Gen. v. Bristol, 2 J. & W. 308; Mills v. Farmer, 1 Mer. 55; Att. Gen. v. Haberdashers' Co., 4 Bro. Ch. 103; see *post*, chapter upon Charitable Trusts, where this matter is stated at large.

⁴ Att. Gen. v. Windsor, 8 H. L. Ca. 369; 24 Beav. 679; Gloucester v. Wood, 1 H. L. Cas. 272; 3 Hare, 131; Dawson v. Clark, 18 Ves. 254; Dunnage v. White, 1 J. & W. 583; Morice v. Durham, 10 Ves. 537; Woollett v. Harris, 5 Madd. 452; Southouse v. Bate, 2 Ves. & B. 396; Goodere v. Lloyd, 3 Sim. 538; Pratt v. Sladden, 14 Ves. 198; Anon., 1 Com. 345; Penfold v. Bouch, 4 Hare, 271; Brown v. Jones, 1 Atk. 101; Sidney v. Shelley, 19 Ves. 359; Emblyn v. Freeman, Pr. Ch. 542; Coard v. Holderness, 20 Beav. 147; Longley v. Longley, L. R. 13 Eq. 137.

⁵ Barrs v. Fewke, 2 Hem. & M. 60.

trusts thereafter to be declared, and no declaration is ever made,¹ the legal title only will pass to the grantee or devisee, while a trust in the equitable interest will result to the settlor, his heirs, or legal representatives, according to the nature of the property, whether real or personal; for it appears upon the instrument itself that the legal title alone was intended for the first taker, and that the equitable interest was intended to go to some other person, and as such other person cannot take the equitable interest for want of a declaration of the trust, it results to the settlor or his heirs.² So if a testator says that he gives the residue, and stops there,³ or if he cancels a residuary bequest by drawing a line through it.⁴ But if it should plainly appear from the whole instrument that the donee is to take beneficially in case the trusts are not declared, no trust will result to the owner or heir.⁵

§ 158. It is to be observed, however, that the intention of the instrument is to be gathered from its general scope; hence, although the words *upon trust* are very strong evidence of the donor's intention not to confer the beneficial interest upon the donee,⁶ yet it may be negatived by the context, and the general interpretation of the whole paper;⁷ so,

¹ *London v. Garway*, 2 Vern. 571; *Collins v. Wakeman*, 2 Ves. Jr. 683; *Emblyn v. Freeman*, Pr. Ch. 541; *Fitch v. Weber*, 6 Hare, 145; *Brookman v. Hales*, 2 V. & B. 45; *Brown v. Jones*, 1 Atk. 188; *Sidney v. Shelley*, 19 Ves. 352; *Taylor v. Haygarth*, 14 Sim. 8; *Flint v. Warren*, 16 Sim. 124; *Onslow v. Wallis*, 1 H. & Tw. 513; 1 McN. & G. 506; *Jones v. Goodchild*, 3 P. Wms. 33; *Sturtevant v. Jaques*, 14 Allen, 526; *Shaw v. Spencer*, 100 Mass. 388.

² *Aston v. Wood*, L. R. 6 Eq. 419; *Jones v. Bradley*, L. R. 3 Eq. 635.

³ *Cloyne v. Young*, 2 Ves. Sr. 91; *Langham v. Sandford*, 17 Ves. 435; *Mapp v. Elcock*, 2 Phill. 793.

⁴ *Mence v. Mence*, 18 Ves. 348; *Skrymsher v. Northcote*, 1 Swanst. 566.

⁵ *Sidney v. Shelley*, 19 Ves. 352. Whether a trust results to a debtor in an unclaimed dividend. *Dillaye v. Greenough*, 45 N. Y. 438.

⁶ *Hill v. London*, 1 Atk. 618; *Woollett v. Harris*, 5 Md. 452; *Sturtevant v. Jaques*, 14 Allen, 526; *Shaw v. Spencer*, 100 Mass. 526.

⁷ *Coningham v. Mellish*, Pr. Ch. 31; *Dawson v. Clark*, 15 Ves. 409;

if the donee is called a *trustee*, the term may be shown to apply to one of two funds, and the donee may take a beneficial interest in the other,¹ or it may be so used as to be a mere *descriptio personæ*, and although no beneficiary is named, a trust does not necessarily result to the grantor.² On the other hand it may appear, from the whole instrument, that the donee is not to take the beneficial interest, although the words *upon trust*, or *trustee*, are not used; as where there is a direction that the donee shall be allowed his costs and expenses out of the fund given him, which would be without meaning if he took the whole beneficial interest in the fund.³ But if the conveyance is by deed for a valuable consideration, the grantee will take the beneficial interest if the trusts fail to be declared, or fail in any way; for there can be no resulting trusts where the grantee pays a valuable consideration for the estate.⁴ (a) Where a will contained in substance this clause, "I give to my executor, P., \$800 to have and to hold the same to the use of S. as follows: I desire in case S. should at any time need assistance or come to want, that my executor should expend such part of said \$800 as will make her comfortable and keep her so during her life. The remainder, if any, of said \$800, at the decease of S. I give to the said P. and his heirs," it was

18 Ves. 247; *Hughes v. Evans*, 13 Sim. 496; *Cook v. Hutchinson*, 1 Keen, 42; *Dillaye v. Greenough*, 45 N. Y. 438.

¹ *Gibbs v. Rumsey*, 2 V. & B. 294; *Pratt v. Sladden*, 14 Ves. 193; *Battely v. Windle*, 2 Bro. Ch. 31; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, 13 Minn. 187; *Dillaye v. Greenough*, 45 N. Y. 438.

² *Dillaye v. Greenough*, 45 N. Y. 438.

³ *Saltmarsh v. Barrett*, 3 De G., F. & J. 279; 29 Beav. 474.

⁴ *Brown v. Jones*, 1 Atk. 158; *Ridout v. Dowding*, id. 419; *Kerlin v. Campbell*, 15 Penn. St. 500.

(a) A trust fails, when there was no intention to create one, which can be carried out; and even charitable trusts fail when they cannot be carried out in the mode intended, if there was no intention that they should be carried out in any other mode. *Teele v. Bishop of Derry*, 168 Mass. 341. So when a deed shows no intention outside of the mode and form adopted by the deed, it fails, if the deed itself was never delivered. *Loring v. Hildreth*, 170 Mass. 328, 331.

held that P. held the money to the use of S. during her life, and whether she was in need or no must pay the *income* to her, and *if in need* must expend for her such part of the *principal* as might be requisite to make her comfortable.¹

§ 159. If a trust for a specific purpose fails by the failure of the purpose, the property reverts to the donor or his heirs.² (a) If the gift is made upon a trust, and the trust is insufficiently or ineffectually declared, as, if it is too indefinite, vague, and uncertain to be carried into effect, it will result to the settlor, his heirs, or representatives.³ Whether a trust is insufficiently declared or not, depends of course upon the particular construction to be given to each individual deed or will;⁴ and so, whether a trust is too vague to be executed or not, depends upon the interpretation given to each instrument.⁵ If the declaration of trust is too imperfect to establish that purpose, and yet plainly shows that the intention was that the donee should not take beneficially, and that the sole purpose of the gift or grant was to carry out the purpose of the trust, which fails, the donee will take in trust for the donor or his heirs; but if it appear, from the whole instrument, that some beneficial interest was intended for the donee, or that he was intended to take beneficially in case the particular purpose fails, no trust will result, but he will take the estate discharged of all burdens.⁶

¹ Coburn v. Anderson, 131 Mass. 513.

² Gumbert's App., 110 Penn. St. 496.

³ Williams v. Kershaw, 5 Cl. & Fin. 111; Ellis v. Selby, 7 Sim. 352; 1 M. & C. 286; Fowler v. Garlike, 1 R. & M. 232; Morice v. Durham, 9 Ves. 399; 10 Ves. 522; Kendall v. Granger, 5 Beav. 300; Vesey v. Jamson, 1 S. & S. 69; Stubbs v. Sargon, 3 M. & C. 500; 2 K. 255; Leslie v. Devonshire, 2 Bro. Ch. 187; James v. Allen, 3 Mer. 17; Sturtevant v. Jaques, 14 Allen, 526; Shaw v. Spencer, 100 Mass. 388.

⁴ Ellis v. Selby, 1 M. & K. 298.

⁵ Ibid.

⁶ Gibbs v. Rumsey, 2 Ves. & B. 291; Cawood v. Thompson, 1 Sm. & Gif. 409; Lomax v. Ripley, 3 Sm. & Gif. 48; Hughes v. Evans, 13 Sim. 496; Ralston v. Telfair, 2 Dev. Eq. 255.

§ 160. Where a gift is made upon trusts that are void, in whole or in part, for illegality,¹ or that fail by lapse, or otherwise, during the life of the donor,² a trust will result to the donor, his heirs, or legal representatives, if the property is not otherwise disposed of. (a) Thus, where the gift or trust is void by statute, as a disposition in favor of persons or objects prohibited from taking,³ or given at a time and in a manner forbidden, as in violation of the statutes of mortmain, or similar statutes,⁴ or where the gift contravenes some policy of the law, as tending to a perpetuity,⁵ or where it fails by the death of the beneficial donee or *cestui que trust*,⁶ a trust, to the extent of the estate given, will result to the donor, or his heirs, or legal representatives, if it is not otherwise disposed of. If the purposes of a trust fail or are completely performed, the trustees hold the estate for the heirs at law as a resulting

¹ *Turner v. Russell*, 10 Hare, 204; *Cook v. Stationers' Co.*, 3 M. & K. 262; *Carrick v. Errington*, 2 P. Wms. 361; *Tregonwell v. Sydenham*, 3 Dow, 194; *Arnold v. Chapman*, 7 Ves. 108; *Jones v. Mitchell*, 1 S. & S. 290; *Page v. Leapingwell*, 18 Ves. 463; *Pilkington v. Boughey*, 12 Sim. 114; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Stevens v. Ely*, 1 Dev. Eq. 493; *Dashiel v. Att. Gen.*, 6 Har. & J. 1; *Lemmond v. People*, 6 Ired. Eq. 137.

² *Williams v. Coade*, 10 Ves. 300; *Ackroyd v. Smithson*, 1 Bro. Ch. 503; *Spink v. Lewis*, 3 id. 335; *Hutcheson v. Hammond*, id. 128; *Muckleston v. Brown*, 6 Ves. 63; *Davenport v. Coltman*, 12 Sim. 610; *Cruse v. Barley*, 3 P. Wms. 22; *Hawley v. James*, 5 Paige, 318; *Gwynn v. Gwynn*, 27 S. C. 526.

³ *Carrick v. Errington*, 2 P. Wms. 361; *Davers v. Dewes*, 3 id. 43.

⁴ *Att. Gen. v. Weymouth*, Amb. 20; *Jones v. Mitchell*, 1 S. & S. 294; *West v. Shuttleworth*, 2 M. & K. 684; *Acts 39 & 40 Geo. IV. c. 98*; *Eyre v. Marsden*, 2 Keen, 561; *McDonald v. Bryce*, id. 276; *Lemmond v. People*, 6 Ired. Eq. 137.

⁵ *Tregonwell v. Sydenham*, 3 Dow, 194; *Leake v. Robinson*, 2 Mer. 363; *Marshall v. Holloway*, 2 Swanst. 432; *Southampton v. Hertford*, 2 V. & B. 54; *Curtis v. Lukin*, 5 Beav. 147; *Boughton v. James*, 1 Call. 26; 1 H. L. Cas. 406; *Brown v. Stoughton*, 14 Sim. 369; *Searisbrick v. Skelmersdale*, 17 Sim. 187; *Furrin v. Newcomb*, 3 K. & J. 16.

⁶ *Ackroyd v. Smithson*, 1 Bro. Ch. 503; *Cox v. Parker*, 22 Beav. 188; *Harker v. Reilly*, 4 Del. Ch. 72; *Bond v. Moore*, 90 N. C. 239.

(a) See *Rudy's Estate*, 185 Penn. 199, 768; *Farrington v. Putnam*, 90 St. 359; *Edson v. Bartow*, 154 N. Y. Maine, 405; 10 Harv. L. Rev. 445.

trust.¹ So if a trust for a particular purpose fail, by the dissolution of a corporation, or other organized body, a trust created for their particular benefit will result to the donor's heirs.² All that the donor has not given out of himself remains in him, and if he has not provided to whom the property shall belong on failure or determination of the trust, that right is still his, and he may convey the property subject to the trust.³ In all cases, if the trust arises or results by presumption of law, it may be rebutted as to instruments *inter vivos* by parol evidence that it was the intention of the settlor that the donee should take the surplus beneficially, or the whole estate if the trust failed *in toto*;⁴ but where the trust results, not by presumption of law nor from the facts and circumstances, but from the construction and force of a written instrument, no parol evidence can be introduced to control such construction and force.⁵

§ 160 a. In England, the heir and the next of kin or legal representatives are not the same persons, or they have not the same rights and interests; consequently questions of some difficulty arise as to whether a trust in property results to the heir, or to the next of kin, or the legal representatives. The general rule is, if the property is real estate, that the trust results to the heir; if personal property, to the next of kin under the statutes of distribution, or to the legal representatives. But suppose a testator has devised real estate in trust and directed it to be sold and the proceeds applied to purposes named, and the real estate is converted into money, and the trust fails in whole or in part; or suppose money is given in trust, and there is a direction to invest it in lands, which is done, and the trust fails, to whom does the trust result, to the heir as real estate, or to

¹ Packard v. Marshall, 138 Mass. 333.

² Easterbrooks v. Tillinghast, 5 Gray, 17.

³ Schlessinger v. Mallard, 70 Cal. 326.

⁴ Ante, §§ 139, 140, 145, 147; Cook v. Hutchinson, 1 Keen, 50.

⁵ Ante, § 150; Langham v. Sanford, 17 Ves. 442.

the next of kin as personal property? Such questions are not important in the United States, for the reason that in most if not all the States the same persons take both the real and personal estate of an ancestor in the same proportion and with the same rights, and it is comparatively unimportant whether the trust results as real or personal property.¹ There is, however, one question still important in the United States, and that is, does the trust result to the heirs-at-law, or to the residuary devisees or legatees? The donor, settlor, or testator still retains such an interest in property given by him in trust, that the interest which results upon the failure of the trusts created by him may be devised by him, and the question in each case is whether the resulting interest becomes a part of the residue and passes to the residuary legatee, if there is one, or whether it passes to the heirs. The question may be stated in another form, thus: has the testator died intestate as to the interests which result to him upon a failure of the trusts, or do the provisions of the will embrace such interests and convey them to some person or persons, or class of persons named? The distinction between the heirs and the residuary legatees is that the residuary legatees claim *under* the will, and the heirs claim *dehors* the will. All the cases that can arise must depend upon the intention of the donor or settlors, and upon the construction of each particular will. If the subject-matter of the bequest that fails is personal estate, the residuary legatee will take all that results; for a general residuary bequest is always held to carry every interest, whether undisposed of in the will, or undisposed of in any event.² Therefore it is only where the will contains

¹ See all the English cases cited and the nice distinctions drawn, Lewin on Trusts, 121-132 (5th ed.); Hill on Trustees, 127-143.

² Dawson v. Clarke, 15 Ves. 417; Brown v. Higgs, 4 Ves. 708; 8 Ves. 570; Shanley v. Baker, 4 Ves. 732; Oke v. Heath, 1 Ves. 141; Cambridge v. Rous, 8 Ves. 25; Cooke v. Stationers' Co., 3 M. & K. 264; Bland v. Bland, 2 J. & W. 406; Jones v. Mitchell, 1 S. & S. 298. Sir William Grant said that it must be a very peculiar case indeed in which there can be at once a residuary clause and a partial intestacy unless some part of the residue be ill given. Leake v. Robinson, 2 Mer. 392; King

no residuary clause that the next of kin (or heirs in the United States) can assert any claim. There is, however, this obvious remark to be made: that if the *residuum* is itself given upon a trust that fails, it of course results to the next of kin or heirs.¹ But a different rule is applied at common law to gifts of real estate. If real estate was bequeathed upon trusts that were void, or that failed, the real estate did not pass to the residuary devisee, but resulted to the heir-at-law, for the reason that nothing passed by the gift of the residue except what was intended to pass, and a bequest of real estate for a particular purpose indicated a plain intention not to embrace it in the residuary bequest, and although it might be void or fail, yet it was so far operative as to indicate the intention of the donor not to allow it to pass under the residuary clause of the will. The common law was altered by 1 Vict. Ch. 26, and real estate is governed by the same rule as personal estate.²

§ 161. It was formerly said that if a man conveyed his estate to a stranger without consideration, or for a mere nominal one, a trust resulted to the owner, on the ground that the law would not presume a man to part with his property without some inducement thereto.³ This was in *v. Woodhull*, 3 Edw. Ch. 79; *Swinton v. Egleston*, 3 Rich. Eq. 201; *Hamberlin v. Terry*, 1 Sm. & M. Ch. 589; *Johnson v. Johnson*, 3 Ired. Eq. 427; *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Com. v. Nase*, 1 Ashm. 242; *Woolmer's Est.*, 3 Whart. 879; *Taylor v. Lucas*, 4 Hawks, 215; *Pool v. Harrison*, 18 Ala. 515; *Vick v. McDaniel*, 3 How. (Miss.) 337; *Bryson v. Nichols*, 2 Hill, Ch. 113.

¹ *Skrymsher v. Northcote*, 1 Swanst. 566; *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; *Woolmer's Est.*, 3 Whart. 477; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Salt v. Chattaway*, 3 Beav. 576; *Floyd v. Barker*, 1 Paige, 480; *Frazier v. Frazier*, 2 Leigh, 642; *Trippe v. Frazier*, 4 H. & J. 446.

² In the United States there is considerable variety in the decisions of the courts, if not some uncertainty in the law, where it is not determined by statute. See a very learned discussion of the law in New York in *Van Kluck v. Dutch Reformed Church*, 6 Paige, 600; 20 Wend. 458. In Massachusetts, *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 Pick. 306; *Clapp v. Stoughton*, id. 463; 4 Kent Com. 541.

³ *Lewin on Trusts*, 116 (5th Lond. ed.), and cases cited; *Tolar v.*

strict analogy to the common law, whereby, if a feoffment was made without consideration, the legal title *only* passed to the feoffee, and a use resulted to the feoffor.¹ In conformity with this rule, Mr. Cruise lays it down, that if the legal estate in lands is conveyed to a stranger without any consideration, there arises a resulting trust to the original owner;² for where there is neither consideration, nor declaration of use, to show the intention of the parties, it cannot be supposed that the estate was intended to be given away.³ And the burden was put upon the grantee to show the consideration, and upon failure of proof, a use was presumed to the grantor, for the reason, as stated by Sir Francis Bacon, that when feoffments were made, it grew doubtful whether estates were in use or purchase; and as purchases were things notorious, and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration than the feoffor to prove his trust, and so made intendment toward the use, and put the purchaser to the proof of his purchase.⁴ To the same effect are Coke on Littleton and many of the older, and some of the more modern, authorities.⁵

§ 162. But the rule that a trust resulted to the grantor upon a voluntary conveyance was confined to common-law conveyances or assurances, such as feoffments, grants, fines, recoveries, and releases which operated without consideration, and vested the estate in the alienee by the act itself, as Tolar, 1 Dev. Eq. 456; 2 Story. Eq. Jur. § 1199; Cecil v. Butcher, 2 J. & W. 573; Souerby v. Arden, 1 Johns. Ch. 246.

¹ Dyer v. Dyer, 2 Cox, 92; Pinney v. Fellows, 15 Vt. 538; Botsford v. Burr, 2 Johns. Ch. 405.

² Cruise, Dig. tit. 12, c. 1, § 52; tit. 11, c. 4, § 16.

³ Cruise, Dig. tit. 11, c. 4, § 16 *et seq.*

⁴ Bacon on Uses, 317.

⁵ 1 Inst. 23 *a*, 271 *a*: Dyer, 166 *a*, 186 *b*: 11 Mod. 182; Cleve's Case, 6 Rep. 17 *b*: Woodliffe v. Drury, Cro. Eliz. 439; Duke of Norfolk v. Brown, Pr. Ch. 80; Warman v. Seaman, 2 Freem. 308; Hayes v. Kingdome, 1 Vern. 33; Grey v. Grey, 2 Swanst. 598; Elliot v. Elliot, 2 Ch. Cas. 232; Att. Gen. v. Wilson, 1 Cr. & Ph. 1; Sculthorpe v. Burgess, 1 Ves. Jr. 92; Tyrrell's Case, 2 Freem. 304; Ward v. Lant, Pr. Ch. 182.

by livery of seizin;¹ although it was always doubtful whether a use could result from a conveyance by lease and release, even though it was voluntary, and no uses were declared; for the extinguishment of the estate of the lessee was a good consideration, yet such a conveyance was a strict common-law conveyance.² This rule does not apply to modern conveyances, and no trust is now held to result to a grantor although he conveys his estate without consideration.³ (a)

¹ Cruise, Dig. tit. 11, c. 4, § 16.

² Cruise, Dig. tit. 32, c. 11, § 17.

³ *Hutchins v. Lee*, 1 Atk. 447; *Lloyd v. Spillett*, 2 Atk. 150; *Young v. Peachy*, id. 257; *Burn v. Winthrop*, 1 Johns. Ch. 329; *Graff v. Rohrer*, 35 Md. 327; *Hogan v. Jaques*, 19 N. J. Eq. 123; *Bust v. Wilson*, 28 Cal. 632; *Jackson v. Cleveland*, 15 Mich. 94; *Ownes v. Ownes*, 23 N. J. Eq. 60. But see *McKenney v. Burns*, 31 Ga. 295, and *Haigh v. Kaye*, L. R. 7 Ch. 469; *Blodgett v. Hildreth*, 103 Mass. 486; *Stevenson v. Crapnell*, 114 Ill. 19.

(a) In *Re Duke of Marlborough*, [1894] 2 Ch. 133, where an American wife voluntarily conveyed her house to her husband to enable him to mortgage it in his own name, the decision in *Haigh v. Kaye* was considered as of higher authority than *Leman v. Whitley*, which was also questioned in *Sugden on Vendors* (14th ed.), p. 702; and it was held that, the husband having died without reconveying to her, though apparently not unwilling to do so, the wife was entitled to a reconveyance. In *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, it was likewise held that the statute of frauds does not exclude evidence of a fraud, as when a person to whom land is conveyed as a trustee, and who knows it was so conveyed, denies the trust and claims the land as his own. Hence one who claims land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a de-

claration that the grantee is a trustee for him; that such a trust is an express trust, and the statute of limitations is not a defence to the claim.

In Indiana, even where there is no fraud or misrepresentation up to the time a voluntary conveyance is made, there is held to be a resulting trust for the grantor, when good faith so requires. *Myers v. Jackson*, 135 Ind. 136; *Giffen v. Taylor*, 139 Ind. 573. See *Nashville Trust Co. v. Lannon* (Tenn. Ch.) 36 S. W. 977; *Bowler v. Curler*, 21 Nev. 158; *Larmon v. Knight*, 140 Ill. 232. In California, where husband and wife may contract with each other, and undue influence is not presumed when one conveys property to the other, want of consideration does not establish a resulting trust in the case of a voluntary conveyance by one of them to the other. *Tillaux v. Tillaux*, 115 Cal. 663. In Massachusetts, after a voluntary

At the present day almost all conveyances are in form deeds of bargain and sale, and operate to pass the estate by virtue of the statute of uses, or of statutes in the several States prescribing the formalities necessary to convey lands. Under the statute of uses, the bargain between the bargainor and the bargainee, and the consideration, raised a use in the bargainee; the statute immediately stepped in and vested the legal title in the same person for whom a beneficial use had been raised by the bargain. In conveyances that are in form deeds of bargain and sale, parol evidence cannot be received to control or contradict the statement of the consideration. Such a statement is a solemn and essential part of the deed, and its *existence* cannot be disproved by parol,¹ although it is allowed so far to control the statement as to the payment of it, as to show that it still exists as a debt due from the grantee to the grantor.² (a) And so in States

¹ *Leman v. Whitley*, 4 Russ. 423; *Philbrook v. Delano*, 29 Maine, 410; *Graves v. Graves*, 29 N. H. 129; *Randall v. Phillips*, 3 Mason, 388; *Hutchinson v. Tindall*, 2 Green, Ch. 357; *Alison v. Kurtz*, 2 Watts, 187; *Wilkinson v. Wilkinson*, 2 Dev. Eq. 376; *Morris v. Morris*, 2 Bibb, 311; *Movan v. Hayes*, 1 Johns. Ch. 339; *Rathbun v. Rathbun*, 6 Barb. 98; *Balbeck v. Donaldson*, 6 Am. Law. Reg. 118; *Graff v. Rohrer*, 35 Md. 327.

² *Leman v. Whitley*, 4 Russ. 423; *Graves v. Graves*, 29 N. H. 129; *Philbrook v. Delano*, 21 Maine, 420; *Randall v. Phillips*, 3 Mason, 388; *Thomas v. McCormack*, 9 Dana, 188; *Radsall v. Radsall*, 9 Wis. 379; *Farrington v. Barr*, 36 N. H. 86.

conveyance, untainted by fraud, unaffected by any written declaration of trust, and without consideration, even though there is an oral agreement that the grantee holds the land in trust, the grantor cannot avoid the deed for fraud, accident, or mistake. *Fitzgerald v. Fitzgerald*, 168 Mass. 488. In New York, a voluntary trust is declared and enforced only when a confidential relation is alleged to have been taken advantage of, in which case the donee is required to show clearly fair dealing and absence of fraud.

Goldsmith v. Goldsmith, 145 N. Y. 313; *Lamb v. Lamb*, 46 N. Y. S. 219; *Hutchinson v. Hutchinson*, 81 Hun, 482; see *Lovett v. Taylor*, 54 N. J. Eq. 311.

(a) The consideration expressed in a deed is open to parol explanation for most purposes, but a want of consideration cannot be shown against the recital of the deed to establish a resulting trust in the grantor. *Bobb v. Bobb*, 89 Mo. 411; *Weiss v. Heitkamp*, 127 Mo. 23.

where it is declared by statute, as in Massachusetts,¹ that deeds duly executed, acknowledged, and recorded shall be effectual to pass the estate without other ceremony, it is not competent to control the effect of such deeds by parol, or to engraft uses, trusts, or other limitations upon them not contained in the instruments themselves, or in some other instrument executed before or at the same time with them, in such manner as to become a part of them.² To allow parol evidence to raise a resulting trust upon such deeds would be to break in upon the express provisions of the statute of frauds. Mr. Hill states the modern rule correctly when he says,³ "that it is the clear result of the authorities that where a person, a stranger in blood to the donor, and *a fortiori* if connected with him in blood, is in possession of an estate under a voluntary conveyance duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust, and he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him."⁴ And where the deed contains a clause, as most deeds do, that the

¹ Gen. Stat. c. 89, § 1.

² *Gerry v. Stimson*, 60 Maine, 186; *Philbrook v. Delano*, 29 id. 410; *Titcomb v. Morrill*, 10 Allen, 15; *Bartlett v. Bartlett*, 14 Gray, 278; *Walker v. Locke*, 5 Cush. 90; *Blodgett v. Hildreth*, 103 Mass. 484; *Carnes v. Colburn*, 104 Mass. 274; *Whitton v. Whitton*, 3 Cush. 191; *Graves v. Graves*, 29 N. H. 129; *Rathbun v. Rathbun*, 6 Barb. 105; *Bank of U. S. v. Housman*, 6 Paige, 526; *Miller v. Wilson*, 15 Ohio, 108; *Parnell v. Hingston*, 3 Sm. & Gif. 337; *Taylor v. Taylor*, 1 Atk. 386; *Dyer v. Dyer*, 2 Cox, 93; *Fordyce v. Wallis*, 3 Bro. Ch. 576; *Squire v. Harder*, 1 Paige, 494; *Balbeck v. Donaldson*, 6 Am. Law Reg. 148; *Jackson v. Garnsey*, 16 Johns. 189; *Jackson v. Caldwell*, 1 Cow. 622; *Farrington v. Barr*, 36 N. H. 431.

³ Hill on Trustees, 170 (4th Am. ed.).

⁴ *Cook v. Fountain*, 3 Swanst. 590; *Clavering v. Clavering*, 2 Vern. 473; *Boughton v. Boughton*, 1 Atk. 625; *Cecil v. Butcher*, 2 Jac. & W. 573; *Jeffreys v. Jeffreys*, 1 Cr. & Ph. 138; *Dummer v. Pitcher*, 2 M. & K. 262; *Leman v. Whitley*, 4 Russ. 423; *Graff v. Rohrer*, 35 Md. 327.

estate is had and held to the grantee, his heirs and assigns, *to his and their use and behoof*, no trust can result, as it is a rule that when a use is declared, no other use can be shown to result.¹ (a) *A fortiori* a trust deed cannot be turned into a resulting trust for the grantor by proof that it was without consideration.² And when a deed contains covenants of warranty, no use can result to the grantor, for such covenants estop him from claiming any legal or beneficial interest in the estate.³

§ 163. It may be stated that courts do not favor voluntary conveyances, and will not lend their aid to enforce them if they are imperfectly executed, and their decrees are necessary to give them validity and force. In such cases equity will not interfere, but will leave the parties to their rights at law.⁴ (b) And, further, equity will always look upon

¹ *Graves v. Graves*, 29 N. H. 129; *Sprague v. Woods*, 4 Watts & S. 192; *Vandervolgen v. Yates*, 5 Seld. 219; *Gove v. Learoyd*, 140 Mass. 524.

² *Bobb v. Bobb*, 89 Mo. 419.

³ *Philbrook v. Delano*, 29 Maine, 410.

⁴ *Lane v. Ewing*, 31 Mo. 75.

(a) *Lovett v. Taylor*, 54 N. J. Eq. 311.

(b) See *Rogers v. Rogers* (R. I.), 39 Atl. 755; *supra*, § 97, note (a). In voluntary gifts, equity does not aid in perfecting a gift, but the *cestui que trust* acquires, upon a declaration of trust, an absolute, equitable estate or title, and not a mere right to ask for a title; and when there is a valuable consideration, a contract to declare a trust may in equity be deemed equivalent to an actual declaration. *Wittingham v. Lighthipe*, 46 N. J. Eq. 429; *Janes v. Falk*, 50 id. 468, 472; *Smith's Estate*, 144 Penn. St. 428; *Williamson v. Yager*, 91 Ky. 282; *McCreary v. Gewinner* (Ga.), 29 S. E. 960. Although a parol agreement to exe-

cute a trust cannot be enforced, and a mere refusal to perform a contract is not in itself a fraud, yet when property is conveyed in reliance on its fulfilment, equity will not permit a party to consummate a fraud by retaining it without consideration and in violation of his agreement. *Randall v. Constans*, 33 Minn. 329; *Thompson v. Marley*, 102 Mich. 476; *Whitehouse v. Whitehouse*, 90 Maine, 468; *In re McAuley's Estate*, 184 Penn. St. 124; *Dougherty v. Shillingsburg*, 175 id. 56; *McCartney v. Ridgway*, 160 Ill. 129; *Forney v. Remy*, 77 Iowa, 549; *First Nat. Bank v. Fries*, 121 N. C. 241.

An unconditional gift made by a person *in extremis* may take effect as

such conveyances with suspicion, especially if made to strangers for no particular purpose. If any fraud or misrepresentation is practised upon a grantor, equity will fasten a trust upon the conscience of the fraudulent grantee.¹ If fraud upon the grantor is alleged, the fact that the conveyance was without consideration is always considered as pertinent evidence, and will be considered as one badge of fraud, if there are other facts and circumstances pointing in that direction.² A disposition by will, however, is not subject to these rules, as a gift by will imports a consideration, and no averments by parol can be received to fasten a use or trust upon such gift; but the donee will take both the legal and beneficial estate, unless it clearly appears from the whole will that such was not the intention of the donor.³

§ 164. It is further to be observed that voluntary conveyances to a wife or child were never within the rule that such gifts raised a resulting trust for the donor. In conveyances of this kind to the donor's family the analogy of the common law was followed, whereby, if a feoffment was made to a stranger without consideration, a use resulted to the feoffor; but if a feoffment was made to a wife or child, no use

¹ *Post*, Chap. VI.² *Post*, § 187.³ *Ante*, § 94.

a gift *inter vivos*. *Henschel v. Maurer*, 69 Wis. 576. A gift *inter vivos*, and a voluntary trust, which is an equitable gift, must both be completed by delivery, while a trust requires only a declaration. *Bath Savings Inst'n v. Hathorn*, 88 Maine, 122, 125. A voluntary contract to create a trust will not be enforced or perfected in equity so far as it remains executory. *Norway S. Bank v. Merriam*, 88 Maine, 146; *Landon v. Hutton*, 50 N. J. Eq. 500. In equity a voluntary trust is enforceable even when the *cestui que trust* does not assent to or know of it.

Connecticut River S. Bank v. Albee, 64 Vt. 571; *Williams v. Haskins*, 66 Vt. 378; *Cathcart v. Nelson*, 70 Vt. 317; *Maloney v. Tilton*, 51 N. Y. S. 19. When executed, it is irrevocable. *In re Soulard*, 141 Mo. 642; *Landon v. Hutton*, 50 N. J. Eq. 500; *Polk v. Boggs*, 122 Cal. 114.

A writing, which shows intention to make an absolute gift, but is not delivered, will not be treated as valid as a declaration of trust. *Norway S. Bank v. Merriam*, 88 Maine, 146; *Wadd v. Hazelton*, 137 N. Y. 215; *Sprague v. Thurber*, 17 R. I. 454, 458.

resulted, for the consideration of blood was held a good consideration, and an advance or settlement was presumed. So marriage was not only a good but a valuable consideration, and no trusts could result from conveyances made in consideration of marriage, either of the grantor or of any member of his family. But if voluntary conveyances to wife or children were made by a man deeply indebted, or with an intention to delay his creditors, while he could not raise a trust in his own favor, yet his creditors could avoid the conveyances or raise a trust upon them in their own favor to the extent of their claims.¹

§ 165. If the voluntary conveyance is made for some illegal or fraudulent purpose, whether it is a common-law or a modern conveyance, no trust will result to the grantor; as, if the voluntary conveyance is made to delay, hinder, and defeat creditors,² or to give a man a colorable qualification to vote, or to sit in parliament,³ or to kill game,⁴ or to disqualify the grantor for an office,⁵ or to commit any other fraud,⁶ for the reason that the rules of law cannot be used,

¹ *Dunnica v. Coy*, 28 Mo. 525; *Spirett v. Willows*, 3 De G., J. & S. 293; *Robinson v. Robinson*, 17 Ohio St. 430; *Baldwin v. Campfield*, 4 Halst. Ch. 891; *Spicer v. Ayers*, 2 N. Y. Sup. Ct. 626.

² *Cottington v. Fletcher*, 2 Atk. 156; *Chaplin v. Chaplin*, 3 P. Wms. 233; *Muckleston v. Brown*, 6 Ves. 68; *Stewart v. Iglehart*, 7 Gill & J. 132; *Bryant v. Mansfield*, 22 Maine, 310; *Randall v. Phillips*, 3 Mason, 378; *Wilson v. Cheshire*, 1 McCord, 233; *Mason v. Baker*, 1 A. K. Marsh. 208; *Chamberlayne v. Temple*, 2 Rand. 384; *Stewart v. Dailey*, 6 Litt. 212; *Jackson v. Dutton*, 3 Har. 98; *McClure v. Purcel*, 3 A. K. Marsh. 61; *Steele v. Worthington*, 2 Ham. 82.

³ *Pitt's Case*, cited Amb. 266; *Curtis v. Perry*, 6 Ves. 747; *Cutler v. Tuttle*, 19 N. J. Ch. 553, 562.

⁴ *Roberts v. Roberts*, Daniel, 143; *Brackenbury v. Brackenbury*, 2 Jac. & W. 391; *Cecil v. Butcher*, id. 565.

⁵ *Birch v. Blagrove*, Amb. 264; *Gaskell v. Gaskell*, 2 Y. & J. 502; *Vandenberg v. Palmer*, 4 K. & J. 204; *Childers v. Childers*, 1 De G. & J. 482; *Field v. Lonsdale*, 13 Beav. 78; *Doe v. Rutledge*, Cowp. 705.

⁶ *Tipton v. Powell*, 2 Cold. 19; *Haigh v. Kaye*, L. R. 7 Ch. 473; *Ownes v. Ownes*, 23 N. J. Eq. 60; *Miller v. Davis*, 50 Mo. 572.

controlled, or avoided by parties with a fraudulent intent to do that indirectly which they cannot do directly.¹

§ 165 a. A resulting trust is to be performed or executed by the trustee by transferring the title to the *cestui que trust* at his request;² but if the trustee has incurred any expenses upon the estate by paying taxes or making improvements, or advancing part of the purchase-money, he will be allowed to hold the estate until his advances are repaid.³

¹ Scobie v. Blanchard, 3 N. H. 170 ; Pritchard v. Brown, 4 N. H. 401 ; Hutchins v. Heywood, 50 N. H. 488 ; Sugd. V. & P. 416.

² Millard v. Hathaway, 27 Cal. 119.

³ Malroy v. Sloans, 44 Vt. 311.

CHAPTER VI.

CONSTRUCTIVE TRUSTS.

- § 166. General nature of constructive trusts. They arise from fraud.
- § 167. Jurisdiction of equity over them, and the relief given by converting the offending party into a trustee.
- § 168. Classification of constructive trusts.
- § 169. General definition of a fraud in equity.
- § 170. Principles upon which equity gives relief against fraud.
- § 171. Actual fraud, or *suggestio falsi*.
- § 172. Illustrations of actual fraud.
- § 173. The misrepresentations and frauds that equity will relieve against.
- § 174. The misrepresentation must be of facts material to the contract.
- § 175. The misrepresentation must be of something peculiarly within the party's knowledge.
- § 176. The relief will depend upon the form in which it is sought.
- § 177. Fraud that arises from concealment, or *suppressio veri*.
- § 178. This kind of fraud depends much upon the relation of the parties.
- § 179. When a person may not be silent.
- § 180. *Suppressio veri* is generally in law an affirmative act.
- § 181. Courts will relieve where acts are fraudulently prevented from being done — illustrations.
- § 182. Trust established where a party fraudulently prevents a will from being made in another's favor.
- § 183. Trust established in *odium spoliatoris*.
- § 184. Trust established upon a conveyance made in ignorance or mistake.
- § 185. But if the conveyance is a compromise, courts will support it if possible.
- § 186. Trust established when a deed by mistake contains more land than was intended.
- § 187. Misrepresentation of the value of property and inadequacy of consideration.
- § 188. Catching bargains with young heirs and reversioners.
- § 189. Trust arising from mental incapacity or imbecility of parties.
- § 190. Mental weakness — old age.
- § 191. Drunkenness.
- § 192. Duress — oppression and distress.
- § 193. Where several of these circumstances are found combined.
- § 194. Frauds that arise by construction from the fiduciary relations of parties.
- § 195. Between trustee and *cestui que trust*.
- § 196. Renewal of leases in his own name by trustee.
- §§ 197, 198. Contracts prohibited between trustee and *cestui que trust*, but the *cestui que trust* alone can avoid them.
- § 199. Rule does not apply to dry trustees.

- § 200. Guardians and wards.
- § 201. Parents and children.
- §§ 202, 203. Attorney and client.
- § 204. Rule applies to all confidential advisers.
- § 205. Administrators and executors.
- § 206. Principal and agent.
- § 207. Directors of corporations.
- § 208. Trusts that arise out of inducements held out for marriage.
- § 209. Other fiduciary relations.
- § 210. Undefined fiduciary and friendly relations.
- § 211. Trusts arising from the frauds of third persons.
- § 212. Frauds upon third persons as creditors, etc.
- § 213. Conveyances by man or woman on the point of marriage.
- § 214. Illegal and immoral contracts.
- § 215. Fraud by pretending to buy for another.
- § 216. Devises or conveyances upon secret illegal trusts.
- § 217. Purchases from trustees with knowledge of the trusts.
- § 218. Purchases without notice of the trust.
- § 219. The safeguards thrown around such purchases.
- § 220. The consideration in such cases.
- § 221. The consideration must have been actually paid.
- § 222. Notice of the trust — to whom it may be.
- § 223. Notice may be actual or constructive.
- § 224. Purchase of property from executors or administrators — real estate.
- § 225. Personal property.
- § 226. Constructive trusts may be proved by parol — statute of frauds does not apply.
- § 227. The right to set aside a conveyance for fraud is an equitable estate that may be conveyed and devised.
- §§ 228–230. Statute of frauds and the time within which steps must be taken to avoid a fraudulent conveyance.

§ 166. THE trusts thus far considered arise from the *express* agreements and intentions of the parties, or from their intentions *implied* from their agreements, or *result* from their express or implied agreements. (a) These trusts arise,

(a) As to the distinction between express and constructive trusts, see *Cunningham v. Foot*, 3 A. C. 984; *Price v. Phillips*, 13 Rep. (Eng.) 191; *Culbertson v. The H. Witbeck Co.*, 127 U. S. 326. Usually there is no element of intentional fraud in a resulting or implied trust, but the law presumes the intent from the facts and circumstances accompanying the transaction. When one takes a conveyance secretly, contrary to the beneficiary's wishes, in violation of his duty to him, and in fraud of his rights, the trust is a constructive or involuntary trust, and not a resulting trust. *Farmers' and Traders' Bank v. Kimball Milling Co.*, 1 So. Dak. 388, 393; *Buck v. Swazey*, 35 Maine, 41; 56 Am. Dec. 681; *Giles v. Anslow*, 128 Ill. 187; *Mayfield v. Forsyth*, 164 Ill. 32; *Thompson v. Marley*, 102 Mich. 476;

result, or are implied from the contracts and relations of the parties. The intention of the parties as manifested in contracts made in good faith is the foundation of them. There is another large class of trusts which arise from frauds committed by one party upon another. Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title, to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property,

Wilmoth v. Wilmoth, 34 W. Va. 426 ; Currence v. Ward, 43 W. Va. 367 ; Barger v. Barger, 30 Oregon, 268 ; Sale v. Thornberry, 86 Ky. 266 ; Ramsey v. Ramsey (N. C.), 31 S. E. 835.

A constructive trust arising from a wrongful purchase in one's own name with another's funds is not merely a right or cause of action personal to the beneficiary, authorizing him to sue for, and thereby acquire an estate in the land, but, like a resulting trust proper, or the equity of redemption of a mortgagor after forfeiture, it is, in and of itself, an equitable estate, vendible and descendible as any other interest in lands, and capable of being executed into a legal estate by the decree of a court of equity, at the suit of the beneficiary, or any one in privity with him, in blood or

estate. Sanford v. Hamner, 115 Ala. 406, 416.

When the object of a bill in equity is single, the subject-matter the same, and the appropriate prayers for relief not inconsistent, a bill is not necessarily multifarious, which in one aspect shows an express trust arising from the contract, in another a purely resulting trust, and in another the use of the assets of a *cestui que trust* by a trustee in payment of property to which he took title in his own name, although the rights of the party whose money was used are not subject in all respects to the same principles of law. Kelly v. Browning, 113 Ala. 420, 444 ; Graves v. Corbin, 132 U. S. 571, 586 ; Mills v. Hurd, 32 Fed. Rep. 127 ; Kelley v. Boettcher, 85 id. 55.

courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society.¹ Such trusts are called *constructive* trusts. They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the court, but they are thrust upon a party contrary to his intention and against his consent. The reason is that courts of equity have a large jurisdiction over all matters of trust and confidence. They control and direct their administration, and in certain cases they annul and put an end to them by directing the trustee to convey the trust property to the person beneficially interested. They can also remove the trustees and appoint new ones. Therefore, courts of equity by raising a trust by construction in cases of fraud can do equal and complete justice between the parties. By this fiction of a constructive trust courts of equity have great powers. They can order the constructive trustee to hold the legal title for the original owner upon just and proper terms. If he has paid any value for the legal estate, they can order the estate to stand as security for it; they can order accounts to be taken and settled;² they can decree a reconveyance of the property, or they can put an end to the trust by declaring the conveyances to the constructive trustee to be null and void, and order that they be surrendered up and cancelled. In all such cases the relief is really founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or

¹ *Thompson v. Thompson*, 16 Wis. 91; *McLane v. Johnson*, 43 Vt. 48; *Pillow v. Brown*, 26 Ark. 240; *Collins v. Collins*, 6 Lans. 368; *Hollingshed v. Simms*, 51 Cal. 158; *Hendrix v. Nunn*, 46 Tex. 141; *Kayser v. Maugham*, 8 Col. 232; *Johnson v. Giles*, 69 Ga. 652.

² *Thompson v. Thompson*, 16 Wis. 91; *McLane v. Johnson*, 43 Vt. 48; *Collins v. Collins*, 6 Lans. (N. Y.) 368.

possesses himself of trust property, or who has defrauded another of his estate by misrepresentation, concealment, or other fraudulent practices, is converted by the court into a trustee and ordered to account for or reconvey the property, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties defrauded or beneficially entitled have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust. Generally speaking, the *constructive trusts* described in this chapter are not trusts at all in the strict and proper signification of the word "trusts;" but as courts are agreed in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts, and as courts and the profession have concurred in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology, while a change might lead to confusion and misunderstanding.¹ (a)

¹ See Westbury, Lord Chancellor, in *Rolfe v. Gregory*, 4 De G., J. & S. 679.

(a) See *Sanford v. Sanford*, 139 U. S. 642; *Benedict v. Moore*, 76 F. R. 472; *Aborn v. Padelford*, 17 R. I. 143; *Stanford v. Mann*, 167 Ill. 79; *Lewis v. Lindley*, 19 Mont. 422; *Pugh v. Miller*, 126 Ind. 189; *Giffen v. Taylor*, 139 Ind. 573; *Kelly v. Browning*, 113 Ala. 420; *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277; *Walker v. Daly*, 80 Wis. 222; *Davis v. Settle*, 43 W. Va. 17; *Shoufe v. Griffiths*, 4 Wash. 161; *Boston & C. S. Co. v. Reed*, 23 Col. 523; *Jackson v. Hyde*, 91 Cal. 463; *Converse v. Sickles*, 44 N. Y. S. 1080; *Pope v. Dapray*, 176 Ill. 478.

The forms and varieties of involuntary trusts are practically limitless. Thus, whenever one acquires a legal title with notice that the equitable title is in another, he is a

trustee thereof for the benefit of the equitable title. *Bailey v. Winn*, 101 Mo. 649; *Indiana, &c. R. Co. v. Swannell*, 157 Ill. 616; see *In re Champion*, [1893] 1 Ch. 101; 67 L. T. 344; 94 L. T. J. 57. And if he fraudulently conveys it to a purchaser in good faith, he holds the proceeds and the interest thereon in trust, such proceeds being considered in equity as the land itself. *Valentine v. Richardt*, 126 N. Y. 272. Where an insolvent fraudulently procured a sale of goods to him, and then resold them, he, or his voluntary assignee, holds their proceeds, when capable of specific identification, as in notes or credits, as a constructive trustee for the original owner. *American Sugar*

§ 167. Courts of common law have an extensive jurisdiction in cases of fraud, but it is readily seen that the remedy in equity is more easily moulded to the varying circumstances of different cases. As between the immediate parties, fraud makes all things void which are done under its direct influence. Thus, *non est factum* can be pleaded to a suit upon a deed or bond, procured by fraud or duress, on the ground that whatever is done under the influence of fraud is not done at all.¹ The same evidence is admissible in both courts. Prob-

¹ 1 Chitty, Plead. 483. Courts of chancery in England and the courts of the United States, and of many of the several States, have a jurisdiction in equity to set aside deeds and contracts procured by misrepresentation, concealment, collusion, or fraud. In Massachusetts, the Supreme Judicial Court has jurisdiction in equity in cases of fraud, accident, and mistake, according to the usage and practice of courts of equity where there is not a plain, adequate, and complete remedy at law. Gen. Stat.

Ref. Co. v. Fancher, 145 N. Y. 552. So equity has jurisdiction to decree an account of the rents and profits of lands against a disseizor, when the land owners are infants or persons *non compos mentis*. Robinson v. Burritt, 66 Miss. 356. But an innocent tenant, entering under the disseizor, and paying rent to him without notice of such owner's title, will not be required to again pay the rent to the owner. Boylan v. Deinzer, 45 N. J. Eq. 485. A grantee of land purchased by a trustee with trust funds, though without notice, holds it as trustee of the beneficiary, if he receives it only in payment of the trustee's prior indebtedness to him. Orb v. Coapstick, 136 Ind. 313; Darling v. Potts, 118 Mo. 506. So a mother of a ward, who receives and retains the trust funds from its guardian, is a trustee *de son tort*. Huntley v. Denny, 65 Vt. 185. Even if an insane person's guardian obtains li-

cense of court to sell the ward's land for fictitious debts, the purchaser at the sale, if he has knowledge of the fraud, will be held a trustee for such ward. Dickel v. Smith, 38 W. Va. 635. A supposed gift from a person who is in fact *non compos* creates a trust for such person's benefit. Teegarden v. Lewis, 145 Ind. 98. Fraud is not a necessary element in a constructive trust when a fiduciary relation already exists. Butler v. Weeks, 33 N. Y. S. 1090; Alaniz v. Casenave, 91 Cal. 41.

An involuntary trust is enforceable against persons who come into possession of the property only to the same extent, in the same manner, and with like force and effect as against the original trustee. Gray v. Farmers' Exchange Bank, 105 Cal. 60, 64; Roggenkamp v. Roggenkamp, 68 F. R. 605; Edwards v. Culberson, 111 N. C. 342.

ably the same evidence that would convince a court of equity that a deed was procured by fraud, and that the grantee ought to hold as a constructive trustee for the grantor, would also persuade a jury to return a verdict against such deed. In some States the parties have a right to trial by jury of all questions of fact, as of fraud or no fraud, arising upon the pleadings in equity. In other States, the court may in its discretion send such issues of fact to trial by a jury.¹ Thus, the remedy in equity in cases of fraud is sought, not so much from the mode of proof and the rules of evidence, as it is

ch. 113, § 2. It was supposed by the profession that this statute conferred upon the court a jurisdiction in equity in accordance with the general usages of the courts of equity in England and the United States. But the court by a strict construction of the words, "where there is not a plain, adequate, and complete remedy at law," denied their jurisdiction in cases of fraud, where an action at law might be maintained by the injured party. Thus, if a deed is procured from a person by fraud, he cannot maintain a suit in equity to set it aside, if it is possible to maintain a real action for the recovery of the land; and as such deeds are void, or at least voidable, such action may be maintained at law, and the court has no jurisdiction in equity. *Bassett v. Brown*, 10 Mass. 355. This decision goes upon the strict meaning of the words, "where there is not a plain, adequate, and complete remedy at law," words which were formerly found in every bill in equity, in order to give the court jurisdiction. But they did not exclude the jurisdiction in equity, if the court had a jurisdiction, concurrent or otherwise, according to the usage and practice of courts of equity. The court in Massachusetts still has jurisdiction in equity in cases of fraud, where there is a peculiar complication of circumstances or of parties. *Pratt v. Pond*, 5 Allen, 59; *Glass v. Hulbert*, 102 Mass. 26; *Martin v. Graves*, 5 Allen, 601; *Whittemore v. Cowell*, 7 Allen, 446; *Pool v. Lloyd*, 5 Met. 528. But the practitioner must determine at his peril whether a particular case comes within such jurisdiction. It would have been more simple and certain for the administration of justice, to have given to the words of exclusion the meaning attached to them in bills of equity, and to have made the jurisdiction of the court to depend upon the known usage and practice of courts of equity. Thus, both the court and the bar would have had some known ground to go upon. Of course these remarks apply only to those cases of fraud where there is a jurisdiction in equity to set aside conveyances procured by fraud, and for other relief according to the known usage and practice of courts of equity, and not to mere cases of cheating and fraud in many of the affairs of life. See *Miller v. Scammon*, 52 N. H. 609.

¹ 1 Story's Eq. Jur. § 190 a.

from the complete character of the relief given. It is true, that in some cases courts of equity will act upon circumstances and presumptions of fraud which courts of law would not deem satisfactory proofs.¹ As if a guardian purchases an estate from a ward, equity will presume fraud from the existence of the relation of guardian and ward,—a rule that courts of law would not always act upon. Lord Eldon said, that courts of equity in many cases would order an instrument to be delivered up, as unduly obtained, which a jury would not be justified in impeaching by the rules of law.² However, fraud must be proved in both courts, and is not to be imputed from mere circumstances of suspicion. It is not, however, the rule that the court will not presume or construe a trust to arise except in cases of absolute necessity;³ for courts of equity will act upon the just preponderance of all the facts and circumstances of proof in the case.⁴

§ 168. Constructive trusts may be divided into three classes, to be determined according to the circumstances under which they arise. First, trusts that arise from actual fraud practised by one man upon another. Second, trusts that arise from constructive fraud.⁵ In this second class the conduct may not be actually tainted with moral fraud or evil intention, but it may be contrary to some rule established by public policy for the protection of society. Thus, a purchase made by a guardian of his ward, or by a trustee of his *cestui que trust*, or by an attorney of his client, may be in good faith, and as beneficial to all parties as any other transaction in life; and yet the inconvenience and danger of allowing contracts to be entered into by parties holding such relations to each other are so great that courts of equity construe such contracts *prima facie* to be fraudulent, and they construe a trust to arise from them. Third, trusts that arise from some equitable principle inde-

¹ Warner v. Daniels, 1 Wood. & M. 103; Denton v. McKenzie, 1 Des. 289.

² Fullager v. Clark, 18 Ves. 483; Chesterfield v. Janssen, 2 Ves. 155.

³ Cook v. Fountain, 3 Swanst. 555.

⁴ 2 Story's Eq. Jur. § 1195; Steele v. Kinkle, 3 Ala. 352.

⁵ Post, § 194.

pendent of the existence of any fraud ; as where an estate has been purchased, and the consideration-money paid, but the deed is not taken, equity will raise a trust by construction for the purchaser.

§ 169. No certain and accurate definition or description of actual fraud can be given. Courts have never laid down, in a general proposition, what does and what does not constitute fraud, nor any general rule by which they are controlled in giving relief,¹ lest other means of committing fraud should be resorted to. As Lord Hardwicke said, "fraud is infinite, and were courts of equity once to lay down rules how far they would go and no further, in extending the relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive."² Although it is difficult to give a definition of it, yet Mr. Story said,³ that "fraud in the sense of a court of equity properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."⁴ And courts of equity will not only interfere, in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done"⁵ (a).

¹ *Mortlock v. Buller*, 10 Ves. 306.

² *Parke's Hist. of Chan.* 508 ; *Lawley v. Hooper*, 3 Atk. 279 ; 1 *Domat, Civil Law*, B. 1, tit. 18, § 3, art. 1.

³ 1 *Story's Eq. Jur.* § 187.

⁴ *Chesterfield v. Janssen*, 2 Ves. Sr. 155 ; *Gale v. Gale*, 19 Barb. 251 ; 1 *Fonb. Eq. B.* 1, c. 2, § 3, note (r).

⁵ *Middleton v. Middleton*, 1 Jac. & W. 96 ; *Waltham's Case*, cited 11 Ves. 638, 14 Ves. 290 ; *Devenish v. Baines*, Pr. Ch. 4.

(a) In *Huxley v. Rice*, 40 Mich. 73, 82, approved in *Moore v. Crawford*, 130 U. S. 122, 128, the court said : " It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by intent or immediate consequence, the party

§ 170. Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic, that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit. Thus at law married women or infants are not liable upon their contracts, nor are they bound by their deeds, receipts, or releases, whether made *bona fide* or fraudulently;¹ but in equity if a married woman has obtained property by fraud, the court disregards the technical rules

¹ *People v. Kendall*, 25 Wend. 399; *Burley v. Russell*, 10 N. H. 184; *West v. Moore*, 14 Vt. 447; *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Price v. Hewitt*, 8 Exch. 145.

deriving title under it will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief; and the setting up of the statute of frauds by a party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects." See also *Hinton v. Pritchard* (N. C.), 10 L. R. Ann. 401, and note; *Ward v. Ward*, 59 Conn. 188; *Tanney v. Tanney*, 159 Penn. St. 277; *McDevitt v. Frantz*, 85 Va. 922; *Man-*

nix v. Purcell, 46 Ohio St. 102; *Champlin v. Champlin*, 136 Ill. 309; *Barber v. Barber*, 146 Ind. 390; *Harris v. Daugherty*, 74 Tex. 1; *Shoufe v. Griffiths*, 4 Wash. 161; *Riley v. Martinelli*, 97 Cal. 575.

Estoppels *in pais* are not affected by the statute of frauds. *Bell v. Goodnature*, 50 Minn. 417. Hence, an equitable interest, although it cannot be transferred by parol, may be abandoned or released to the holder of the legal title by matter *in pais*, when such intention of the parties is clearly shown. *Gorrell v. Alsbaugh*, 120 N. C. 362, 368; *Engel's Estate*, 180 Penn. St. 215.

of common law in regard to married women, and converts her by construction into a trustee, and compels her to do justice by executing the trust.¹ The same principles apply to infants, although they cannot be sued at common law, save in a few exceptionable cases. So if an infant fraudulently misrepresents his age and gives deeds or releases, upon which others act, equity will not allow him to impeach such deeds on account of his minority.² This is on the ground that infants and married women shall not take advantage of the rules made for their protection to perpetrate frauds upon innocent persons, but that they shall be bound by their own fraudulent representations, or by equitable estoppels, like other persons.³

§ 171. Fraud, arising from facts and circumstances of imposition, presents the plainest case for relief,⁴ for it comes within what is called the *suggestio falsi*.⁵ Wherever by misrepresentation, combination, conspiracy, oppression, intimidation, surprise, or any other practice at variance with honest, fair dealing, one is deceived, entrapped, or surprised into a conveyance of the legal title to his property, by deed or by will, courts of equity will not allow the fraudulent grantee to avail himself of the transaction to enjoy the beneficial interest, but will construe him to be a trustee, and will order him to account upon equitable principles, and to make a reconveyance of the property.⁶ Thus,

¹ *Vaughan v. Vanderslegen*, 2 Dr. 363; *Jones v. Kearney*, 1 Dr. & W. 167.

² *Stoolfoos v. Jenkins*, 12 S. & R. 399; *Wright v. Snow*, 2 De G. & S. 321.

³ *Davis v. Fingle*, 8 B. Monr. 539; *Wright v. Arnold*, 4 id. 643; *Hall v. Timmons*, 2 Rich. Eq. 120.

⁴ *Chesterfield v. Janssen*, 2 Ves. 155; *Beegle v. Wentz*, 55 Penn. St. 369.

⁵ *Evans v. Bicknell*, 6 Ves. 173; *Jarvis v. Duke*, 1 Vern. 20; *Broderick v. Broderick*, 1 P. Wms. 240; *Nevitt v. Gibson*, 1 Freem. Ch. 438; *Bulkley v. Wilford*, 2 Cl. & Fin. 102.

⁶ *Tyler v. Black*, 13 How. 231; *Boyce v. Grundy*, 2 Pet. 210; *Smith v. Richards*, 13 Pet. 26; *McAllister v. Barry*, 2 Hayw. 290; *Walker v. Dunlop*, 5 Hayw. 271; *Harris v. Williamson*, 4 id. 124; *Stephenson v. Taylor*, 1 A. K. Marsh. 235; *Pitts v. Cottingham*, 9 Porter, 675; *Lewis v. Mc-*

where one buys land at an execution sale, or sale under a trust deed, under an agreement with the debtor that the latter may redeem, the purchaser holds in trust; it would be a fraud to allow him to repudiate the contract.¹ Mere declarations and admissions of the party to be charged accompanying the transfer of title have been held sufficient to raise a trust.² It must be remembered, in connection with these cases, that although they are placed on the ground of fraud, the doctrine of North Carolina, that trusts in land may be created by parol, probably has had an influence in nearly all the decisions.³ In Pennsylvania, an agreement to allow redemption is held to be within the statute of frauds, and will not be enforced as creating a constructive trust.⁴ Equity will enforce a parol promise to a testator by a legatee to hold the legacy for the benefit partly or wholly

Lemore, 10 Yerg. 206; *Spence v. Duren*, 2 Ala. 251; *Harris v. Carter*, 3 Stew. 233; *How v. Weldon*, 2 Ves. 517; *Neville v. Wilkinson*, 1 Bro. Ch. 596; *Earl of Bath's Case*, 3 Ch. Ca. 56; *Willan v. Willan*, 16 Ves. 82; *Say v. Barwich*, 1 V. & B. 195; *Barnsley v. Powell*, 1 Ves. 289; *Mathew v. Hanbury*, 2 Vern. 187; *Bridgman v. Green*, 2 Ves. 627; *Evans v. Llewellyn*, 1 Cox, 340; *Bennet v. Vade*, 2 Atk. 324; *Mad. Ch. Pr.* 342; *Clermont v. Tasburgh*, 1 J. & W. 112; *Dowd v. Tucker*, 41 Conn. 198; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Church v. Ruland*, 64 Penn. St. 432; *Rick's App.*, 105 id. 528; *Beach v. Dyer*, 93 Ill. 295; *Long v. Fox*, 100 id. 43; *Brophy v. Lawler*, 107 id. 284; *Henschel v. Mamero*, 120 id. 660; *Ludlow v. Flournoy*, 34 Ark. 451. A trust sale may be set aside when oppressive to the knowledge of the purchaser. *Littell v. Grady*, 38 Ark. 584. But no mere verbal understanding between testator and the legatee as to the final disposition of property bequeathed will create a trust. *Allman v. Pigg*, 82 Ill. 149.

¹ *Mulholland v. York*, 82 N. C. 510; *Tankard v. Tankard*, 84 id. 286; *McNair v. Pope*, 100 id. 408. See also *Turner v. King*, 2 Ired. Eq. 132; *Vannoy v. Martin*, id. 169; *Vestal v. Sloan*, 76 N. C. 127; *McLeod v. Bullard*, 84 id. 515; *Cheek v. Watson*, 85 id. 195; *Gidney v. Moore*, 86 id. 484; *McKee v. Vail*, 79 id. 194, declares such a contract void when not in writing; but in 82 N. C. 510, *supra*, this case was distinguished on the ground that there was no relation of confidence or equitable element in the agreement in that case.

² *Smiley v. Pearce*, 98 N. C. 185.

³ See § 75.

⁴ *Salsbury v. Black*, 119 Penn. St. 200; *Kimmel v. Smith*, 117 id. 183, and cases cited.

of another, in consideration of which promise the testator for the benefit of such third person makes the bequest to the promisor. It would be a fraud for the legatee to retain the property for his own benefit.¹ (a) Even silent acquiescence encouraging a testator to make a will with a declared expectation that he will apply it for the benefit of others, has been held to have the force of an express promise.² A parol promise on consideration of which a deed was made will be enforced in equity.³ (b) Where the devisee, under a

¹ *Vreeland v. Williams*, 32 N. J. Eq. 734. See *Socher's App.*, 104 Penn. St. 609.

² *Laytin v. Davidson*, 95 N. Y. 263.

³ *Clark v. Haney*, 62 Tex. 511; *Lott v. Kaiser*, 61 id. 665.

(a) The statute of wills does not prevent a parol trust being engrafted upon a devise or bequest after the probate of the will, at least with respect to personalty. *Moore v. Campbell*, 102 Ala. 445; 113 Ala. 587; *Hamilton v. Hall*, 111 Mich. 291; *Moran v. Moran*, 104 Iowa, 216; *Clarke v. Clarke*, 46 S. C. 230. See *contra*, *Amherst College v. Ritch*, 151 N. Y. 282; *Fairchild v. Edson*, 154 N. Y. 199. When, however, the depositor in a savings bank retains control of the fund, both principal and interest, during his life, and intends that no interest in it shall pass until after his death, the transaction is in the nature of a testamentary deposition, and is void as evading the statute of wills. *Nutt v. Morse*, 142 Mass. 1; *Zeller v. Jordan*, 105 Cal. 143.

If a testator is induced to make a bequest by the express or implied promise of the legatee that he will devote the legacy to a certain lawful purpose, a secret trust is created, and equity will require the legatee to fulfil his promise. *O'Hara v. Dudley*, 95 N. Y. 403; *Amherst*

College v. Ritch, 151 N. Y. 282; *Buckingham v. Clark*, 61 Conn. 204; *Gilpatrick v. Glidden*, 81 Maine, 137; *Grant v. Bradstreet*, 87 Maine, 583; *Hodnett's Estate*, 154 Penn. St. 485. This applies to the will of a wife made at her husband's instigation upon his promise to hold the property for their children. *Larmon v. Knight*, 140 Ill. 232.

The fact that a will, in creating a trust, gives permission to the trustee to apply such portion of the trust fund to his personal use as he may find necessary, without accounting therefor, does not abolish the trust. *Jones v. Newell*, 78 Hun, 290.

(b) When a person who occupies a fiduciary relation to the owner of real estate takes advantage of the confidence thus reposed in him to acquire an absolute conveyance thereof, without consideration, through a verbal agreement of trust, which he promises to place in writing, and he refuses to so reduce it to writing, or to reconvey the land to the real owner, a court of equity has power to set aside the convey-

will defectively executed, obtained a conveyance of the estate from the heir-at-law by representing that the will was duly executed,¹ or where an executor obtained a release of a legacy by representing that there was no legacy given by the will,² or where a purchaser misrepresented the quantity and quality of the land he was about to purchase,³ or where the vendor misrepresented the quantity of land in a tract sold, as twenty acres overflowed by a river, when in fact it was more than a hundred acres,⁴ or where a husband and wife conveyed land to A. on no consideration but his promise to reconvey it to the wife, and A.'s prior creditors attached the land,⁵ the court gave relief. If one is induced by fraud to take in the name of another a conveyance of land he buys, he may elect to treat the transaction as creating a trust for him; but if he does not so elect, his heirs cannot do so, for no estate vested in him to pass by descent.⁶ In *Smith v. Richards*,⁷ the Supreme Court of the United States cited the following proposition⁸ with approval: "Where a party intentionally or by design misrepresents a material fact, or produces a false impression⁹ in order to mislead another,¹⁰ or to entrap or cheat him, or to obtain an undue advantage of him, — in every such case there is positive fraud in the

¹ *Broderick v. Broderick*, 1 P. Wms. 239.

² *Jarvis v. Duke*, 1 Vern. 19; *Murray v. Palmer*, 18 Sch. & L. 474; *James v. Greaves*, 2 P. Wms. 270; *Horseley v. Chaloner*, 2 Ves. 83.

³ *Tyler v. Black*, 13 How. 231.

⁴ *Boyce v. Grundy*, 3 Pet. 210. See *Prescott v. Wright*, 4 Gray, 461. But see *Bartlett v. Salmon*, 6 De G., M. & G. 40.

⁵ *Cox v. Arnsmann*, 76 Ind. 210.

⁶ *Cooper v. Cockrum*, 87 Ind. 443.

⁷ 13 Pet. 36.

⁸ 1 Story's Eq. Jur. §§ 192, 193.

⁹ *Laidlaw v. Organ*, 2 Wheat. 195; *Pidcock v. Bishop*, 3 B. & Cr. 605; *Smith v. Bank of Scotland*, 1 Dow, 72; *Evans v. Bicknell*, 6 Ves. 173.

¹⁰ *State v. Holloway*, 8 Blackf. 45.

ance, or to give other proper relief. be converted into a trust by any
Bohm v. Bohm, 9 Col. 100; *Jerome* oral declaration of the parties there-
v. Bohm, 21 Col. 322; see *supra*, to. *Moore v. Hamerstag*, 109 Cal.
 § 137. An absolute conveyance 122; *supra*, § 77.
 cannot, however, after its execution,

truest sense of the term;¹ there is an evil act, with an evil intent; *dolum malum, ad circumveniendum*. And the misrepresentation may as well be by acts as words, by artifices that mislead² as by positive assertions."³ Lord Thurlow said, "it would be ridiculous for the court to make a distinction between the two cases."⁴ "Whether the party thus representing a fact knew it to be false or made the assertion without knowing whether it was true or false is wholly immaterial;⁵ for the affirmation of what one does not know or believe to be true is, equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false.⁶ And even if a party innocently misrepresent a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party.⁷ Or, as Lord Thurlow expresses it, it misleads the parties contracting on

¹ *Atwood v. Small*, 6 Cl. & Fin. 232; 1 *Younge*, 407; *Taylor v. Ashton*, 11 Mee. & W. 401; *Warner v. Daniel*, 1 Wood. & M. 103; *Torrey v. Buck*, 1 Green, Ch. 366; *Jarvis v. Duke*, 1 Vern. 19; *Broderick v. Broderick*, 1 P. Wms. 239.

² *Chisholm v. Gadsden*, 1 Strobb. 220; *Huguenin v. Baseley*, 14 Ves. 273; *State v. Holloway*, 8 Blackf. 45.

³ *Ibid.*; *Laidlaw v. Organ*, 2 Wheat. 195; *Smith v. Bank of Scotland*, 1 Dow, 272; 2 *Kent*, 484; *Chesterfield v. Janssen*, 2 Ves. 155; *Neville v. Wilkinson*, 1 Bro. Ch. 546.

⁴ *Neville v. Wilkinson*, 1 Bro. Ch. 546.

⁵ *Wright v. Snow*, 2 De G. & Sm. 321.

⁶ *Ainslie v. Medlycott*, 9 Ves. 21; *Graves v. White*, Freem. 57; *Pearson v. Morgan*, 2 Bro. Ch. 389; *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; *Taylor v. Ashton*, 11 Mee. & W. 401; *Smith v. Mitchell*, 6 Ga. 455; *Hazard v. Irwin*, 18 Pick. 85; *Doggett v. Emerson*, 3 Story, 733; *Hough v. Richardson*, id. 691; *Mason v. Crosby*, 1 Wood. & M. 352; *Smith v. Babcock*, 2 id. 246; *Hammatt v. Emerson*, 27 Maine, 308.

⁷ *Ibid.*; *Pearson v. Morgan*, 2 Bro. Ch. 389; *Burrows v. Loeke*, 10 Ves. 475; *De Manville v. Compton*, 1 Ves. & B. 355; *Ex parte Carr*, 3 Ves. & B. 111; *Carpenter v. Am. Ins. Co.*, 1 Story, 57; *Tayman v. Mitchell*, 1 Md. Ch. Dec. 496; *Pratt v. Philbrook*, 33 Maine, 17; *Harding v. Randall*, 15 id. 332; *Rosevelt v. Fulton*, 2 Cow. 129; *Champlin v. Laytin*, 6 Paige, 189; *Reese v. Wyman*, 9 Ga. 439; *Reynell v. Sprye*, 8 Hare, 222; *Lewis v. McLemore*, 11 Yerg. 206; *Thomas v. McCann*, 4 B. Mon. 601; *Hunt v. Moore*, 2 Barr, 105; *Joice v. Taylor*, 6 G. & J. 51; *Lockridge v. Foster*, 4 Seam. 570; *Turnbull v. Gadsden*, 2 Strobb. Eq. 14.

the subject-matter.”¹ There may also be fraud upon a third person not a party to the immediate conveyance that will raise a trust; for example, a purchaser knowing of a prior deed to A. holds in trust for A.² There is a distinction between cases of fraud in which equity will set aside the sale altogether, and those cases in which it will allow the sale to stand, and hold the purchaser as a trustee. A trust will not be declared, if thereby in effect the beneficiary would receive the benefit of the fraud at the expense of a third person equally innocent.³

§ 172. If a person purchasing an estate falsely pretends and represents that he is purchasing or acting as agent for another, when in fact he is purchasing for himself, and such misrepresentation misleads and throws the vendor off his guard, and the purchaser makes a better bargain than he otherwise could, or the representation is in any way material, equity will not enforce the agreement, or, if it is already executed, will convert the purchaser into a trustee.⁴ And so if a purchaser at auction or otherwise represents that he is purchasing or bidding for some other person, as for the debtor in a sale under an execution,⁵ or for the mortgagor in a sale under a foreclosure, or for the family under an executor's or administrator's sale, and competition is thus prevented and the purchase is made on his own terms, equity will decree that such person shall be a trustee for the person for whom he represented that he was acting. So if a purchaser by fraud prevents other purchasers from attend-

¹ *Neville v. Wilkinson*, 1 Bro. Ch. 546.

² *Cannon v. Handley*, 72 Cal. 133 ; see § 212.

³ *Hudson v. Morris*, 55 Tex. 605.

⁴ *Phillips v. Bucks*, 1 Vern. 227 and notes; *Fellowes v. Gwydyr*, 1 Sim. 63 ; 1 R. & M. 83. But a mere mistake of parties will not avoid a lease. *Stiner v. Stiner*, 58 Barb. 643.

⁵ *Peebles v. Reading*, 8 Ser. & R. 484 ; *Gilmore v. Johnson*, 29 Ga. 67 ; *Belcher v. Saunders*, 34 Ala. 9 ; *Roller v. Spilmore*, 13 Wis. 26 ; *Arnold v. Cord*, 16 Ind. 176 ; *Northcote v. Martin*, 28 Miss. 469 ; *Soggins v. Heard*, 31 Miss. 426 ; *Pearson v. East*, 36 Md. 23 ; *Minot v. Mitchell*, 30 Ind. 228.

ing a sale,¹ or if a purchaser fraudulently agrees that he will purchase an estate in his own behalf and that of another, in order to prevent competition, and gets the property into his own name, at a less price, he will be a trustee for the person defrauded.² On the other hand, where an agent makes a fraudulent representation, or does a fraudulent act, in a purchase or sale, with or without the privity or knowledge or consent of his principal, and the principal adopts the bargain and attempts to reap an advantage from it so tainted by the fraud of the agent, he will be held bound by the fraud of the agent, and relief will be given.³ Indeed, the doctrine has been thus broadly stated: "That where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning."⁴ And the same rule applies with more force to misrepresentations made by one of several partners.⁵ But if the agreement is a fair one between the parties, it will not be affected

¹ *Martin v. Blight*, 4 J. J. Marsh. 491; *Rives v. Lawrence*, 4 Ga. 233; *Beegle v. Wentz*, 55 Penn. St. 369; *Boynnton v. Housler*, 73 id. 453; *Wolford v. Herrington*, 74 id. 311.

² *McCulloch v. Cowher*, 5 Watts & S. 427; *Ferguson v. Williamson*, 20 Ark. 272; *Owson v. Cown*, 22 Miss. 329.

³ *Ferson v. Sanger*, 1 Wood. & M. 147; *Warner v. Daniels*, id. 90; *Kibbe v. Hamilton Ins. Co.*, 11 Gray, 163; *Brooke v. Berry*, 2 Gill. 83; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Fuller v. Wilson*, 3 Ad. & El. (N. S.) 58. See also *Cornfoot v. Fowke*, 6 M. & W. 358; *National Exchange Co. v. Drew*, 2 Macq. 103; *Sugd.* 144, V. & P. 718; *Gentry v. Law*, 4 Nev. 97.

⁴ *Hortopp v. Hortopp*, 21 Beav. 259; *Scholefield v. Templar*, John. 155; *Cassard v. Hinman*, 6 Bosw. 9; *Wilde v. Gibson*, 1 H. L. Cas. 605; *Elwell v. Chamberlain*, 31 N. Y. 619; *Bennett v. Judson*, 21 N. Y. 238; *Buford v. Caldwell*, 3 Mo. 477; *Thomas v. McCann*, 4 B. Mon. 601; *Perham v. Randolph*, 4 How. (Miss.) 435; *Stone v. Denny*, 4 Met. 161; *Gentry v. Law*, 4 Nev. 97.

⁵ *Blair v. Bromley*, 2 Phill. 239, 354.

because brought about by the fraud of some third person for his collateral benefit.¹ And if the agreement is not a fair one, it will not be invalidated by the fraudulent representations of a third person in no way connected with either party,² unless the circumstances are such that the bargain may be said to have been entered into by mistake.³

§ 173. However repugnant to entire good faith and sound morals any misrepresentation upon any subject, however made, may be, courts of justice cannot undertake to sit as censors upon mere morals. There are in every community two classes of rights, — perfect rights, and imperfect rights. Perfect rights are those that may be enforced, or for the breach of which damages may be recovered; imperfect rights are those which are conceded to every man, but which cannot be enforced by human tribunals, and for the breach of which no damages can be recovered. Thus every man has a right to the utmost good faith, and the most perfect frankness and truthfulness in all the transactions of business; but courts of justice would be utterly powerless to enforce such a standard of morality. They would have neither the time nor the means of investigating the innumerable arts of buyers and sellers. And so courts have been obliged to lay down certain practical rules and limitations upon the subject of misrepresentation. Thus the misrepresentation must generally be of facts, or matters of fact, and not of mere matters of expectation or opinion,⁴ as if one should represent that an estate contained a valuable mine, when in fact no mine existed,⁵ or that an estate contained only two or three hundred acres, when in fact it contained over twelve hundred acres, or that there was no timber upon

¹ *Bellamy v. Sabine*, 2 Phill. 425; *Blackie v. Clarke*, 15 Beav. 595.

² *Fisher v. Boody*, 1 Curtis, 206; *Beach v. Dyer*, 93 Ill. 295.

³ *Ibid.* And it must be a fraud at the time of the purchase, not afterwards. *Wheeler v. Reynolds*, 67 N. Y. 227.

⁴ *Ferson v. Sanger*, 1 Wood. & M. 146; *Warner v. Daniels*, *id.* 98; *Rush v. Vought*, 55 Penn. St. 437.

⁵ *Lowndes v. Lane*, 2 Cox, 363.

it, when there was a large amount of valuable timber,¹ or the seller should falsely represent that the custom of a public-house was a certain sum monthly,² or that an estate was situate in one locality or county, when it was situate in another,³ or that stocks were selling for such a sum in the market, when they were worthless,⁴ or that a third person has paid a certain sum for the same property,⁵ or that it rents for so much.⁶ In these and similar cases the misrepresentation is of facts that go to the merits of the contract, and avoid it, if false. But if the representation is to the value, which is matter of opinion, it will not in general avoid the contract, as where the affirmation is that the estate is worth so much; or even if the representation is stronger, as that so much was given for it, or that so much has been offered or refused.⁷ Any person who confides in or is cheated by such representations is considered too careless of his own interests to invoke the interposition of courts.⁸ A misrepresentation, however, of a mere matter of opinion may avoid a contract, or convert the fraudulent party into a trustee, where the other party is known to place confidence in the opinions and judgment of the person with whom he is dealing, or where the relations between the parties are of a confidential and fiduciary character, or where one party has peculiar or exclusive means of acquiring proper information

¹ *Tyler v. Black*, 13 How. 230.

² *Pilmore v. Hood*, 6 Scott, 827.

³ *Best v. Stow*, 2 Sandf. Ch. 298; *Bennett v. Judson*, 21 N. Y. 238.

⁴ *Manning v. Albee*, 11 Allen, 522. See *Warner v. Daniels*, 1 Wood. & M. 102.

⁵ *Medbury v. Watson*, 6 Met. 259.

⁶ *Elkins v. Tresham*, 1 Sev. 102; 1 Sid. 146.

⁷ *Hepburn v. Dunlop*, 1 Wheat. 189; *Irvine v. Kirkpatrick*, 3 Eng. L. & Eq. 17; *Medbury v. Watson*, 6 Met. 259; *Bacon v. Bronson*, 7 John. Ch. 144; *Stone v. Denny*, 4 Met. 151; *Small v. Atwood*, 3 Younge Exch. 407; *Veasey v. Doton*, 3 Allen, 351; *Hemmer v. Cooper*, 8 Allen, 334; *Best v. Blackburn*, 6 Litt. 51; *Speiglemyer v. Crawford*, 6 Paige, 254.

⁸ *Manning v. Albee*, 11 Allen, 522; 2 Kent, 484, 485; *Vernon v. Keys*, 12 East, 632; *Hough v. Richardson*, 3 Story, 696; *Jenkins v. Eldredge*, id. 181.

upon which to form a judgment or opinion,¹ or where the representations are such that one party is induced to rely upon the opinions of the other.²

§ 174. Again, the misrepresentation must be of some fact material to the contract, or of something that goes to its essence;³ as if an estate is represented to contain one thousand acres, and it contains nine hundred and ninety-nine acres,⁴ or if the age of an article is represented to be ten years, and it is a few months more or less,⁵ or a thing is represented to have been purchased in one place and it is in fact purchased at another,⁶ or if a spring of water is represented to be upon a given tract of land, when in fact it is not;⁷ in all these matters the facts represented are too trifling or collateral to be material, and no relief would be granted. Yet, if the leading motive of the purchase of an estate was known to be material, relief would be granted. As, if the leading motive of the purchase of an estate was known to be the purpose of acquiring a spring of water, then a fraudulent misrepresentation as to the locality of the spring would become material to the contract; or if the vendor should fraudulently point out the boundary lines, so as to take in the spring, or more land than belonged to him, the contract would be avoided.⁸ But if the boundaries are properly pointed out, a misrepresentation as to the number of acres in a farm is not material.⁹

¹ *Sheoffer v. Sleade*, 7 Blackf. 178; *Hill v. Gray*, 1 Starkie, 352; *Keates v. Cadogan*, 2 Eng. L. & Eq. 321.

² *Reynell v. Sprye*, 8 Hare, 222; 1 De G., M. & G. 660.

³ *Phillips v. Bucks*, 1 Vern. 227; *Hough v. Richardson*, 3 Story, 659; *Turnbull v. Gadsden*, 2 Strobb. Eq. 14; *Morris Canal v. Emmett*, 9 Paige, 186; *Clark v. Everhart*, 63 Penn. St. 347.

⁴ *Ibid.*; *Stebbins v. Eddy*, 4 Mason, 414; *Winston v. Gwathmey*, 8 B. Mon. 19; *Winch v. Winchester*, 1 Ves. & B. 375; *Ingpont v. Worcup*, Finch, 310.

⁵ *Geddes v. Pennington*, 5 Dow, 159.

⁶ *Ibid.*

⁷ *Winston v. Gwathmey*, 8 B. Mon. 19.

⁸ *Elliott v. Boaz*, 9 Ala. 772.

⁹ *Stebbins v. Eddy*, 4 Mason, 414; *Morris Canal v. Emmett*, 9 Paige, 168.

§ 175. The misrepresentation must also be of something peculiarly within the knowledge of one of the parties, or the facts must be of such a nature that both parties cannot easily obtain the information. Thus, if both parties have the same means of information, as if both parties go upon a tract of land and have equal means of judging of the quantity of timber upon it,¹ or if representations are made of town lots and the future prospects of the town, and the facts are equally open to both parties upon inquiry,² or if there is a misrepresentation of title, and the facts are equally accessible to both parties,³ or generally, if both parties have the same information, or an equal opportunity to obtain the same information, there cannot be such a fraud, arising from such a misrepresentation as will convert one of the parties into a trustee.⁴ So if there are fraudulent misrepresentations sufficient to avoid the contract, and the innocent party obtains a knowledge of all the facts before completing the contract, he can have no relief.⁵ And so if the misrepresentations, though fraudulent, are so vague and uncertain that they ought not to mislead a reasonable man, but should rather put him upon inquiry, he can have no relief.⁶

§ 176. The action of courts in cases of alleged fraud will frequently depend upon the form in which the matter is brought before them, and upon the relief sought in the proceedings. Thus a bill may be brought by a party for the specific performance of a contract which he holds, or a bill may be brought by a party to set aside the contract, or convert the opposite party who holds under the contract into a trustee, or a suit may be brought by a party at common law

¹ *Hough v. Richardson*, 3 Story, 659 ; *Tindall v. Harkinson*, 19 Ga. 448.

² *Bell v. Henderson*, 6 How. (Miss.) 311.

³ *Glasscock v. Minor*, 11 Mo. 655 ; *Juzan v. Toulmin*, 9 Ala. 662.

⁴ *Hobbs v. Parker*, 31 Maine, 143 ; *Hutchinson v. Brown*, 1 Clark, 408.

⁵ *Yeates v. Prior*, 6 Eng. 68 ; *Knuckolls v. Lea*, 10 Humph. 577 ; *Pratt v. Philbrook*, 33 Maine, 17.

⁶ *Hough v. Richardson*, 3 Story, 659.

to recover damages for the breach of the same contract. It does not follow, because a court of equity would refuse to decree the specific performance of a contract, that it would also, on a proper bill, decree the contract to be set aside, or that it would order the party claiming under it to be a trustee for the other party.¹ And so if a party comes into a court of equity to ask that an agreement which he holds may be specifically performed by the opposite party, he must come with clean hands, as it is said. There must not be any fraud, misrepresentation, or concealment on his part in procuring the contract; or, still stronger, there must not be a suspicion of concealment, misrepresentation, fraud, or unfairness adhering to him. And even further, if the bargain imposes great hardship on the defendant, or is made under any misapprehension or mistake, or unadvisedly, courts of equity will decline to interfere actively in decreeing a specific execution of the agreement, but will leave the parties to their rights at law.² It will be seen from this that it requires much less evidence of fraud to enable a defendant to resist the specific performance of an agreement, than it requires to enable him to succeed as a plaintiff in a bill to set aside the same contract.³ In the case last named he must establish the fraud affirmatively, by proof of the facts and circumstances, to the reasonable satisfaction of the court. And there may be such a case that the court would refuse to set aside a contract on the one side, because the evidence of fraud was insufficient to set the court in motion; and on the other side it would refuse to decree a specific performance, because the circumstances were too suspicious to allow it actively to interfere for the other party. In such case the parties would be left to an action at common law upon the agreements with such rights as they may have in a common-law suit.⁴

¹ 1 Story's Eq. Jur. § 693.

² *Savage v. Brocksopp*, 18 Ves. 335; *Cadman v. Horner*, id. 12; *Clermont v. Tasburg*, 1 Jac. & W. 112; *Wall v. Stubbs*, 1 Madd. 80; *Mortlock v. Buller*, 10 Ves. 292.

³ *Ibid.*; *Townshend v. Stangroom*, 6 Ves. 328 n.; *Lowndes v. Lane*, 2 Cox, 363.

⁴ Story's Eq. Jur. § 693.

§ 177. The rules that apply to affirmative acts or representations which mislead, deceive, and defraud, are of comparatively easy application in most cases. A single affirmative word upon a material matter tending to mislead, and actually misleading, is enough to establish fraud.¹ (a) It is the *suggestio falsi* which may be defined to be a false affirmation, in whatever form it may be made, whether by words or acts, of a material fact, rightfully acted upon by the other party: such an affirmation avoids the contract or converts the offending party into a trustee for the person defrauded. But how far a contracting party may legally conceal facts known to him, affecting the value of the subject-matter of the agreement, is another and more difficult question. There is no doubt in sound morals upon the matter. The natural instincts of every right-minded man concur with every writer on morals in condemning every concealment that suffers another to contract in ignorance of the facts that give value to his property.² The common law teaches as high a standard of morals as any other system of law. The decisions of judges and the books of elementary

¹ *Turner v. Harvey*, 1 Jac. 169.

² Cic. de Off. Lib. 3, c. 12, 13; Paley, Mor. Phi. B. 3, c. 7; Grotius, B. 2, c. 12, § 9; Puff. De Jure Nat. B. 5, c. 3, § 4.

(a) The rule now is that one person is not liable, at least in an action of deceit, for a false representation upon the faith of which another person acts, even though made carelessly or negligently, and without investigation, provided he made it in the honest belief that it was true. *Derry v. Peek*, 14 A. C. 337; *Angus v. Clifford*, [1891] 2 Ch. 449; *Nash v. Minnesota Title Co.*, 163 Mass. 574; *Kountze v. Kennedy*, 117 N. Y. 124. See *Houston v. Thornton*, 122 N. C. 365. There is thus no real distinction between fraud in a court of equity and fraud at common law. *Le Lievre*

v. Gould, [1893] 1 Q. B. 491, 498. The above rule does not apply when there is a legal obligation on the part of one person towards another to give him correct information, such as the obligation of a trustee to give, on demand, to his *cestui que trust* information as to the trust fund; but the trustee is not obliged to answer the inquiries of a stranger, like an intending incumbrancer, who is about to deal with the *cestui que trust*. *Low v. Bouverie*, [1891] 3 Ch. 82; *Re Wyatt*, 65 L. T. 214; [1891] W. N. 137, 192; *In re Tillott*, [1892] 1 Ch. 86; *In re Dartnall*, [1895] 1 Ch. 474.

writers contain the highest and purest maxims of good faith and sound morality in every transaction and relation of life. Whenever, therefore, a question of concealment arises, either in a suit at common law or in equity, it cannot be a question what the highest morality requires; but it is a question how far courts can go practically in giving relief, without rendering the contracts of men so uncertain that no business could be transacted without danger of prolonged litigation. In communities governed by known, fixed, and practical rules, and not by the mere discretion of men or judges, it sometimes happens that courts must decline to give relief in cases where a man of pure principles and delicate honor would scorn to obtain or hold an advantage. Thus, in all cases of *suggestio falsi*, where active steps have been taken to deceive and gain an advantage, courts have little trouble in giving relief; but where an advantage has been gained by concealment, or *suppressio veri*, as it is called, or by mere silence, it is more difficult to lay down fixed rules that may not do more harm than good to business and society. However, concealment, or *suppressio veri*, is often of that fraudulent character that avoids a contract or converts the offending party into a trustee.

§ 178. There may be such relations between the parties that silence, or the non-disclosure of a material fact, will be a fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee.¹ Thus, if an attorney contracts with his client without disclosing to him material facts in his possession, the contract would be void. The trust and confidence of the

¹ *Pidcock v. Bishop*, 3 B. & Cr. 605; *Martin v. Morgan*, 1 Brod. & Bing. 289; *Squire v. Whitton*, 1 H. L. Cas. 333; *Owen v. Homan*, 3 Eng. L. & Eq. 121; 5 Mac. & Gor. 378; *Etting v. Bank of U. S.*, 11 Wheat. 59; *Carew's Case*, 7 De G. M. & G. 43; *Smith v. Bank of Scotland*, 1 Dow, P. Cas. 292; *Clark v. Everhart*, 63 Penn. St. 347; *Miller v. Welles*, 23 Conn. 33.

client in his attorney is such that an obligation is imposed upon the attorney to communicate every material circumstance of law or fact. Mere silence, under such circumstances, becomes fraudulent concealment.¹ The same rule applies to all contracts of an agent with his principal, principal with his surety, landlord with his tenant, parent with his child, guardian with his ward, ancestor with the heir, husband with his wife, trustee with his *cestui que trust*, executors or administrators with creditors, legatees, or distributees of the estate, partners with their copartners, appointors with their appointees, and part-owners with part-owners;² though the part-owners of a ship, holding by several and independent titles, were held not to stand in such confidential relations to each other that one was under obligation to communicate material facts upon a negotiation to purchase.³ (a) If any of the parties above named propose to contract with the persons with whom they stand in such relations of trust and confidence, they must use the utmost good faith. It is not enough that they do not affirmatively misrepresent: *they must not conceal; they must speak, and speak fully to every material fact known to them*, or the contract will not be allowed to stand.⁴ Thus, if a partner

¹ Bulkley v. Wilford, 2 Clark & Fin. 102.

² Beaumont v. Boulton, 5 Ves. 485; Ormond v. Hutchinson, 13 Ves. 51; Gartside v. Isherwood, 1 Bro. Ch. 558; Wellford v. Chancellor, 5 Grat. 39.

³ Mathews v. Bliss, 22 Pick. 48.

⁴ Maddeford v. Austwick, 1 Sim. 89; 2 M. & K. 279; Popham v. Brooke, 5 Russ. 8; Gordon v. Gordon, 3 Swanst. 470; Cocking v. Pratt, 1 Ves. 401; Higgins v. Joyce, 2 Jones & La. 328; Farnham v. Brooks, 9 Pick. 234; Ogden v. Astor, 4 Sandf. S. C. 312; Ormond v. Hutchinson, 13 Ves. 51; Beaumont v. Boulton, 5 Ves. 485; Gartside v. Isherwood, 1 Bro. Ch. 558.

(a) See Brownlie v. Campbell, 5 A. C. 925. A surety is under no larger obligation to disclose to his co-surety than the creditor is under to both of them. Mackreth v. Walmesley, 51 L. T. 19. Concealment to- wards a mercantile agency is not necessarily an actual fraud upon a subscriber relying upon its report. See Vermont Marble Co. v. Smith, 13 Ind. App. 457.

who keeps the accounts of the firm should purchase his copartner's interest, without disclosing the state of the accounts, the agreement could not stand.¹ The same rule applies to family relations in general; as, where a younger brother disputed the legitimacy of his elder brother, and a settlement and partition were entered into, the younger brother having in his possession facts that tended to show that his parents intermarried before the birth of the elder, which facts he did not communicate, the settlement was set aside.² The duty of disclosing facts arises either from a fiduciary relation, or from a trust properly understood to be reposed in one party by another about a matter concerning which the latter has peculiar means of information.³

§ 179. There are, also, cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. Thus, if a party taking a guaranty from a surety does not disclose facts within his knowledge that enhance the risk, and suffers the surety to bind himself in ignorance of the increased risk,⁴ or if a party already defrauded by his clerk should receive security from a third person for such clerk's fidelity, without communicating the fact of the fraud already committed, thus holding the clerk out as trustworthy;⁵ in both these and in similar cases the contracts would be void for concealment. Silence as to such facts, under such cir-

¹ *Maddeford v. Austwick*, 1 Sim. 89; 2 M. & K. 279; *Smith in re Hay*, 6 Madd. 2; *Popham v. Brooke*, 5 Russ. 8.

² *Gordon v. Gordon*, 3 Swanst. 399; *Cocking v. Pratt*, 1 Ves. 401.

³ *Maclary v. Reznor*, 3 Del. Ch. 445.

⁴ *Martin v. Morgan*, 1 Brod. & Bing. 289; *Pidcock v. Bishop*, 3 B. & Cr. 605; *Owen v. Homan*, 3 Eng. L. & Eq. 121; 25 Eng. L. & Eq. 1; 4 H. L. Cas. 997; *Carew's Case*, 7 De G., M. & G. 43; *Leith Banking Co. v. Bell*, 8 Shaw & Dun. 721; *Railton v. Matthews*, 10 Cl. & Fin. 935; *Hamilton v. Watson*, 12 id. 119; *Squire v. Whitton*, 1 H. L. Cas. 333; *N. British Ins. Co. v. Lloyd*, 28 Eng. L. & Eq. 456; 10 Exch. 523; *Evans v. Kneeland*, 9 Ala. 42.

⁵ *Franklin Bank v. Cooper*, 36 Maine, 195; *Smith v. Bank of Scotland*, 1 Dow, P. Cas. 272; *Maltby's Case*, id. 294; *Etting v. Bank of U. S.*, 11 Wheat. 59.

cumstances, would be equivalent to a positive affirmation that no such facts existed.¹ And so, if a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the relation was confidential, and yet not to state material facts, is fraudulent. It is said that a party in such circumstances *is bound to destroy the confidence reposed in him, or to state all the facts which such confidence demands.*² He cannot himself contract at arm's length, and permit the other to act as though the relation was one of trust and confidence. And so, if one party knows that the other has fallen into a delusion or mistake as to an article of property, and he does not remove such delusion or mistake, but is silent, and enters into a contract, knowing that the other is contracting under the influence of such delusion or mistake, the contract may be set aside; *for, not to remove that delusion or mistake is equivalent to an express misrepresentation.*³

§ 180. There must be a positive concealment to amount to a *suppressio veri*. Mere silence, if nothing is done to conceal a fact, is not in general *suppressio veri*. *Aliud est celare, aliud tacere*. Mere silence between strangers, contracting at arm's length, and understanding that they are so contracting, will not in general avoid a contract, or convert one of the parties into a trustee for the other.⁴ Thus, the

¹ Franklin Bank v. Cooper, 36 Maine, 195; Smith v. Bank of Scotland, 1 Dow, P. Cas. 272; Maltby's Case, id. 294; Etting v. Bank of U. S., 11 Wheat. 59.

² Per Mr. Redfield, 1 Story's Eq. Jur. § 212 a; Bruce v. Ruler, 2 Man. & Ry. 3; Fitzsimmons v. Joslin, 21 Vt. 129; Hanson v. Edgerly, 29 N. H. 343; Bank of Republic v. Baxter, 31 Vt. 101; Allen v. Addington, 7 Wend. 10; 11 Wend. 374; Paddock v. Strobbridge, 29 Vt. 470; Dolman v. Nokes, 22 Beav. 402; Hayward v. Cope, 25 Beav. 140; Foot v. Foote, 58 Barb. 258; Babcock v. Case, 61 Penn. St. 427.

³ Keates v. Cadogan, 2 Eng. L. & Eq. 318; Hill v. Gray, 1 Starkie, 434.

⁴ Fox v. Mackreth, 2 Bro. Ch. 300; 2 Cox, 320; Harris v. Tyson, 24 Penn. St. 359; Mathews v. Bliss, 22 Pick. 48.

value of property may frequently depend upon extrinsic facts; as, whether there is peace or war, whether there is or is not a demand in the market, or in a distant place for property of that description, whether transportation is accessible, or whether the money market is easy or close. If one having information upon such matters enters into a contract with another with whom he has no confidential or fiduciary relations, and he neither says nor does anything to mislead or deceive, but is simply silent upon the facts known to him, equity will not in general disturb the contract;¹ but if he speaks a word, or does an act, that tends to mislead the other party, or throw him off his guard, the contract may be avoided, and he may be converted into a trustee.² The law permits persons to deal at arm's length, if they both understand that they are so dealing, and it permits them to be silent as to matters known only to one of them, if no inquiries are made; but it does not permit any artifice to be added to silence, in order to conceal a fact material to the contract. Thus, concealment, or *suppressio veri*, which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is defined to be the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, *sed juris et de jure*, to know.³ Thus, if a stranger discover a valuable mine or spring, or any other thing or circumstances, on or in connection with land of another, he may be silent, and purchase the land;⁴

¹ Fox v. Mackreth, 2 Bro. Ch. 300; 2 Cox, 320; Harris v. Tyson, 24 Penn. St. 359; Mathews v. Bliss, 22 Pick. 48. Mr. Kent, in the earlier editions of his Commentaries, stated a broader doctrine, but his later editions state the doctrine as in the text. See 2 Kent, 482, 484, 490, and notes; Laidlaw v. Organ, 2 Wheat. 178.

² Turner v. Harvey, Jac. 169; Laidlaw v. Organ, 2 Wheat. 178; Mathews v. Bliss, 22 Pick. 48.

³ Young v. Bumpass, 1 Freem. Ch. 241; 1 Story's Eq. Jur. § 207; Irvine v. Kirkpatrick, 3 Eng. L. & Eq. 17; Laidlaw v. Organ, 2 Wheat. 178.

⁴ Fox v. Mackreth, 2 Bro. Ch. 400; 2 Cox, 300; 1 Lead. Cas. Eq.

but if he use any art to prevent a knowledge of the fact from coming to the owner, equity will rescind the contract,¹ and a very slight act will convert innocent silence into fraudulent concealment.² But if one of the parties employs an agent to contract, and the agent, knowing a material fact, is silent or conceals it, his principal will not be affected with the knowledge, nor will the contract be vitiated.³

§ 181. Courts of equity will not only interfere in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do, by converting the party who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done.⁴ If one by a promise to buy land at an auction sale for one having an equitable interest in it induces the latter and her friends not to bid against him, he will be held a trustee.⁵ Where one induces the owner of real estate not to redeem it by a promise to hold the property until paid by the rents and profits, and then to return the estate, equity will hold him to his promise.⁶ So, if a delay is agreed to in the sale of land on a promise of the debtor to sell privately and apply the proceeds in a certain manner, the proceeds will be

188; *Harris v. Tyson*, 21 Penn. St. 359; *Earl of Bath, &c.*, Case, 3 Ch. Cas. 56, 74, 103, 104; *Mathews v. Bliss*, 22 Pick. 48.

¹ *Bowman v. Bates*, 2 Bibb, 47.

² *Turner v. Harvey*, Jac. 169; *Laidlaw v. Organ*, 2 Wheat. 178; *Torrey v. Buck*, 1 Green, Ch. 380; *Mathews v. Bliss*, 22 Pick. 48.

³ *Wilde v. Gibson*, 1 H. L. Cas. 605, reversing same case, 2 Y. & Col. 542.

⁴ *Middleton v. Middleton*, 1 Jac. & W. 96; *Reech v. Kennegall*, 1 Ves. 123; *Oldham v. Litchford*, 2 Vern. 506; *Dutton v. Poole*, 2 Lev. 211; *Mestaer v. Gillespie*, 11 Ves. 638, and cases cited; *Jenkins v. Eldredge*, 3 Story, 181. See remarks in *McGowan v. McGowan*, 14 Gray, 119; *Morey v. Herrick*, 18 Pa. St. 128; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Dixon v. Olmuis*, 1 Cox, Ch. 414.

⁵ *Cowperthwaite v. Bank*, 102 Penn. St. 397; *Heath's App.*, 100 id. 1.

⁶ *Scheffermeyer v. Schaper*, 97 Ind. 70.

impressed with a trust.¹ If a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded, to the extent of the interest intended for him.² So, where the tenant in tail in remainder, fraudulently or by force, prevented the tenant in tail for life in possession from suffering a common recovery, and thereby barring the entail for the purpose of providing for other persons by will out of the estate, it was held that the tenant in tail in remainder, when the estate came to him, was a trustee, and the court took care that the estate should go precisely as if the common recovery had been suffered, although the tenant in tail was a married woman, and the fraud had been committed by her husband, and she was not privy to it.³ And where issue in tail prevented his father, tenant in tail, from suffering a recovery, by promising to provide for younger children, in favor of whom the recovery was to be suffered, equity converted the tenant in tail into a trustee for the younger children.⁴ And where a person fraudulently intercepts a gift intended for another, by promising to hand it over if it is left to him, equity will compel an execution of the promise, by converting such person into a trustee.⁵ (a) So, if devisees or heirs prevent a

¹ *Boyce v. Stanton*, 15 Lea, 346.

² *Middleton v. Middleton*, 1 Jac. & W. 96; *Reech v. Kennegall*, 1 Ves. 123; *Oldham v. Litchford*, 2 Vern. 506; *Dutton v. Poole*, 2 Lev. 211; *Mestaer v. Gillespie*, 11 Ves. 638, and cases cited; *Jenkins v. Eldredge*, 3 Story, 181. See remarks in *McGowan v. McGowan*, 14 Gray, 119; *Morey v. Herrick*, 18 Penn. St. 128; *Church v. Ruland*, 64 id. 432; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Dixon v. Olmius*, 1 Cox, Ch. 414; *Fischbeck v. Gross*, 112 Ill. 208.

³ *Luttrell v. Olmius*, and *Waltham's Case*, cited 11 Ves. 638; and 14 Ves. 290.

⁴ *Jones v. McKee*, 6 Barr, 428; *Devenish v. Baines*, Prec. Ch. 4.

⁵ *Hoge v. Hoge*, 1 Watts, 213; *Devenish v. Baines*, Prec. Ch. 4;

(a) *Rollins v. Mitchell*, 52 Minn. 41, 50.

testator from charging his estate with annuities or legacies, by saying that it is not worth while to put them in the will, and that they will pay them, they will be trustees for such intended annuitants or legatees.¹ So, if an executor prevents a gift or legacy from being given to one, by promising to pay it as if inserted in the will, he will be a trustee.² So, where a testator held a note against his father, which he intended to give up in his will, the residuary legatee promising that she would surrender the note, equity held her to be a trustee.³ So, where one fraudulently procured a deed to be made to herself, instead of to another.⁴ But there must be some actual fraud in procuring a deed or devise to one's self: the mere breach of a promise to convey is not enough.⁵ Where the plaintiff wished to buy certain land and engaged the defendant to find some one who would lend the plaintiff the necessary money, and the defendant dissuaded the plaintiff from seeking the money in other directions, in consequence of which the plaintiff did to some extent abstain from trying to get the funds elsewhere, and the defendant bought the land on his own behalf with his own money and took a deed to himself, it was held that the defendant was not a trustee for the plaintiff either on the ground of agency or fraud. Judge Holmes said: "In any view of the law, before we can convert a man into a trustee, on the ground of fraud, we must be able to see with some reasonable certainty that his fraud was the means of depriv-

Church v. Ruland, 64 Penn. St. 432; *Dowd v. Tucker*, 41 Conn. 198; *Williams v. Vreeland*, 29 N. J. Eq. 417.

¹ *Chamberlain v. Chamberlain*, 2 Freem. 34; *Oldham v. Litchford*, 2 Vern. 506; *Mestaer v. Gillespie*, 11 Ves. 638; *Huguenin v. Baseley*, 14 Ves. 290; *Griffin v. Nanson*, 4 Ves. 344; *Hoge v. Hoge*, 1 Watts, 213; *Jones v. McKee*, 3 Barr, 496, and 4 Barr, 428; *Norris v. Frazer*, L. R. 15 Eq. 329; *McCormick v. Grogan*, L. R. 4 H. L. 82.

² *Thynn v. Thynn*, 1 Vern. 296; *Reach v. Kennigate*, Amb. 67; *Barrow v. Greenbough*, 3 Ves. 152; *Chamberlain v. Agar*, 2 V. & B. 250; *Podmore v. Gunning*, 7 Sm. 644.

³ *Richardson v. Adams*, 10 Yerg. 273; *Jones v. McKee*, 3 Barr, 496.

⁴ *Miller v. Pearce*, 6 Watts & S. 97.

⁵ *Hoge v. Hoge*, 1 Watts, 213.

ing the plaintiff of the property he seeks to follow," and in this case he did not deem it probable that such was the consequence of the defendant's fraudulent concealment of his intent to buy, and of his dissuasions.¹ We think this decision is open to severe criticism. Such fraudulent conduct should be repressed with a strong hand, the presumption should be against the evil doer so strongly as to cut off the chance of his gaining an advantage by his own wrong or keeping it if gained. (a) If an heir fraudulently, or through ignorance, procure a will to be revoked, so that the estate comes to him, he will be a trustee; as, where A. had sold a part of his estate, and the purchaser desired a fine to be levied, B., his heir, acting as his attorney, advised a fine to be levied of his whole estate, whereby A.'s will was revoked, and the estate descended to B.; the devisee under the will called upon B. to hold the property as his trustee, and he was so held by the court; Lord Eldon saying, "You, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be trustee of the property for the benefit of that person who would have been entitled to it if you had known what, as an

¹ *Collins v. Sullivan*, 135 Mass. 461, 463.

(a) Theft and felony do not prevent the felon from being held a trustee. *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546; *Grouch v. Hazlehurst L. Co. (Miss.)*, 16 So. Rep. 496. In England and New York it is held that a person who kills another to secure the latter's property by descent or devise, or to prevent the revocation of his will, cannot, on the ground of public policy, take as heir or under the will. See *Cleaver v. Mutual R. F. Life Ass'n*, [1892] 1 Q. B. 147; *Riggs v. Palmer*, 115 N. Y. 506; *Ellerson v. Westcott*, 148 N. Y. 149; *Lundy v. Lundy*, 24 Can. Supr. Ct.

650; see *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591; 41 Cent. L. J. 377. Elsewhere it is held that the murder does not alter the will or the law of descent. *Shellenberger v. Ransom*, 41 Neb. 631; 31 Neb. 61; *Owens v. Owens*, 100 N. C. 240; *Holdom v. Ancient Order of United Workmen*, 159 Ill. 619; *Carpenter's Estate*, 170 Penn. St. 203; *Deem v. Millikin*, 6 Ohio Cir. Ct. 357. The view is also maintained that the murderer, upon thus acquiring title, is a constructive trustee. See Prof. J. B. Ames's article in 36 Am. L. Reg. N. S. 227.

attorney, you ought to have known, and, not knowing it, you shall not take advantage of your own ignorance.”¹ In such cases it has been held that mere promises are not enough, that there must be some proof of a fraudulent intent or purpose to create a trust; it is also held that such trust does not follow the property, but is only an agreement which equity will enforce.²

§ 182. While a court of equity will thus create a trust where a person has by fraud prevented a will from being made in favor of another, it has no jurisdiction to prevent the probate of, or to set aside, a will fraudulently procured. Ecclesiastical and common-law courts in England, and probate courts with the common-law courts in the United States, alone have jurisdiction over wills. Thus, until within a short period all wills in England were first presented to the ecclesiastical courts, and they were there allowed or disallowed according to the evidence. If they were allowed, the final judgment allowing them was conclusive upon the personalty until such judgment was reversed or annulled. The validity of such will, however, so far as real estate was concerned, was tried in the courts of common law as often as the title to the separate parcels of land was in controversy. Whenever in the prosecution or defence of a real action such will of real estate was given in evidence, not only its execution was tried, but its validity, as whether it was obtained by undue influence or fraud, or whether the testator was of sound mind. Courts of equity in a few early cases assumed jurisdiction to set aside wills procured by fraud,³ but it is now well settled that they will not interfere, but that courts of common law have exclusive jurisdiction; nor will they interfere to set aside the judg-

¹ *Bulkley v. Wilford*, 2 Cl. & Fin. 177; 8 Bligh (N. S.), 11; *Segrave v. Kirwan*, Beat. 157; *Nanney v. Williams*, 22 Beav. 452. See *Mix v. King*, 55 Ill. 434.

² *Bedilian v. Seaton*, 3 Wall. Jr. 280.

³ *Maundy v. Maundy*, 1 Ch. R. 66; *Well v. Thornagh*, Pr. Ch. 123; *Goss v. Tracy*, 1 P. Wms. 287; 2 Vern. 700.

ment or probate of a will procured by fraud.¹ To set aside such a judgment, proceedings must be had in the nature of proceedings for a new trial in the court in which such judgment or decree was passed.² The extent to which a court of equity will go in correcting a fraud perpetrated in relation to a will, is to give relief where fraud has prevented a will from being made, or where a fraud has been practised upon the legatee, as where a name is inserted fraudulently in a will in place of the intended devisee or legatee, or where the revocation of a will has been procured or prevented by fraud,³ or where there is a gift to executors under such circumstances that it ought to be a trust for relations, or where a legatee promises the testator that he will hand over the legacy to a third person.⁴ In all these cases the will itself is established, but certain other collateral things are decreed growing out of the manner in which the will was procured.⁵ In New York, New Jersey, and South Carolina, the old English practice is followed, and wills must be proved whenever they are used to establish or defeat the title to real estate, nor has a court of equity jurisdiction to set them aside. This rule has been modified in New York so far that when the title of real

¹ *Roberts v. Wynne*, 1 Ch. R. 125; *Herbert v. Lownes*, id. 13; *Archer v. Mosse*, 2 Vern. 8; *Thynn v. Thynn*, 1 Vern. 296; *Devenish v. Baines*, 1 Pr. Ch. 3; *Barnesley v. Powell*, 1 Ves. 287; *Marriott v. Marriott*, Str. 666; *Plume v. Beale*, 1 P. Wms. 388; *Rockwood v. Rockwood*, 1 Leon. 192; *Cro. Eliz.* 163; *Dutton v. Poole*, 1 Vent. 318; *Beringer v. Beringer*, 26 Car. II.; *Chamberlain v. Chamberlain*, 2 Freem. 34; *Leicester v. Foxcroft*, Gilb. 11; *Ketrick v. Barnsby*, 3 Bro. P. C. 358; *Webb v. Claverden*, 2 Atk. 424; *Bennett v. Vade*, id. 324; *Anon.*, 3 Atk. 17; *Sheffield v. Buckingham*, 1 Atk. 628; *Allen v. Macpherson*, 5 Beav. 469; 1 Phill. 133; 1 H. L. Cas. 191; *Murray v. Murphy*, 39 Miss. 214.

² *Waters v. Stickney*, 12 Allen, 1.

³ *Bulkley v. Wilford*, 2 Cl. & Fin. 177; 8 Bligh (N. S.), 11; *Segrave v. Kirwan*, Beat. 157; *Nanney v. Williams*, 22 Beav. 452; *Dowd v. Tucker*, 41 Conn. 198; *Williams v. Vreeland*, 29 N. J. Eq. 417.

⁴ *Kennell v. Abbott*, 4 Ves. 802; *Marriott v. Marriott*, Str. 666, cited *Gilbert*, 203, 209; *Williams v. Fitch*, 18 N. Y. 546; 7 Sim. 644; 1 Watts, 163; *Church v. Ruland*, 64 Penn. St. 432.

⁵ *Marriott v. Marriott*, Str. & Gil. *ut supra*.

estate depends upon a will, the validity of which is doubted, and the parties are not in possession of the real estate, nor in such a position that a real action can be brought, or if there is any technical reason why a real action cannot be sustained, a court of equity will take jurisdiction to prevent a failure of justice.¹ In nearly all the other States the judgments of the courts of probate allowing a will are conclusive upon all the world, both as to real and personal estate. In all actions at law involving title under such wills, it is only necessary to produce the judgment of the probate court allowing them. Courts of equity have no jurisdiction to set aside such wills for fraud, nor can they set aside the judgments of the probate court allowing them.² If, however, a will is probated by accident or mistake, or the probate is procured by fraud, the judgment may be reversed or modified by proceedings in the same court in the nature of a petition for a review or for a new trial.³ This, however, may depend upon the statutes of the several States giving jurisdiction to their several courts of probate. While courts of equity will not interfere to set aside wills procured by fraud, or to set aside the probate of those procured by fraud, they will not interfere in favor of the fraudulent party to enable him to establish any rights under the will.⁴ As a general rule neither courts of equity nor of common law will take notice of a will for any purpose unless it has been proved in the courts of probate having jurisdiction over such matters.⁵

¹ *Brady v. McCosker*, 1 Comst. 214; *Clarke v. Sawyer*, 2 id. 498.

² *Gould v. Gould*, 3 Story, 516; *Fouvergne v. New Orleans*, 18 How. 470; *Gaines v. Chew*, 2 How. 645; *Tarver v. Tarver*, 9 Pet. 180; *Adams v. Adams*, 22 Vt. 50; *Cotton v. Ross*, 1 Paige, 396; *Muir v. Trustees*, 3 Barb. Ch. 477; *Hamberlin v. Tenny*, 7 How. (Miss.), 143; *Lyne v. Guardian*, 1 Miss. 410; *Hunter's Will*, 6 Ohio, 499; *Watson v. Bothwell*, 11 Ala. 653; *Johnson v. Glasscock*, 2 Ala. 233; *Hunt v. Hamilton*, 9 Dana, 90; *McDowall v. Peyton*, 2 Des. 313; *Howell v. Whitechurch*, 4 Heyw. 49; *Burrows v. Ragland*, 6 Humph. 481; *Blue v. Patterson*, 1 Dev. & Bat. Eq. 459; *Trexler v. Miller*, 6 Ired. Eq. 248.

³ *Waters v. Stickney*, 12 Allen, 1. ⁴ *Nelson v. Oldfield*, 2 Vern. 76.

⁵ *Price v. Dewhurst*, 4 My. & Cr. 76, 80, 81; *Gaines v. Chew*, 2 How. 615, 616.

§ 183. Another instance of a constructive trust arising from fraud in relation to deeds or wills, is where a party has suppressed or destroyed a deed or other instrument of title. Every one is entitled to aid from the judicial tribunals in all cases of fraud, and if a defendant has fraudulently suppressed or destroyed the evidence of a man's title, and is in possession of the property himself, he ought to be declared a trustee for the rightful owner under the suppressed paper;¹ and if a deed or will is destroyed or suppressed, a court of equity can give relief. There seems to be no difficulty in this matter so far as relates to deeds,² nor so far as relates to wills of real estate in those jurisdictions where a will must be proved in court in every instance where it is necessary to the title of real estate; but in jurisdictions where a will cannot be noticed by other courts until it is first proved in a court of probate, there is a difficulty in proceeding in equity for fraud in suppressing it, except by a bill of discovery of evidence to use in the courts of probate in proving the will. Accordingly it has been determined in some States that a will cannot be acted upon in courts of equity, although lost, destroyed, or suppressed, until it is first proved in a probate court.³ In other States, courts of equity, in cases of suppressed or spoliated wills, have taken jurisdiction *in odium spoliatoris*, and have allowed such will to be proved, and have carried its provisions into effect, as a

¹ *Bates v. Heard*, Toth. 66; 1 Dick. 4; *Tucker v. Phipps*, 3 Atk. 360; *Hayne v. Hayne*, 1 Dick. 18; *Eyton v. Eyton*, 2 Vern. 280; Pr. Ch. 116; *Dalston v. Coatsworth*, 1 P. Wms. 731; *Woodroff v. Burton*, 1 P. Wms. 734; *Saltern v. Melhuish*, Amb. 249; *Cowper v. Cowper*, 2 P. Wms. 748; *Gartside v. Radcliffe*, 1 Ch. Cas. 292; *Hunt v. Mathews*, 1 Vern. 408; *Wardour v. Beresford*, id. 452; *Downes v. Jennings*, 32 Beav. 290; *Ransom v. Rumsey*, 2 Vern. 561; 1 P. Wms. 733; *Hampden v. Hampden*, 3 Bro. P. C. 550; 1 P. Wms. 733; *Spencer v. Smith*, 1 N. C. C. 75; *Middleton v. Middleton*, 1 J. & W. 99; *Wood v. Abrey*, 3 Mod. 423; *Floyer v. Sherrard*, Amb. 18; *Coles v. Trecothick*, 9 Ves. 246; *Law v. Barchard*, 8 Ves. 133; *White v. Damon*, 7 Ves. 35; *Moth v. Atwood*, 5 Ves. 845; *Stephens v. Bateman*, 1 Bro. Ch. 22; *Griffith v. Spratley*, 2 id. 179.

² *Ward v. Webber*, 1 Wash. (Va.) 274.

³ *Morningstar v. Selby*, 15 Ohio, 345; *Gaines v. Chew*, 2 How. 345; *Gaines v. Hennen*, 24 How. 553.

court of probate would have done if the will had been produced and regularly administered.¹

§ 184. If a party in ignorance and mistake of his rights and interests execute a conveyance, although no fraud is practised upon him, a court of equity will relieve against the instrument; for it is against good conscience to take advantage of one's ignorance to obtain his property.² Thus, if an heir, in ignorance of the value of his inheritance,³ or in ignorance that some legacies or devises had lapsed,⁴ should convey his interest for an inadequate consideration, equity would convert the purchaser into a trustee. And if the purchaser should have full knowledge, or should stand in any confidential relation, or should practise the slightest art to mislead or conceal, the equities would of course be much stronger against the transaction;⁵ but these circumstances are not necessary to avoid the conveyance, for relief will be granted where both parties are in a mutual state of ignorance, or are laboring under the same mistake.⁶ It is to be observed, however, that the ignorance or mistake which entitles a party to relief must be as to some matter of fact;

¹ *Bailey v. Stiles*, 1 Green, Ch. 220; *Allison v. Allison*, 7 Dana, 90; *Legare v. Ashe*, 1 Bay, 461; *Meade v. Langdon*, cited 22 Vt. 59; *Buchanan v. Matlock*, 8 Humph. 390. In New York, the matter is regulated by statute, and courts of equity or the Supreme Court has exclusive jurisdiction in case of a lost or spoliated will. *Bowen v. Idley*, 6 Paige, 46; *Bulkley v. Redmond*, 2 Brad. Sur. 281.

² *Bingham v. Bingham*, 1 Ves. 126; *Ramsden v. Hylton*, 2 Ves. 394; *Turner v. Turner*, 2 Ch. R. 81; *Dunnage v. White*, 1 Swanst. 137; *Naylor v. Wynch*, 1 S. & S. 564; *Evans v. Llewellyn*, 2 Bro. Ch. 150; 1 Cox, 333; *Gossmour v. Pigge*, 8 Jur. 526; *McCarthy v. Decaix*, 2 R. & M. 614; *Huguenin v. Baseley*, 14 Ves. 273; *Hore v. Beecher*, 12 Sim. 465; *Marshall v. Collett*, 1 Y. & Col. Exch. 238; *Midland Great Western Ry. v. Johnson*, 6 H. L. Cas. 811.

³ *Beard v. Campbell*, 2 A. K. Marsh. 125; *Tyler v. Black*, 13 How. 231.

⁴ *Pusey v. Desbouvrie*, 3 P. Wms. 316.

⁵ *Gossmour v. Pigge*, 13 L. J. Ch. 322; *Tyler v. Black*, 13 How. 231; *McCarthy v. Decaix*, 2 R. & M. 222; *Cocking v. Pratt*, 1 Ves. 400.

⁶ *Ibid.*; *Lansdowne v. Lansdowne*, 2 J. & W. 205; *Mose*, 364; *Willan v. Willan*, 16 Ves. 72.

and that mistake or ignorance of the law, or of the consequences that will follow from the conveyance, will not entitle a party to relief.¹ (a) This rule is established by reason of the great danger of abuse that would arise if parties were allowed to reclaim their property upon allegations that they were ignorant of the law, or mistook the consequences of their acts.² Thus, if a party has full knowledge of all the facts, and intends to do the acts or execute the instruments in question in the form in which they are executed, he cannot have relief because he was ignorant of or mistook the law, or because the consequences which legally and naturally follow from the transaction are different from what he expected.³ But if there is a mistake in the instrument itself, and it contains what was not agreed or intended, or does not contain all that was agreed and intended, to be in the writing, equity will give relief.⁴ And if there are

¹ *Marshall v. Collett*, 1 Y. & C. Exch. 238; *Midland Great Western Ry. v. Johnson*, 6 H. L. Cas. 811; *Hunt v. Rousmaniere*, 1 Pet. 1; *Brown v. Ingham*, 1 Bro. Ch. 92; *Pullen v. Ready*, 2 Atk. 591; *Magniac v. Thompson*, 2 Wall. Jr. 209; *Campbell v. Carter*, 14 Ill. 286; *Hall v. Read*, 2 Barb. Ch. 503; *Brown v. Armistead*, 6 Rand. 594; *Hinchman v. Emans*, Saxt. 100; *Freeman v. Cook*, 6 Ired. Eq. 378; *Gunter v. Thomas*, 1 Ired. Eq. 199; *Crofts v. Middleton*, 2 K. & J. 194; *Wintermute v. Snyder*, 2 Green, Ch. 498; *Farley v. Bryant*, 32 Maine, 474; *Freeman v. Curtis*, 51 id. 140; *Ferguson v. Ferguson*, 1 Ga. Dec. 135.

² *Bilbie v. Lumley*, 2 East, 472; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Shotwell v. Murray*, 1 id. 512; *Storrs v. Barker*, 6 id. 169; *Proctor v. Thrall*, 22 Vt. 262.

³ *Storrs v. Barker*, 6 Johns. Ch. 169; *Lyon v. Saunders*, 23 Miss. 124; *Shafer v. Davis*, 13 Ill. 395; *Emmett v. Dewhirst*, 8 Eng. L. & Eq. 83; *Hunt v. Rousmaniere*, 1 Pet. 1; *Farley v. Bryant*, 32 Maine, 474; *Freeman v. Curtis*, 51 id. 140; *Mellish v. Robertson*, 25 Vt. 608; *Gilbert v. Gilbert*, 9 Barb. 532; *Arthur v. Arthur*, 10 Barb. 9.

⁴ *Heacock v. Fly*, 14 Pa. St. 541; *Larkins v. Biddle*, 21 Ala. 256;

(a) *Allcard v. Skinner*, 36 Ch. D. 145; *Fry v. Lane*, 40 Ch. D. 312; *Goode v. Riley*, 153 Mass. 585. In discharge to be cancelled and the assignment substituted. *Short v. Currier*, 153 Mass. 182. instead of an assignment, and no

any other ingredients in the case, as if there is joined to a party's ignorance or mistake of the law some practice upon him to lead him into the bargain,¹ or if the other party, knowing his ignorance or mistake, still suffers him to go on without information,² equity will give relief. If there are any exceptions to the rule that ignorance or mistake of the law is not a ground for relief, they are few in number, and have something peculiar in their character, which calls in other elements of equity, or they stand upon some urgent pressure of circumstances.³

§ 185. When a conveyance is made to compromise claims which the parties deem doubtful,⁴ and especially if the conveyance has for its object the settlement of family controversies,⁵ courts will support it if possible, although founded in ignorance or mistake of facts, as well as of law; provided no fraud has been used to mislead and deceive the party executing the conveyance.⁶

Wyche v. Green, 11 Ga. 169; 16 Ga. 49; *Moser v. Lebenguth*, 2 Rawle, 428; *Fitzgerald v. Peck*, 4 Litt. 127.

¹ 1 Story's Eq. Jur. § 133.

² *Cook v. Nathan*, 16 Barb. 342; *Langstaffe v. Fenwick*, 10 Ves. 405.

³ *State v. Paup*, 13 Ark. 135; *Hunt v. Rousmaniere*, 1 Pet. 1; 1 Story's Eq. Jur. §§ 116, 137.

⁴ *Brown v. Pring*, 1 Ves. 407; *Cann v. Cann*, 1 P. Wms. 727; *Naylor v. Winch*, 1 Sim. & S. 555; *Goodman v. Sayers*, 2 J. & W. 263; *Pickering v. Pickering*, 2 Beav. 91; *Stewart v. Stewart*, 6 Cl. & Fin. 699; *Gibbons v. Caunt*, 4 Ves. 849; *Neale v. Neale*, 1 Keen, 672; *Att. Gen. v. Boucherett*, 25 Beav. 116; *Wiles v. Greshon*, 5 De G., M. & G. 770; *Bradley v. Chase*, 22 Maine, 511; *Richardson v. Eyton*, 15 Eng. L. & Eq. 51; 2 De G., M. & G. 79.

⁵ *Currie v. Steele*, 2 Sandf. 542; *Stone v. Godfrey*, 27 Eng. L. & Eq. 318; 5 De G., M. & G. 76; *Gordon v. Gordon*, 3 Swanst. 463, 476; *Stockley v. Stockley*, 1 V. & B. 29; *Bellamy v. Sabine*, 2 Phill. 425; *Stapilton v. Stapilton*, 1 Atk. 10; 3 Lead. Cas. Eq. 684; *Cann v. Cann*, 1 P. Wms. 727; *Persse v. Persse*, 1 West, 110; 7 Cl. & Fin. 279; *Cory v. Cory*, 1 Ves. 19; *Heap v. Tonge*, 7 Eng. L. & Eq. 189; 9 Hare, 90; *Leonard v. Leonard*, 2 Ball & B. 171; *Dunnage v. White*, 1 Swanst. 137; *Harvey v. Cook*, 4 Russ. 34; *Jodrell v. Jodrell*, 9 Beav. 45; *Frank v. Frank*, 1 Ch. Cas. 84.

⁶ *Smith v. Pincombe*, 10 Eng. L. & Eq. 50; 3 Mac. & G. 653; *Groves*

§ 186. If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee, and will execute the trust by reforming the deed or by ordering a reconveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such mistake.¹ If by a mistake of a third party land is deeded to the husband instead of the wife, as it should have been by reason of the consideration and the agreement, the husband holds in trust for her.² But courts require the most full and satisfactory proof before they will vary by parol evidence the contract between the parties, as written and signed by them,³ and will not give relief unless the mistake is common to both parties,⁴ except the case is such that the parties may be restored to their original situation.⁵ But fraud on one party and mistake on the side of the other is a good cause for setting aside a transaction.⁶

v. Perkins, 6 Sim. 576 ; *Hoge v. Hoge*, 1 Watts, 163 ; *Dunnage v. White*, 1 Swanst. 137 ; *Evans v. Llewellyn*, 1 Cox, 333 ; 2 Bro. Ch. 150 ; *Townshend v. Stangroom*, 6 Ves. 333 ; *Chesterfield v. Janssen*, 2 Ves. 155 ; *Ormond v. Hutchinson*, 13 Ves. 51 ; *Henly v. Cook*, 4 Russ. 34 ; *Stainton v. Carson Co.*, 6 Jur. (N. S.) 360 ; *Ashurst v. Mill*, 7 Hare, 502 ; *Lawton v. Campion*, 18 Beav. 87 ; *Bennett v. Merriman*, 6 Beav. 360 ; *Hogton v. Hogton*, 15 Beav. 278 ; 11 Eng. L. & Eq. 134.

¹ *Exeter v. Exeter*, 3 M. & Cr. 321 ; *Lindo v. Lindo*, 1 Beav. 496 ; *Ramsden v. Hylton*, 2 Ves. 304 ; *Beaumont v. Bramley*, T. & R. 52 ; *Underhill v. Horwood*, 10 Ves. 225 ; *Canedy v. Marcy*, 13 Gray, 373 ; *Brown v. Lamphear*, 35 Vt. 252 ; *Green v. Morris*, 1 Beasley, 170 ; *Richardson v. Bleight*, 8 B. Mon. 580 ; *Whaley v. Eliot*, 1 A. K. Marsh. 343 ; *Belknap v. Sealey*, 2 Duer, 570 ; *Gray v. Woods*, 4 Blackf. 432 ; *Peters v. Goodrich*, 3 Conn. 146 ; *Oliver v. Ins. Co.*, 2 Curtis, 277 ; *Tilton v. Tilton*, 9 N. H. 385 ; *Farley v. Bryant*, 32 Maine, 474 ; *Loss v. Obry*, 22 N. J. Eq. 52.

² *Lide v. Law*, 27 Kans. 242.

³ *Sawyer v. Hovey*, 3 Allen, 331 ; *Gillespie v. Moore*, 2 Johns. Ch. 585 ; *Andrews v. Essex Ins. Co.*, 3 Mason, 10 ; 1 Story's Eq. Jur. § 157.

⁴ *Andrews v. Essex Ins. Co.*, 3 Mason, 10 ; *Bradford v. Romney*, 30 Beav. 431.

⁵ *Garrard v. Fankell*, 30 Beav. 445 ; *Harris v. Pepperell*, L. R. 5 Eq. 1.

⁶ *Bloodgood v. Sears*, 64 Barb. 76 ; *Welles v. Yates*, 44 N. Y. 525.

§ 187. Lord Hardwicke, in his analysis of the various kinds of fraud, stated one species to be "fraud apparent from the intrinsic value and subject of the bargain, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other."¹ The meaning of this is, that fraud may be proved by the inadequacy of the consideration paid for property by the purchaser on the one hand,² or the consideration may be so extravagantly large on the other,³ as to show that the purchaser was imposed upon. It is to be observed, however, that the consideration alone, whether too large or too small, cannot of itself prove fraud in a transaction, for the reason that a mere voluntary conveyance, without *any* consideration, is good and valid between the parties. On the same ground mere inadequacy of consideration will not vitiate a deed,⁴ and so if a party, knowing that the consideration is inadequate, enters into the agreement with his eyes open, he cannot have relief.⁵ It is only where some fraud is practised upon a party that the consideration

¹ *Chesterfield v. Janssen*, 2 Ves. 155; *Harvey v. Mount*, 8 Beav. 439.

² *Ibid.*; *Rosevelt v. Fulton*, 2 Cow. 129; *McDonald v. Neilson*, 2 Cow. 139.

³ *Cockell v. Taylor*, 15 Beav. 103.

⁴ *Pickett v. Loggon*, 14 Ves. 215; *Reynell v. Sprye*, 8 Hare. 222; 1 De G., M. & G. 600; *Howard v. Edgell*, 17 Vt. 9; *Osgood v. Franklin*, 2 Johns. Ch. 1; 14 Johns. 527; *Butler v. Haskell*, 4 Des. 651; *Erwin v. Perham*, 12 How. 197; *Judge v. Wilkins*, 19 Ala. 765; *McCormick v. Malin*, 5 Blackf. 509; *Delafield v. Anderson*, 7 S. & M. 630; *Farmers Bank v. Douglass*, 11 S. & M. 469; *Robinson v. Robinson*, 4 Md. Ch. 183; *Powers v. Hale*, 5 Foster, 145; *Dun v. Chambers*, 4 Barb. 376; *Mann v. Betterly*, 21 Vt. 326; *Green v. Thompson*, 2 Ired. Eq. 365; *White v. Flora*, 2 Overt. 426; *Forde v. Herron*, 4 Munf. 316; *Holmes v. Fresh*, 9 Miss. 201; *Young v. Frost*, 5 Gill, 287; *Coster v. Griswold*, 4 Edw. 364; *Westervelt v. Matheson*, 1 Hoff. 37; *Davidson v. Little*, 27 Penn. St. 251; *Coles v. Trecothick*, 9 Ves. 246; *Moth v. Atwood*, 5 Ves. 845; *White v. Damon*, 7 Ves. 35; *Low v. Barchard*, 8 Ves. 133; *Griffith v. Spratley*, 2 Bro. Ch. 179; *Stephens v. Bateman*, 1 id. 22; *Wood v. Abrey*, 3 Madd. 423; *Floyer v. Sherrard*, Amb. 18; *Harrison v. Guest*, 6 De G., M. & G. 424; 8 H. L. Cas. 481; *Denton v. Donner*, 23 Beav. 285; *Eyre v. Potter*, 15 How. 60; *Chaires v. Brady*, 10 Fla. 133.

⁵ *Willis v. Jernegan*, 2 Atk. 251.

of a conveyance is material.¹ If it appears that a person intended to convey his property for a consideration reasonably proportionate to its value, but that in fact the consideration received was grossly inadequate, then a court of equity would infer that some fraud or deceit had been practised upon him;² or, as Lord Thurlow said, "where the inadequacy of the consideration is so gross and manifest that it is impossible to state it to a man of common sense without producing an exclamation at the inequality of it,³ the court will infer from that fact *alone*, that there must have been such imposition or oppression in the transaction, or such a want of common understanding in the party, as to amount to a case of fraud, from which no advantage or benefit ought to be derived by the other party."⁴ Other authorities say that courts will act on the fact *alone* of inadequacy of consideration when it is so gross and manifest as to *shock the conscience*.⁵ This principle is loose enough,⁶ if it is a principle, and of course every case would depend upon its own facts and circumstances. Where there are suspicious circumstances connected with the fact of inadequacy of

¹ *Huguenin v. Baseley*, 14 Ves. 273; *Wormack v. Rogers*, 9 Ga. 60; *How v. Weldon*, 2 Ves. 516; *Mann v. Betterly*, 21 Vt. 326.

² *Gwynne v. Heaton*, 1 Bro. Ch. 8; *Baugh v. Price*, 3 Wilson, 320; *Eyre v. Potter*, 15 How. 60; *Butler v. Haskell*, 4 Des. 652; *Barnett v. Spratt*, 4 Ired. Eq. 171; *Wright v. Wilson*, 4 Yerg. 294; *Juzan v. Toulmin*, 9 Ala. 692.

³ *Gwynne v. Heaton*, 1 Bro. Ch. 8; *Hamet v. Dundass*, 4 Barr. 178.

⁴ *Heathcote v. Paignon*, 2 Bro. Ch. 175; *Underhill v. Horwood*, 10 Ves. 219; *Ware v. Horwood*, 14 Ves. 28; *Stilwell v. Wilkinson*, Jac. 282; *Barnett v. Spratt*, 4 Ired. Eq. 171.

⁵ *Horsey v. Hough*, 38 Md. 130; *Coles v. Trecothick*, 9 Ves. 246; *Osgood v. Franklin*, 2 Johns. Ch. 1; 14 Johns. 527; *Gwynne v. Heaton*, 1 Bro. Ch. 9; *Underhill v. Horwood*, 10 Ves. 209; *Peacock v. Evans*, 16 Ves. 512; *Wright v. Wilson*, 2 Yerg. 294; *Deaderick v. Watkins*, 8 Humph. 520; *Stilwell v. Wilkinson*, Jac. 280; *Copis v. Middleton*, 2 Madd. 409; *Howard v. Edgell*, 17 Vt. 9; *Butler v. Haskell*, 4 Des. 652; *Eyre v. Potter*, 15 How. 60; *Gist v. Frazier*, 2 Litt. 118; *Seymour v. Delancy*, 6 Johns. Ch. 222; *Juzan v. Toulmin*, 9 Ala. 692; *James v. Morgan*, 1 Lev. 111; *Rice v. Gordon*, 11 Beav. 215; *Booker v. Anderson*, 35 Ill. 66.

⁶ *Gibson v. Jeyes*, 6 Ves. 273; *Warfield v. Ross*, 33 Md. 85.

price, as where the parties stand in a fiduciary relation to each other,¹ or one of them is in distress,² or is ignorant,³ or is weak-minded and imbecile,⁴ inadequacy of consideration will become very pertinent, and oftentimes conclusive evidence that fraud and undue influence have been used to bring about a bargain advantageous to the one side and ruinous to the other.

§ 188. Immediately connected with this subject is the sale by an heir or reversioner of his expectancy or reversionary interest. It is said that "it is incumbent upon those who deal with an expectant heir, relative to his reversionary interest, to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. In all such cases the issue is upon the adequacy of the price. No proof of fraud is necessary; and the relief is given upon general principles of mischief to the public, without requiring particular evidence of actual imposition."⁵ Such a purchase is a constructive fraud, and the purchaser, if a stranger, will be compelled to account and to give up the bargain, if found to be advantageous.⁶ A sale by an heir will not be supported against him unless it is perfectly fair

¹ *Herne v. Meeres*, 1 Vern. 456; *Gibson v. Jeyes*, 6 Ves. 266; *Shaeffer v. Sleade*, 7 Blackf. 178; *Brooke v. Berry*, 2 Gill, 83; *Wright v. Wilson*, 2 Yerg. 294; *Butler v. Haskell*, 4 Des. 680.

² *Cockell v. Taylor*, 15 Beav. 103; *Warfield v. Ross*, 38 Md. 85.

³ *Herne v. Meeres*, 1 Vern. 456; *Pickett v. Loggon*, 14 Ves. 215; *Murray v. Palmer*, 2 Sch. & Lef. 477; *Gwynne v. Heaton*, 1 Bro. Ch. 1; *Wood v. Abrey*, 3 Madd. 417; *McKinney v. Pinkard*, 2 Leigh, 149; *Gasque v. Small*, 2 Strob. Eq. 72; *Esham v. Lamar*, 10 B. Mon. 43; *Butler v. Haskell*, 4 Des. 680; *Cookson v. Richardson*, 69 Ill. 137.

⁴ *Clarkson v. Hanway*, 2 P. Wms. 203; *Gartside v. Isherwood*, 1 Bro. Ch. 558; *Stanhope v. Toppe*, 2 Bro. P. C. 183; *McArtee v. Engart*, 13 Ill. 242; *Wormack v. Rogers*, 9 Ga. 60; *How v. Weldon*, 3 Ves. 517; *Addis v. Campbell*, 4 Beav. 401; *Holden v. Crawford*, 1 Atk. 390; *Mann v. Betterley*, 21 Vt. 326; *Crane v. Conklin*, Saxt. 346; *Brooke v. Berry*, 2 Gill, 83; *Rumph v. Abererombie*, 12 Ala. 64.

⁵ *Sir William Grant*, in *Gowland v. De Faria*, 17 Ves. 20.

⁶ *Jenkins v. Pye*, 12 Pet. 258; *Call v. Gibbons*, 3 P. Wms. 290; *Barnardiston v. Lingood*, 2 Atk. 133; *Walmesley v. Booth*, id. 28; *Gwynne v. Heaton*, 1 Bro. Ch. 10.

in every respect, and beyond suspicion, and for an adequate price.¹ The burden is upon the purchaser to show the fairness of the transaction and the sufficiency of the consideration, and not upon the heir to impeach either the one or the other;² and it is said that it is immaterial that the heir is of mature age.³ In this country the rule may be stated with still more severity, that the sale, by an heir, of his expectancy during the life of the ancestor, is contrary to public policy and is void, unless such sale is assented to by the ancestor, and supported by an adequate consideration.⁴ (a) If, however, the sale is at auction, it will be some proof of fairness and sufficiency of price,⁵ and if the sale is made with the knowledge and assent of the ancestor it will be good.⁶ (b) But it seems that the rule is confined to those

¹ *Knott v. Hill*, 1 Vern. 167; *Westerfield v. Janssen*, 2 Ves. 125; 1 Lead. Cas. Eq. 428-494, Eng. and Am. notes; *Bawtree v. Watson*, 3 M. & K. 339; *Portmore v. Taylor*, 4 Sim. 182; *Peacock v. Evans*, 16 Ves. 512; *Newton v. Hunt*, 5 Sim. 54; *Talbot v. Staniforth*, 1 John. & H. 484; *Foster v. Roberts*, 29 Beav. 467; *Jones v. Ricketts*, 31 Beav. 130; *Salter v. Bradshaw*, 26 Beav. 161; *Bury v. Oppenheim*, id. 594; *King v. Hamlet*, 4 Sim. 223; 2 M. & K. 456; *Denton v. Donner*, 23 Beav. 285; *Hannah v. Hodgson*, 30 Beav. 19; *St. Albyn v. Harding*, 27 Beav. 11; *Nesbitt v. Berridge*, 32 Beav. 282; *Perfect v. Lane*, 31 L. J. Ch. 489; *Edwards v. Burt*, 2 De G., M. & G. 55; *Aldbrough v. Frye*, 7 Cl. & Fin. 436.

² *Gowland v. De Faria*, 17 Ves. 24; *Coles v. Trecothick*, 9 Ves. 246; *Davis v. Marlborough*, 2 Swanst. 141; *Portmore v. Taylor*, 4 Sim. 209; *Shelley v. Nash*, 3 Madd. 236; *Nimmo v. Davis*, 7 Tex. 260; *Poor v. Hazleton*, 15 N. H. 564.

³ *Davis v. Marlborough*, 2 Swanst. 146; *Evans v. Cheshire*, Belt, Supp. 305; *Addis v. Campbell*, 4 Beav. 401.

⁴ *Varick v. Edwards*, 1 Hoff. 383; *Boynton v. Hubbard*, 7 Mass. 112; *Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Met. 121; *Poor v. Hazleton*, 15 N. H. 564; *Nimmo v. Davis*, 7 Tex. 266; *Jenkins v. Pye*, 12 Pet. 257; *Davidson v. Little*, 22 Penn. St. 252.

⁵ *Fox v. Wright*, 6 Madd. 111; *Shelley v. Nash*, 3 Madd. 232; *Newman v. Meek*, 1 Freem. Ch. 441; *Erwin v. Parham*, 12 How. 197.

⁶ *Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Met. 121; *Nimmo*

(a) See *Aylesford v. Morris*, L. Hale v. Hollon (Texas), 39 S. W. R. 8 Ch. 484; *Fry v. Lane*, 40 Ch. 287.

D. 321; *James v. Kerr*, id. 460; (b) Where the heir deals, not be-
McClure v. Raben, 133 Ind. 507; hind his father's back, but with his

expectancies that combine the relation of heir with that of remainder-man and reversioner. If the expectant is not heir, but is simply entitled to a remainder or reversion by virtue of some instrument or settlement, he may sell and assign his future interest, and such sale will not be avoided unless some of the common rules of equity are violated by the purchaser. In such cases there is no fraud upon parents or third persons, consequently there is nothing contrary to public policy in such purchases.¹

§ 189. Another kind of constructive trust arises from the mental incapacities of parties to enter into contracts. Thus a *non compos mentis* cannot make a binding contract.² The deed of such person is either absolutely void, or at least voidable,³ and equity will give relief by declaring a party

v. Davis, 7 Tex. 266; *King v. Hamlet*, 2 M. & K. 456; 3 Cl. & F. 218. In Ohio, however, it has been held that a contract is invalid by which a son released to his father, in consideration of an advancement, all his expectancies upon the father's estate. *Needles v. Needles*, 7 Ohio St. 432. The case is not sustained by other authorities, and seems not to rest upon the principles applicable to such transactions.

¹ *Cribbins v. Markwood*, 13 Grat. 495; *Dunn v. Chambers*, 4 Barb. 376; *Davidson v. Little*, 22 Penn. St. 252; *Wiseman v. Beake*, 2 Vern. 121; *Cole v. Gibbons*, 3 P. Wms. 290; *Barnardiston v. Lingood*, 2 Atk. 133; *Bowers v. Heaps*, 3 V. & B. 117; *Davis v. Marlborough*, 2 Swanst. 130; *Addis v. Campbell*, 4 Beav. 401; *Nickolls v. Gould*, 2 Ves. 422; *Henley v. Axe*, 2 Bro. Ch. 17; 2 Swanst. 141; *Griffith v. Spratley*, 2 Bro. Ch. 179; 1 Cox. 383; *Moth v. Atwood*, 5 Ves. 845; *Montesquieu v. Sandys*, 18 Ves. 302. The peculiar character and position of sailors call for the interposition of courts when they are defrauded, and when one has sold his prize-money for a small sum, the Master of the Rolls said that it was reasonable to regard them as young heirs, and to relieve them accordingly. *How v. Weldon*, 2 Ves. 515.

² *Chesterfield v. Janssen*, 2 Ves. 155.

³ *Allis v. Billings*, 6 Met. 415; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 239; *Price v. Berrington*, 3 Mac. & G. 486; *Molton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *De Silver's Est.*, 5 Rawl. 111; *Bensell v. Chancellor*, 5 Whart. 376; *Beals v. Lee*, 10 Barr. 56.

sanction and assistance, and has all into without such paternal protection. *O'Rorke v. Bolingbroke*, 2 A. the protection that his father can give him, he is not entitled to relief C. 814, 828. as if the contract had been entered

taking under such a conveyance to be a trustee, and by ordering him to execute a reconveyance.¹ Whether a person has capacity enough to make a contract, is always a question of fact in each particular case; for mere weakness of mind, not amounting to idiocy or insanity, is no ground for avoiding a contract. Courts cannot measure the extent of a party's understanding. If, therefore, a person is not an idiot nor an insane person, he may enter into contracts, although he may be of a low order of intelligence and of weak reasoning powers.² At the same time such persons are easily imposed upon and defrauded; and if it appears that one of the parties to a contract is of weak mind and feeble powers, the whole transaction will be carefully investigated, and the conduct of the person procuring such contract will be closely scrutinized; for arts and practices that would be perfectly harmless in a transaction with a man of high intelligence and prudence and great power of observing and reasoning may, and probably would, deceive and mislead a person of weak mind and feeble powers, although not incapable of entering into contracts and transacting business generally.³ Therefore the weakness of a party's mind is a very material fact in determining the character of a transaction, and if, in contracts with such persons, there is found the least art or stratagem, or any undue influence, or any

¹ *Rushloy v. Mansfield*, Toth. 42; *Mansfield's Case*, 12 Co. 123; *Addison v. Mascall*, 2 Vern. 678; 3 Atk. 110; *Price v. Berrington*, 7 Hare, 394; 3 Mac. & G. 486; *Addison v. Dawson*, 2 Vern. 678; *Welby v. Welby*, Toth. 164; *Wright v. Booth*, id. 166; *Wilkinson v. Brayfield*, 2 Vern. 307; *Clark v. Ward*, Pr. Ch. 150; *Ferres v. Ferres*, Eq. Ab. 695; *Att. Gen. v. Parnter*, 3 Bro. Ch. 441.

² *Osmond v. Fitzroy*, 3 P. Wms. 130; *Willis v. Jernegan*, 2 Atk. 251; 1 Story's Eq. Jur. § 235; *Ex parte Allen*, 15 Mass. 58; *Hadley v. Latimer*, 3 Yerg. 537; *Mann v. Betterley*, 21 Vt. 326; *Thomas v. Sheppard*, 2 McCord, Eq. 36; *Rippy v. Gant*, 4 Ired. Eq. 447; *Mason v. Williams*, 3 Munf. 126; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 221; *Green v. Thompson*, 2 Ired. Eq. 365; *Bath & Montague's Ca.*, 3 Ch. Cas. 107.

³ *Bridgman v. Green*, Wilm. 61; 2 Ves. 627; *Donnegal's Case*, id. 407; *Gartside v. Isherwood*, 1 Bro. Ch. 560; *Blackford v. Christian*, 1 Knapp, 77; *Dunn v. Chambers*, 4 Barb. 376; *Clark v. Malpas*, 4 De G., F. & J. 401.

ingredient of fraud or suspicion of unfairness, courts will set the contract aside, or convert the offending party into a trustee.¹ Upon these principles, if the contract is of an unusual, unreasonable, or extraordinary character,² or if it is without consideration, or upon an inadequate consideration,³ or if the instrument falsely recites a consideration,⁴ or if there is actual proof of undue influence,^(a) or of art or circumvention,⁵ or if there is a fiduciary, confidential, or

¹ *Griffin v. De Veulle*, 3 Wood. Lect. App. 16; *Nottige v. Prince*, 2 Gif. 246; *Longmate v. Ledger*, id. 157; *Baker v. Monk*, 33 Beav. 419; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Harding v. Handy*, 11 Wheat. 103; *Tracey v. Sackett*, 1 Ohio St. 54; *Whitehorn v. Hines*, 1 Munf. 557; *Whelan v. Whelan*, 3 Cow. 537; *Deatly v. Murphy*, 3 A. K. Marsh. 472; *Brogden v. Walker*, 2 H. & J. 285; *Rumph v. Abercrombie*, 12 Ala. 64.

² *Fane v. Devonshire*, 2 Bro. P. C. 77; *Bridgman v. Green*, 2 Ves. 627; *Dent v. Bennett*, 7 Sim. 539; 4 M. & Cr. 629; *Malin v. Malin*, 2 Johns. Ch. 238; *Bennett v. Wade*, 2 Atk. 235; *Nantes v. Corrock*, 9 Ves. 181; *Willan v. Willan*, 16 Ves. 72; *Ball v. Maurice*, 3 Bligh (N. S.), 1; 1 Dow (N. S.), 392.

³ *Ibid.*, *Clarkson v. Hanway*, 2 P. Wms. 203; *Gartside v. Isherwood*, 1 Bro. Ch. 558; *Hutchinson v. Tindall*, 2 Green. Ch. 357; *Rumph v. Abercrombie*, 12 Ala. 64; *Fillmer v. Gott*, 7 Bro. P. C. 70; *Hunt v. Moore*, 2 Barr, 105.

⁴ *Gibson v. Russell*, 2 Younge & C. Ch. 104; *Harvey v. Mount*, 8 Beav. 439.

⁵ *Portington v. Eglington*, 2 Vern. 189; *Gartside v. Isherwood*, 1 Bro. Ch. 558; *Bridgman v. Green*, 2 Ves. 627; *Edmunds v. Bird*, 1 V. & B. 542; *Fox v. Mackreth*, 2 Bro. Ch. 420.

(a) The influence, in such cases, to invalidate a conveyance, must be of such a nature as to deprive the grantor of his free agency. *Dorsey v. Wolcott*, 173 Ill. 539; *Francis v. Wilkinson*, 147 Ill. 370; *Ewing v. Bass*, 149 Ind. 1; *Maynard v. Tyler*, 168 Mass. 107; *Ormsby v. Webb*, 134 U. S. 47; *Trost v. Dingler*, 118 Penn. St. 259; *McFadin v. Catron*, 120 Mo. 252; *Rozell v. Vansyckle*, 11 Wash. 79; *Parrish v. Parrish* (Oregon), 54 Pac. 352; *Olmstead v. Webb*, 5 App. D. C. 38; *Wise v. Foote*, 81 Ky. 10. A gift, as well as a conveyance, may be set aside in equity for undue influence, or the donor's executors may recover the gift, though the donee did not stand in any confidential relation to the donor. *James v. Kerr*, 40 Ch. D. 449; *Morley v. Loughman*, [1893] 1 Ch. 736; *Re Wormley*, 137 Penn. St. 101; *Re Corson*, id. 160; *Lewis v. Merritt*, 113 N. Y. 386; *Woodbury v. Woodbury*, 141 Mass. 329.

influential relation between the parties,¹ courts will interfere and protect a person of weak mind from his contracts.

§ 190. Mental weakness is not of itself a sufficient ground for avoiding an agreement, but it must appear that some advantage was taken of it to procure a favorable contract; and if the other party stood in some fiduciary relation to the person of weak mind, the burden is upon him to show that the contract was in every respect fair, and that no advantage was obtained from the influential position on the one hand, or from the feebleness of mind on the other. And it is quite immaterial from whence the mental weakness arises. It may arise from a natural and permanent imbecility of mind, or it may arise from some temporary illness or debility, or from the weakness and infirmity of extreme old age. Each case must depend upon its own circumstances. If there is a fixed and permanent state of idiocy or insanity, or if the party is a declared lunatic and his affairs are in the hands of a committee or of a guardian, there can be little or no doubt. Questions generally arise where there is not this entire want of capacity, — where no general rule can be laid down, but the court is left to judge of the capacity of the contracting party, of the circumstances under which the contract was made, and whether from all the facts in the case the contract ought in equity and good conscience to be sustained. Extreme old age, accompanied by great infirmity; or extreme weakness and feebleness of mind, arising from temporary illness or permanent imbecility, stopping short of absolute incapacity, — are all pertinent facts, tending to show, if accompanied by other circumstances, a fraudulent contract; but if upon all the evidence the contract is a fair one, if the enfeebled person is sur-

¹ *Kennedy v. Kennedy*, 2 Ala. 571; *Brice v. Brice*, 5 Barb. 533; *Buffalow v. Buffalow*, 2 Dev. & Bat. Eq. 241; *Osmond v. Fitzroy*, 3 P. Wms. 130; *Dent v. Bennett*, 7 Sim. 539; 4 M. & C. 269; *Cruise v. Christopher*, 5 Dana, 181; *Whipple v. Clure*, 2 Root, 216; *Brooke v. Berry*, 2 Gill, 83; *McCraw v. Davis*, 2 Ired. Eq. 618; *Huguenin v. Baseley*, 14 Ves. 273; *Griffith v. Robins*, 3 Madd. 191; *Whelan v. Whelan*, 3 Cow. 537.

rounded by his friends, who understand the transaction and explain it to the party, it will not be set aside.¹

§ 191. Substantially the same rules apply to deeds and instruments executed by a drunken person. Drunkards, while laboring under the frenzy of drink, are *non compotes mentis* by their own act,² and it is said that they may plead *non est factum* to a deed executed while so drunk that they do not know what they are doing.³ In such case there can of course be no intelligent consent to any contract. But equity will not always interfere to protect a drunken man from the folly of his own acts, and will not, on account of drunkenness alone, set aside a contract or convert the other party into a trustee.⁴ And this is more especially the rule where the object of the contract is to carry out a family settlement, or the contract is fair and reasonable in its terms.⁵ But if there is any contrivance or management to induce drunkenness and to procure a contract, or if there was any unfair advantage taken of the drunkenness to procure a contract, it would be an actual fraud, and the court

¹ Griffith v. Robins, 3 Madd. 191; Harding v. Handy, 11 Wheat. 193; Dent v. Bennett, 7 Sim. 539; Att. Gen. v. Parnter, 3 Bro. Ch. 443; Hunter v. Atkins, 3 M. & K. 146; Lewis v. Pead, 1 Ves. Jr. 19; Pratt v. Barker, 1 Sim. 1; 4 Russ. 507; Rippey v. Gant, 4 Ired. Eq. 447; Gratz v. Cohen, 11 How. 1.

² Co. Litt. 247 a, 447 a; Beverley's Case, 4 Co. 124; Hendrick v. Hopkins, Cary, 93.

³ Cole v. Robins, Bull. N. P. 172; Cook v. Clayworth, 18 Ves. 12; Reynolds v. Waller, 1 Wash. 212; Rutherford v. Ruff, 4 Des. 350; Gore v. Gibson, 13 M. & W. 623; Barrett v. Buxton, 2 Ark. 167; Peyton v. Rawlins, 1 Hayw. 77; Clifton v. Davis, 1 Pars. Eq. 31; French v. French, 2 Ham. 214; Wigglesworth v. Steers, 1 Hen. & Munf. 70; Shaw v. Thackray, 1 Sm. & Gif. 537.

⁴ Johnson v. Meddlcott, 3 P. Wms. 131 n.; Cory v. Cory, 1 Ves. 19; Nagle v. Bayler, 2 Dr. & W. 60; Cooke v. Clayworth, 18 Ves. 12; Maxwell v. Pittinger, 2 Green. Ch. 156; Morrison v. McLeod, 2 Dev. & Bat. Eq. 221; Whitesides v. Greenlee, 2 Dev. Eq. 152; Moore v. Read, 2 Ired. Eq. 580; Hotchkiss v. Fortson, 7 Yerg. 67; Belcher v. Belcher, 19 Yerg. 121; Hutchinson v. Brown, 1 Clark, Ch. 408; Harbison v. Lemon, 3 Blackf. 51.

⁵ Cory v. Cory, 1 Ves. 19; Cooke v. Clayworth, 18 Ves. 12.

will not allow a party to retain any advantage procured in such manner, nor would it lend its aid to carry it into effect.¹

§ 192. So, equity will relieve in all cases of contracts procured by duress, or fear, or apprehension; for if there has been any restraint upon a person's freedom to consent or dissent, or any practice upon his fears, it is a kind of fraud, and no one ought to enjoy an advantage gained in such manner.² Thus, if a contract is made with one in prison, or under any circumstances of oppression, equity will scrutinize it with great care.³ And so, if advantage is taken of the extreme distress or necessity of a party, to obtain a favorable bargain from him, equity will give relief;⁴ but the advantage must have been within the contemplation of the parties at the time.

§ 193. Of course, if two or more of these suspicious circumstances are found in the same case; as, if property is

¹ *Johnson v. Meddlcott*, 3 P. Wms. 131; *Say v. Barwick*, 1 V. & B. 195; *Jenness v. Howard*, 6 Blackf. 240; *Cory v. Cory*, 1 Ves. 19; *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, Saxt. 346; *Calloway v. Wetherspoon*, 5 Ired. Eq. 128; *Hutchinson v. Tindall*, 2 Green. Ch. 128; *Phillips v. Moore*, 11 Miss. 600; *Cooley v. Rankin*, id. 642; *Cragg v. Holme*, 18 Ves. 14 n.; *Shiers v. Higgons*, 1 Madd. Ch. Pr. 399; *Nagle v. Baylor*, 2 Dr. & W. 64; *Shaw v. Thackray*, 1 Sm. & Gif. 537.

² *Att. Gen. v. Sothen*, 2 Vern. 497; *Crowe v. Ballard*, 1 Ves. Jr. 220; *Anon.*, 3 P. Wms. 29, n. (e); *Gist v. Frazier*, 2 Lit. 118; *Evans v. Llewellyn*, 1 Cox, 340; *Hawes v. Wyatt*, 3 Bro. Ch. 158.

³ *Att. Gen. v. Sothen*, 2 Vern. 497; *Roy v. Beaufort*, 2 Atk. 190; *Falkner v. O'Brien*, 2 B. & B. 214; *Underhill v. Horwood*, 10 Ves. 209; *Nicholls v. Nicholls*, 1 Atk. 409; *Griffith v. Spratley*, 1 Cox, 333; *Hinton v. Hinton*, 2 Ves. 634.

⁴ *Gould v. Okeden*, 3 Bro. P. C. 560; *Harvey v. Mount*, 8 Beav. 439; *Hawes v. Wyatt*, 3 Bro. Ch. 156; *Bosanquet v. Dashwood*, Ca. t. Talb. 37; *Proof v. Hines*, id. 111; *Pickett v. Loggon*, 14 Ves. 215; *Farmer v. Farmer*, 1 H. L. Cas. 724; *Fitzgerald v. Rainsford*, 1 B. & B. 37; *Underhill v. Horwood*, 10 Ves. 209; *Huguenin v. Baseley*, 14 Ves. 273; *Carpenter v. Elliott*, 2 Ves. 494; *Basy v. Magrath*, 2 Sch. & Lef. 31; *Ramsbottom v. Parker*, 6 Madd. 6; *Wood v. Abrey*, 3 Madd. 417; *Crowe v. Ballard*, 1 Ves. Jr. 215; *Nottidge v. Prince*, 6 Jur. (N. S.) 1066; *Davis v.*

obtained from a person of weak mind, or under duress, or in great distress, for a grossly inadequate consideration, or upon any unusual, extraordinary, or oppressive terms, the evidence would be much stronger of some fraudulent practice, and would call upon the suspected party for a very complete vindication of the transaction, or he would be converted into a trustee.¹

§ 194. Lord Hardwicke's "third species of fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed."² At law, fraud must be proved; but in equity there are certain rules prohibiting parties bearing certain relations to each other from contracting between themselves; and if parties bearing such relations enter into contracts with each other, courts of equity presume them to be fraudulent, and convert the fraudulent party into a trustee. And herein courts of equity go further than courts of law, and presume fraud in cases where a court of law would require it to be proved; that is, if parties within the prohibited relations or conditions contract between themselves, courts of equity will avoid the contract altogether, without proof, or they will throw upon the party standing in this position of trust, confidence, and influence, the burden of proving the entire fairness of the transaction. Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his *cestui que trust*, an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether, without proof, or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing

McNally, 5 Sneed, 583; *Graham v. Little*, 3 Jones, Eq. 152; *Stewart v. Hubbard*, id. 186.

¹ *Griffin v. De Veulle*, Wood. Lect. App. 16.

² *Chesterfield v. Janssen*, 2 Ves. 155.

persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust*, or other person holding a similar relation.¹

§ 195. These principles are applied in their full vigor to all contracts and sales between trustee and *cestui que trust*.² The trustee is in such a position of confidence and influence over the *cestui que trust*, that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust*, unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust*.³ The presumption is against the transaction.

¹ Houghton v. Houghton, 15 Beav. 278; Cooke v. Lamotte, id. 234; Ahearne v. Hogan, 1 Dr. 310; Espey v. Lake, 10 Hare, 260; Prideaux v. Lonsdale, 1 De G., J. & S. 433; Bayley v. Williams, 11 Jur. (N. S.) 236; Clark v. Malpas, 31 Beav. 80; Grosvenor v. Sherratt, 28 Beav. 659; Beanland v. Bradley, 2 Sm. & Gif. 339; Taylor v. Taylor, 8 How. 183; Greenfield's Est., 14 Penn. St. 504; Graham v. Pancoast, 30 id. 89; Nace v. Boyer, id. 99; Wester's App., 54 id. 60; Sears v. Shafer, 2 Seld. 268; Buffalow v. Buffalow, 2 Dev. & Bat. 241; Prewett v. Coopwood, 30 Miss. 369; Graham v. Little, 3 Jones, Eq. 152; Powell v. Cobb, id. 456; Gass v. Mason, 4 Sneed, 497; Lovatt v. Knipe, 12 Ir. Eq. 124; Ames v. Port Huron, 11 Mich. 139; European R. R. Co. v. Poor, 59 Maine, 277.

² Hatch v. Hatch, 9 Ves. 296; Hylton v. Hylton, 2 Ves. 549; Hunter v. Atkins, 3 M. & K. 135; Bulkley v. Wilford, 2 Cl. & Fin. 102; Farnam v. Brooks, 9 Pick. 212; Boynton v. Brastow, 53 Me. 362; Staats v. Bergen, 17 N. J. Eq. 554; Coffee v. Ruffin, 4 Cold. 487; Faucett v. Faucett, 4 Bush. 521; Korn v. Shaffer, 27 Md. 83; Baltimore v. Caldwell, 25 Md. 423; Smith v. Townshend, 27 Md. 368; Colborn v. Morton, 3 Keyes, 266; Pairo v. Vickery, 37 Md. 467; Wright v. Campbell, 27 Ark. 637.

³ Crosskill v. Bower, 32 Beav. 86; Pooley v. Quilter, 2 De G. & J. 327; Spring v. Pride, 10 Jur. (N. S.) 646; *Ex parte* Ridgeway, 1 Jur. (N. S.) 97; Herne v. Meeres, 1 Vern. 465; Ayliffe v. Murray, 2 Atk. 59; Fox v. Mackreth, 2 Bro. Ch. 400; Coles v. Trecothick, 9 Ves. 246; *Ex parte* Lacey, 6 Ves. 625; Morse v. Royal, 2 Ves. 376; Whichcote v. Lawrence, 3 Ves. 740; Gibson v. Jeyes, 6 Ves. 277; Hunter v. Atkins, 3 M. & K. 135;

If a *cestui* confess judgment or make a deed to the trustee, the burden is on the latter to repel the intendment of law that there was undue influence.¹ If a trustee conveys trust property to himself, any one or more of the *cestuis* may avoid the deed.² In the case just cited the trustees conveyed the trust property to themselves through a third person, without actual intent to defraud, but for a consideration really inadequate. Considerable time had elapsed, there were future interests in the property represented only by the trustee, and persons other than the trustees had acquired rights in the land for value; wherefore on the whole the court allowed the property to be retained on payment of the difference between the actual consideration and its fair value with interest at annual rests. The general rule is, that the trustee shall not take beneficially by gift or purchase from the *cestui que trust*,³ even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognized trustee;⁴ the question is not whether or not there is

Scott v. Davis, 4 M. & Cr. 87; Kerr v. Dungannon, 1 Dr. & W. 509; Van Epps v. Van Epps, 9 Paige, 237; Hawley v. Cramer, 4 Cow. 717; Campbell v. Walker, 5 Ves. 678; Michoud v. Girod, 4 How. 503; De Caters v. Chaumont, 3 Paige, 178; Child v. Bruce, 4 Paige, 309; Campbell v. Johnston, 1 Sandf. Ch. 148; Cram v. Mitchell, id. 251; Davis v. Simpson, 5 Har. & J. 147; Boyd v. Hawkins, 2 Ired. Ch. 304; Matthews v. Dragand, 3 Des. 25; Thorp v. McCullum, 1 Gilm. 614; Davoue v. Fanning, 2 Johns. Ch. 252; De Bevoise v. Sandford, 1 Hoff. 192; Stuart v. Kissam, 2 Barb. 493; Richardson v. Jones, 3 G. & J. 163; Clark v. Lee, 14 Iowa, 425; Zimmerman v. Harmon, 4 Rich. Eq. 165; Johnson v. Blackman, 11 Conn. 343; Moody v. Vandyke, 4 Binn. 31; Armstrong v. Campbell, 3 Yerg. 201; Bruch v. Lantz, 2 Rawle, 392; Herr's Est., 1 Grant's Cas. 172; Painter v. Henderson, 7 Barr, 48; Brackenridge v. Holland, 2 Blackf. 377; Scroggins v. McDougald, 8 Ala. 382; Thompson v. Wheatley, 5 S. & M. 499; Shelton v. Homer, 5 Met. 462; Freeman v. Harwood, 49 Maine, 195; Hickman v. Stewart, 69 Tex. 255; Patterson's Appl., 118 Penn. St. 571.

¹ Yonge v. Hooper, 73 Ala. 119.

² Morse v. Hill, 136 Mass. 60.

³ Coles v. Trecothick, 9 Ves. 234; Renew v. Butler, 30 Ga. 954; Cadwallader's App., 64 Penn. St. 293; Wright v. Smith, 23 N. J. Eq. 106; Smith v. Drake, id. 302.

⁴ Wright v. Smith, 23 N. J. Eq. 106.

fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se*,¹ to remove all temptation to collusion and prevent the necessity of intricate inquiries in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit.² So where the trustee in selling the property to a third person stipulates that the vendee is to sell it afterwards to the trustee, and the agreement is carried out, the trustee holds still as trustee, and not by an independent title as other purchasers from such vendee might have.³ No trustee can directly or indirectly become a purchaser in his own behalf of the trust property, and hold it against the *cestui*.⁴ (a) A purchase by a trustee inures to the benefit of the *cestui*.⁵ It is not, however, void but only voidable at the election of the *cestui que trust*.⁶ (b) But

¹ *McGaughey v. Brown*, 46 Ark. 25.

² *King v. Remington*, 36 Minn. 25; *Baldwin v. Allison*, 4 Minn. 11; *Jewett v. Miller*, 10 N. Y. 402.

³ *De Celis v. Porter*, 59 Cal. 464.

⁴ *Marshall v. Carson*, 38 N. J. Eq. 250; *Creveling v. Fritts*, 34 id. 134; *People v. O. B. of S. B. B. Co.*, 92 N. Y. 98.

⁵ *People v. Merchants' B'k*, 35 Hun, 97.

⁶ *Dodge v. Stevens*, 94 N. Y. 209; *Gibson v. Barbour*, 100 N. C. 192.

(a) The only method by which a trustee can protect his purchase is, when he sees the absolute necessity of a sale of the estate, and he is ready to give more than any one else, to apply by motion, to the court of equity in which the bill for a sale is filed, to permit him to be the purchaser. *Boswell v. Coaks*, 23 Ch. D. 302, 310; *Markle's Estate*, 182 Penn. St. 378.

(b) This applies to a purchase at public auction. 2 Story Eq. Jur. § 322; *Broder v. Conklin*, 121 Cal. 282, 286; *Hamilton v. Dooly*, 15 Utah, 280. The rule that a trustee cannot purchase or deal with the trust property in his own behalf

does not render the purchase void *ab initio*, but voidable only at the instance of the *cestui que trust*; and even while the title is in the trustee, it may be confirmed by acquiescence and lapse of time, as well as by the express act of the *cestui que trust*. *Kahn v. Chapin*, 152 N. Y. 305, 309; *Harrington v. Erie S. Bank*, 101 N. Y. 257; *Hammond v. Hopkins*, 143 U. S. 224; *Hoyt v. Latham*, id. 553; *Morse v. Hill*, 136 Mass. 60; *Barber v. Bowen*, 47 Minn. 118; *Hopper v. Hopper*, 79 Md. 400; *Harrison v. Manson*, 95 Va. 593; *Quirk v. Liebert*, 12 App. D. C. 394; *Cole v. Stokes*, 113 N. C. 270; *Darling v. Potts*, 118 Mo. 506; *Thompson v. Hartline*, 105 Ala. 263.

there are exceptions to the rule, and a trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee.¹ The trustee must clear the transaction of every shadow of suspicion,² and if he is an attorney he must show that he gave his client, who sold to him, full information and disinterested advice.³ Lord Eldon said he admitted that the exception was a difficult case to make out.⁴ And it may be said generally that it is difficult to find a case where such a transaction has been sustained.⁵ Any withholding of information,⁶ or ignorance of the facts or of his rights on the part of the *cestui*,⁷ or any inadequacy of price,⁸ will

¹ *Wright v. Smith*, 23 N. J. Eq. 106; *Bryan v. Duncan*, 11 Ga. 67; *Dobson v. Racey*, 3 Sandf. 61; *Paillon v. Martin*, 1 id. 569; *Brackenridge v. Holland*, 2 Blackf. 377; *Stuart v. Kissam*, 2 Barb. 494; *Braman v. Oliver*, 2 Stewart, 47; *Julian v. Reynolds*, 8 Ala. 680; *Stallings v. Foreman*, 2 Hill, Ch. 401; *Pratt v. Thornton*, 28 Maine, 355; *McCartney v. Calhoun*, 17 Ala. 301; *Marshall v. Stevens*, 8 Humph. 159; *Beeson v. Beeson*, 9 Barr, 279; *McKinley v. Irvine*, 14 Ala. 681; *Farnam v. Brooks*, 9 Pick. 212; *Lyon v. Lyon*, 8 Ired. Eq. 201; *Harrington v. Brown*, 5 Pick. 519; *Jennison v. Hapgood*, 7 Pick. 1; *Dunlap v. Mitchell*, 10 Ohio, 117; *Scott v. Freeland*, 7 Sm. & M. 410; *Pennock's App.*, 4 Penn. St. 446; *Bruch v. Lantz*, 2 Rawle, 392; *Field v. Arrowsmith*, 3 Humph. 442; *Monro v. Allaire*, 2 Caines' Cas. 163; *Salmon v. Cutts*, 4 De G. & Sm. 131; *Harrison v. Guest*, 6 De G., M. & G. 431; *Herbert v. Smith*, 6 Laus. 493; *Birdwell v. Cain*, 1 Cold. 301; *Rice v. Cleghorn*, 21 Ind. 80; *Johnson v. Bennett*, 39 Barb. 37; *Buel v. Buckingham*, 16 Iowa, 284; *Brown v. Cowell*, 116 Mass. 465; *post*, § 428; *Graves v. Waterman*, 63 N. Y. 657; *Golson v. Dunlap*, 73 Cal. 157; *Miggett's App.*, 109 Penn. St. 520.

² *Lathrop v. Pollard*, 6 Col. 424; *Jones v. Lloyd*, 117 Ill. 597; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Everett v. Henry*, 67 Tex. 402.

³ *Dunn v. Dunn*, 42 N. J. Eq. 431.

⁴ *Coles v. Trecothick*, 9 Ves. 246.

⁵ 2 Sugd. V. & P. (8 Am. ed.) 687.

⁶ *Fox v. Mackreth*, 2 Bro. Ch. 400; *Scott v. Davis*, 4 M. & Cr. 87; *Herne v. Meeres*, 1 Vern. 465; *Cook v. Sherman*, 4 McCrary, 20.

⁷ *Leach v. Leach*, 65 Wis. 284.

⁸ *Pugh v. Bell*, 1 J. J. Marsh. 398; *Morse v. Royal*, 12 Ves. 373.

make such purchaser a constructive trustee. The *cestui que trust* must know that he is dealing with the trustee. Therefore, if the trustee purchases through an agent or third person, and the *cestui que trust* does not know the trustee in the transaction, the contract will be void, or a trust in the agent.¹ The rule is that the trustee shall not purchase directly or indirectly; therefore if the trustee conveys to a stranger, and the stranger conveys back to the trustee, the transaction is equally void.² So, if the trustee purchases at auction of the *cestui que trust*, the presumption is strongly against the transaction,³ and the purchase is generally void.⁴ And one of several trustees is under the same disabilities:⁵ they cannot convey to each other.⁶ And so, if the purchase is made by an agent or attorney of the trustee.⁷ Nor can the trustee's wife purchase.⁸ Nor can the trustee purchase as agent for another.⁹ The *cestui que trust* is not estopped to avoid such sales, although he has taken a legacy under the will of the trustee, if such legacy is not a charge upon the trust estate and is not otherwise connected with the trust fund.¹⁰ If such sales are avoided, upon a reconveyance the trustee is entitled to receive back all the purchase-money and all other claims which he may have against the

¹ Randall v. Errington, 10 Ves. 423.

² Dobson v. Racey, 3 Sandf. 61.

³ Att. Gen. v. Dudley, Coop. 146; Whelpdale v. Cookson, 1 Ves. 9; Lister v. Lister, 6 Ves. 631; Sanderson v. Walker, 13 Ves. 601; Downes v. Grazebrook, 3 Mer. 200; Campbell v. Walker, 3 Ves. 378; Whitcomb v. Minichin, 5 Madd. 91.

⁴ Roberts v. Roberts, 65 N. C. 27.

⁵ Whichcote v. Lawrence, 3 Ves. 740.

⁶ Boynton v. Brastow, 53 Maine, 362.

⁷ Campbell v. Walker, 5 Ves. 378; Cox v. John, 32 Ohio St. 532.

⁸ Dundas's App., 64 Penn. St. 325; Leitch v. Wells, 48 Barb. 637. But it has been held that the trustee's wife might purchase where the trust property was sold under a judicial decree of sale, in the absence of fraud and collusion, if the sale is affirmed by a decree of the court upon a report of the proceedings. Armstrong's App., 69 Penn. St. 409.

⁹ North Baltimore, &c. Ass'n v. Caldwell, 25 Md. 420; James v. James, 55 Ala. 525.

¹⁰ Smith v. Townshend, 27 Md. 368.

estate.¹ (a) And he may purchase of the *cestui que trust* property not embraced in the trust fund, care being taken that the influence of the relation does not affect the transaction.² Sometimes the trustee is allowed, by decrees of sale, to be a bidder for the property at his own auction; in such case the trustee must show the utmost diligence and good faith for the interest of the *cestui que trust*.³ Where a trustee has an interest to protect by bidding at a sale of trust property, he may ask the court for permission to bid, and when this is granted after hearing all parties interested, he can bid, and obtain a perfect title.⁴ And a trustee may buy at a sale procured by some one else, not controlled by himself, in good faith to protect the interests of himself and others.⁵ (b) A trustee who has *bona fide* sold the property to a third person may afterwards buy it for himself,⁶ and the prohibition does not apply where the sale of the property is by a judgment creditor of the *cestui* through the sheriff, and not the trustee's sale.⁷ Acquiescence, lapse of time, or express act of the *cestui* may make the trustee's title good.⁸ Matters of indebtedness growing out of relations of trust and confidence are subject to adjustment and settlement the same as claims arising in other transactions.⁹

¹ Elliott v. Pool, 6 Jones, Eq. 42. ² Eldredge v. Smith, 34 Vt. 484.

³ Cadwallader's App., 64 Penn. St. 293; Colgate v. Colgate, 23 N. J. Eq. 372.

⁴ Scholle v. Scholle, 101 N. Y. 167.

⁵ Lusk's App., 108 Penn. St. 152; Allen v. Gillette, 127 U. S. 589.

⁶ Welch v. McGrath, 59 Iowa, 519.

⁷ Clark v. Holland, 72 Iowa, 36.

⁸ Harrington v. Erie County Savings Bank, 101 N. Y. 257.

⁹ Clute v. Frasier, 58 Iowa, 273.

(a) So the assignee of a contract to purchase real estate, who receives it in trust for the assignor, has an equitable lien on the land, when he receives the title, for so much of moneys paid as he necessarily advanced to prevent a forfeiture under the contract to purchase, and preserve the interest of his assignor, though he did not ask or receive the latter's approval thereof. *Stewart v. Fellows*, 128 Ill. 480.

(b) An executor is not precluded from purchasing at the sale of an heir's interest in real estate, that not being within his control as trustee. *Hlaigh v. Pearson*, 11 Utah, 51.

§ 196. If among the assets of the trust estate there are leases, the trustee cannot renew them in his own name; and if he renews them in his own name, he must hold them by a constructive trust for the same persons beneficially interested in the old leases.¹ Even if the lessor refuse to renew the lease for the benefit of the *cestui que trust*, and the trustee takes it in his own name, he is still a constructive trustee, and he must account for all the income and profits. (a) This is on the ground that a trustee should be under no temptations to make any contracts in relation to the trust property, even collaterally, on his own private account.² The same rule extends to all persons who have only a partial interest in property: they shall not take advantage of their situation to renew leases in their own names; as, tenants for life,³ mortgagees,⁴ devisees subject to debts, legacies, or annui-

¹ *Keech v. Sandford*, commonly called the Rumford Market Case, Sel. Ch. Cas. 61; 1 Lead. Cas. Eq. 36, Eng. & Am. notes; *Griffin v. Griffin*, 1 Sch. & Lef. 354; *Pickering v. Vowles*, 1 Bro. Ch. 198; *Pierson v. Shore*, 1 Atk. 480; *Nesbitt v. Tredennick*, 1 B. & B. 46; *Turner v. Hill*, 11 Sim. 14; *Whalley v. Whalley*, 1 Vern. 484; *Holt v. Holt*, 1 Ch. Cas. 190; *Anon.*, 2 id. 207; *Abney v. Miller*, 2 Atk. 597; *Killick v. Flexney*, 4 Bro. Ch. 161; *Luckin v. Rushworth*, Finch, 392; *Mulvaney v. Dillon*, 1 B. & B. 409; *Fosbrook v. Balguy*, 1 M. & K. 226; *Owen v. Williams*, Amb. 794; *Fitzgibbon v. Scanlan*, 1 Dow, 261; *Bradford v. Brownjohn*, L. R. 3 Ch. 714.

² *Keech v. Sandford*, Sel. Ch. Cas. 61; *Griffin v. Griffin*, 1 Sch. & Lef. 353.

³ *Eyre v. Dolphin*, 2 B. & B. 290; *Rawe v. Chichester*, Amb. 719; *Coffin v. Fernyhough*, 2 Bro. Ch. 291; *Taster v. Marriott*, Amb. 668; *James v. Dean*, 11 Ves. 383; 15 Ves. 236; *Kempton v. Packman*, 7 Ves. 176; *Giddings v. Giddings*, 3 Russ. 241; *Crop v. Norton*, 9 Mod. 233; *Buckley v. Lanauze*, Llo. & Goo. t. Plunk. 327; *Tanner v. Elworthy*, 4 Beav. 487; *Waters v. Bailey*, 2 Y. & C. Ch. 218; *Yem v. Edwards*, 3 K. & J. 564; 1 De G. & J. 598; *Brookman v. Hales*, 2 V. & B. 45.

⁴ *Rushworth's Case*, Freem. 13; *Nesbitt v. Tredennick*, 1 B. & B. 46.

(a) The trust which the court in which the renewal has been obtained by virtue of the original lease. *In re Lulham*, 53 L. J. Ch. n. s. 928, 931.
position, but extends to other cases

ties,¹ joint tenants,² or partners;³ and where there was a mere tenancy at will, it was held that the tenant could not renew in his own name, and deprive the remainder-man of what might come to him.⁴ And if, instead of renewing, the trustee or other person sell the right to renew for money, he must account for the price to the persons beneficially interested.⁵ Nor can an agent acting for the trustee renew in his own name.⁶ The same rule applies when the trustee of an equity of redemption becomes the purchaser in a foreclosure suit,⁷ and to the purchase by a trustee of any property, not a part of the trust fund, which has the necessary effect to diminish the trust fund.⁸

§ 197. It is thus seen that the rule against purchasing by trustees, of the *cestui que trust*, amounts almost to prohibition; for if a trustee purchases the property, and sells it at a profit, he must account for it as a trustee; not because there was any fraud in the transaction, but because it is against the policy of the law to allow such transactions.⁹ Nor is it

¹ *Jackson v. Welch*, Llo. & Goo. t. Plunk. 346; *Winslow v. Tighe*, 2 B. & B. 195; *Stubbs v. Roth*, id. 548; *Webb v. Lugar*, 2 Y. & C. 247; *Jones v. Kearney*, 1 Conn. & Laws, 34.

² *Palmer v. Young*, 1 Vern. 276.

³ *Fetherstonhaugh v. Fenwick*, 17 Ves. 298; *Ex parte Grace*, 1 Bos. & P. 376; *Clegg v. Fishwick*, 1 Macn. & G. 294, 299, Am. ed. Perkins, note 1; *Clegg v. Edmondson*, 8 De G., M. & G. 787.

⁴ *James v. Dean*, 11 Ves. 383; 15 Ves. 236; *Re Tottenham*, 16 Ired. Ch. 118.

⁵ *Owen v. Williams*, Amb. 734.

⁶ *Edwards v. Lewis*, 3 Atk. 538.

⁷ *Hubbell v. Medbury*, 53 N. Y. 98; *Terrett v. Crombie*, 6 Laus. 83.

⁸ *Fulton v. Whitney*, 67 N. Y. 548.

⁹ *Hawley v. Cramer*, 4 Cow. 117; *Prevost v. Gratz*, 1 Pet. 66, 367; 6 Wheat. 481; *Edwards v. Meyrick*, 2 Hare, 60; *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Fox v. Mackreth*, 2 Bro. Ch. 400; 1 Cox. 310; *John v. Bennett*, 39 Barb. 237; *Kent v. Chalfant*, 7 Minn. 487; *Tiffany v. Clark*, 1 N. Y. Sup. Ct. Add. 9; *Ilandin v. Davis*, 81 Ky. 34. An administrator who has bid in, in his own name, at a foreclosure of a mortgage belonging to his intestate, under the act authorizing him to do so, holds in trust, and cannot sell without the authority of the court. *Rafferty v. Mallory*, 3 Biss. 362. But see *Frouberger v. Lewis*, 79 N. C. 426, where an exception to

material that there should be an advantage, or profit, arising out of a purchase by the trustee from the *cestui que trust*. It is not necessary to prove such advantage or profit: it is enough to show the relation and the purchase. The trustee can make no profit from his management of the estate, and he is bound not to put himself in any position where his private interests may conflict with the interests of the *cestui que trust*.¹ If a trustee purchases the trust property, the *cestui que trust* may have the purchase set aside and the property resold.² (a) The general rule is that only lapse of time or ratification can make the purchase good, and the burden of proof is on the trustee to show laches or acquies-

the rule is said to be in case the trustee has a personal interest in the property, when he may bid at the sale to protect that interest; but then he ought to obtain the sanction of the court.

¹ *Ex parte* Lacey, 6 Ves. 625; *Chesterfield v. Janssen*, 2 Ves. 138; *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 138; *Cane v. Allen*, 2 Dow, 289; *Slade v. Van Vechten*, 11 Paige, 21; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Michoud v. Girod*, 4 How. 503; *Dobson v. Racey*, 3 Sandf. 61; *Morse v. Royal*, 12 Ves. 355; *Ex parte* James, 8 Ves. 337; *Ex parte* Bennett, 10 Ves. 381; *Saagar v. Wilson*, 4 S. & W. 102. Such transactions are fraudulent *per se*. *Nelson v. Hoyvner*, 66 Ill. 487. The attorney of the trustee comes equally within the prohibition, and it makes no difference in the application of the rule that a third person has conducted the business and shares in the profits. *Cox v. John*, 32 Ohio St. 532.

² *Sypher v. McHenry*, 18 Iowa, 232. After the trust is ended and the trustee has made a sale under his power, the trustee, acting in good faith, may deal with the property and become the owner of what was trust property by purchase or otherwise. *Bush v. Shearman*, 80 Ill. 160. But the court will carefully see that good faith is observed; and a settlement of guardian's account and conveyance of minor's property on the day he becomes of age, and while he is unadvised of his rights, under the influence and control of others, is not binding, and can only be upheld by clear proof that it is just and equitable. *Berkmeyer v. Kellerman*, 32 Ohio St. 239. See Sugd. V. & P. (8th Am. ed.) 685 *et seq.*, where the rules are clearly stated by Lord St. Leonards, and the American cases are all collected and arranged by Hon. J. C. Perkins.

(a) The trustee cannot retain the purchaser would resell to the benefit of a purchase, by which the trustee. *Re Postlethwaite*, 59 a friend bought at his sale on a L. T. 58.
mere friendly understanding that

cence.¹ But if he has made a fair sale to a third party, it has been held that the trustee could repurchase from his trustee, though the transaction will be jealously scrutinized in equity.²

§ 198. The *cestui que trust* alone can avoid such conveyances.³ They are at his option. And if they are found to be beneficial to him or otherwise, he may compel the trustee to complete a purchase and take the estate and pay the purchase-money.⁴

§ 199. The above rule does not apply to mere naked or dry trustees who practically have no interest in or power over the estate, as trustees to preserve contingent remainders.⁵ Where the trustee has no duty to perform, as where one is trustee in fee for another in fee, having no authority over the estate, and standing in no relation of influence over the *cestui que trust*, the person named as trustee may purchase;⁶ and if the *cestui que trust* make all the arrangements for the sale, such as plans, notices, choice of auctioneer, terms and conditions, and the trustee is in no situation to obtain any exclusive information, the court will deal with the contract as with contracts between other parties.⁷ A mortgagee may purchase of the mortgagor under a decree of foreclosure or otherwise,⁸ but if the mortgage contains a power of sale, the mortgagee becomes a trustee of

¹ Pearce v. Gamble, 72 Ala. 341.

² Foxworth v. White, 72 Ala. 224.

³ Rice v. Cleghorn, 21 Ind. 80.

⁴ Thorp v. McCullum, 1 Gilm. 624; McClure v. Miller, 1 Bail. Ch. 107; Lister v. Lister, 6 Ves. 631; *Ex parte Reynolds*, 5 Ves. 707; Sanderson v. Walker, 13 Ves. 603; Larco v. Casaneuava, 30 Cal. 560.

⁵ Parker v. White, 11 Ves. 226; Naylor v. Winch, 1 S. & S. 567; Sutton v. Jones, 15 Ves. 587; Pooley v. Quilter, 4 Drew. 189.

⁶ Pooley v. Quilter, 4 Drew. 189.

⁷ Coles v. Trecothick, 9 Ves. 248; *Monro v. Allaire*, 2 Caines' Cas. 183; Salmon v. Cutts, 4 De G. & Sm. 131.

⁸ Iddings v. Bruen, 4 Sandf. Ch. 223; *Murdoch's Case*, 2 Bland, 461; Knight v. Majoribanks, 2 Mac. & G. 10; 2 Hall & T. 308; Rhodes v. Sanderson, 36 Cal. 414.

the power of sale for the mortgagor, and neither he nor his agents, attorneys, or auctioneers, can purchase for themselves or others; or, if they do, they become constructive trustees.¹ (a) And so the pledgee of stock cannot buy the same even at the broker's board.² Where land is devised to

¹ *Dobson v. Racey*, 4 Seld. 216; *Waters v. Groom*, 11 Cl. & Fin. 684; *Mapps v. Sharpe*, 32 Ill. 13; *Murray v. Vanderbilt*, 39 Barb. 140; *Blackley v. Fowler*, 31 Cal. 326; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Elliot v. Wood*, 53 Barb. 285; *Thornton v. Jarvin*, 43 Mo. 153; *Wall v. Town*, 45 Ill. 493; *Robinson v. Cudwin*, 41 Ala. 693; *Allen v. Chatfield*, 3 Minn. 435; *Montague v. Dawes*, 14 Allen, 369. See *Bailey v. Ætna Insurance Co.*, 10 Allen, 286; *Fowle v. Merrill*, 10 Allen, 350; *Smith v. Provin*, 4 Allen, 516; *Woodlee v. Burch*, 43 Mo. 231; *Dyer v. Shurtleff*, 112 Mass. 165. See *Scott v. Mann*, 33 Tex. 721. But a second mortgagee may purchase under a power of sale contained in a prior mortgage. *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; 2 De G., J. & S. 455; *Shaw v. Bunney*, 34 L. J. Ch. 257; 11 Jur. (N. S.) 99; 2 De G., J. & S. 468; *Kirkwood v. Thompson*, 11 Jur. (N. S.) 385; 2 De G., J. & S. 613. And it is said that the administrator of the mortgagee may purchase. *Woodlee v. Burch*, 43 Mo. 231. And so a trustee may buy the equity of redemption in property on which he holds a mortgage as trustee. *Britton v. Lewis*, 8 Rich. Eq. 271; *Eldridge v. Smith*, 5 Shaw, 484. The power of sale is a power coupled with an interest, and is irrevocable. *Capron v. Attleborough Bk.*, 11 Gray, 492. And can be executed after the death of the mortgagor. *Varnum v. Meserve*, 8 Allen, 158; *Harnehall v. Orndorff*, 35 Md. 340. As to form of notice, see *Roche v. Farnsworth*, 106 Mass. 509, and remarks of Endicott, J., upon this case in *Dyer v. Shurtleff*, 112 Mass. 165. Equity will aid the defective execution of a power of sale in a mortgage in favor of a *bona fide* purchaser who has paid his money for the estate. *Beatty v. Clark*, 20 Cal. 11; *Rowen v. Lamb*, 4 Green, 468. The whole matter of power of sale in mortgages, with the authorities, is stated in 1 Sugd. V. & P. 65-68. If a power of sale in a mortgage provides for the payment of the expenses of the sale, counsel fees may be paid. *Varnum v. Meserve*, 8 Allen, 158. But the mortgagee can receive nothing for his own time and trouble in executing the power. *Imboden v. Atkinson*, 23 Ark. 622.

² *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242; *Baltimore Ins. Co. v. Dalrymple*, id. 269; *Byron v. Rayner*, id. 424.

(a) In Massachusetts, a mortgage with power of sale usually authorizes the mortgagee to become a purchaser; in such case, he may, if so authorized, make the deed directly to himself. *Hall v. Bliss*, 118 Mass. 554. The power of sale may be fully executed by one to whom the mortgage has been assigned as collateral security. *Holmes v. Turner's Falls Co.*, 150 Mass. 536.

one charged with the payment of an annuity to another for life, the devisee does not stand in the position of trustee for the annuitant, and he may purchase the annuity at a profit.¹ So a *cestui que trust* may devise property to his trustee, and there is no presumption against such gifts.² A *cestui que trust* may purchase the trust property or other property of the trustee, and the purchase will be good; at least the trustee cannot set it aside.³ But sales to a *cestui que trust* involving an investment of the trust fund, or any dealing in relation to it, may be avoided by the *cestui que trust*.⁴

§ 200. Conveyances from wards to guardians are investigated with more severity by courts than contracts between parent and child, for the reason that there is not that family relationship and affection which sustain and uphold family settlements. The relation between guardian and ward is one of great influence over the ward, and is generally founded upon the pecuniary relation between them. While the relation actually subsists, no contracts can be made.⁵ But if a contract or conveyance is made by the ward to the guardian just after attaining his property, and before a full settlement is made, and while the influence of the guardian is still in full force, courts will examine it in all its aspects; and the guardian claiming under such a conveyance must satisfy the court that the transaction was fair and proper, and that it did not proceed from undue influence, or from any fear, hope, or other unworthy motive induced in the mind of the ward by the conduct of the guardian.⁶ If there

¹ *Powell v. Murray*, 2 Edw. 636.

² *Stump v. Gaby*, 5 De G., M. & G. 623; *Hindson v. Wetherill*, id. 301. But see *Waters v. Thorn*, 22 Beav. 547.

³ *Walker v. Brungard*, 13 Sm. & M. 723; *Bank v. Maey*, 4 Ind. 362.

⁴ *McCants v. Bee*, 1 McCord, Ch. 382; *Chester v. Greer*, 5 Humph. 26; *Wade v. Harper*, 3 Yerg. 383. Where a sale of land by trustee of a bank is sought to be avoided by the *cestui que trust*, the improvements cannot be made a charge against the seller. *Paine v. Irwin*, 16 Hun, 390.

⁵ *Dawson v. Massey*, 1 B. & B. 226; *Blackmore v. Shelby*, 8 Humph. 439; *Bostwick v. Atkins*, 3 Comst. 53; *Gallatian v. Cunningham*, 8 Cow. 361; *Clarke v. Devereaux*, 1 S. C. 172.

⁶ *Richardson v. Linney*, 7 B. Mon. 471; *Andrews v. Jones*, 10 Ala.

is the slightest suspicion of any improper motive for a gift, as that a better or more speedy settlement may be obtained, the conveyance will be avoided, and the guardian will continue to hold the property in trust for the ward. Where a guardian improperly procures an infant's land to be sold by decree of a court, the conveyance will be avoided; but if the land has been conveyed to an innocent purchaser without notice, the title will be allowed to stand.¹ (a) The influence of the guardian over the ward may be so subtle, and the motives of the gift may be of such a nature, as to baffle a court of equity in reaching them. Therefore it has been said that, although the gift from the ward may be a highly moral act, and alike creditable and honorable to him, yet, if the court is not entirely satisfied by clear demonstration that the gift was properly made, it will be set aside. Nothing can be allowed to stand that proceeds from the pressure of the relation of guardian and ward fresh upon the mind of the ward.² But if the relation has entirely ceased, and a

400; *Eberts v. Eberts*, 54 Penn. St. 110; *Dawson v. Massey*, 1 B. & B. 229; *Aylward v. Kearney*, 2 id. 463; *Wright v. Proud*, 13 Ves. 136; *Wedderburn v. Wedderburn*, 4 M. & C. 41; *Mulhallen v. Marum*, 3 Dr. & W. 317; *Cary v. Mansfield*, 1 Ves. 379; *Garvin v. Williams*, 44 Mo. 465; *Amer. Law Reg.* vol. 11 (N. S.), 656; *Ashton v. Thompson*, 32 Minn. 25.

¹ *Gwinn v. Williams*, 30 Md. 376.

² *Hatch v. Hatch*, 9 Ves. 297; *Hylton v. Hylton*, 2 Ves. 548; *Pierce v. Waring*, id., and 1 Ves. 380, and 1 P. Wms. 120, n.; 1 Cox, 125; *Wood v. Downes*, 18 Ves. 126; *Johnson v. Johnson*, 5 Ala. 90; *Williams v. Powell*, 1 Ired. Eq. 460; *Caplinger v. Stokes*, Meigs, 175; *Somes v. Skinner*, 16 Mass. 348; *Whitman's App.*, 28 Penn. St. 348; *Hawkin's App.*, 32 id. 263; *Scott v. Freeland*, 7 Sm. & M. 420; *Garvin v. Williams*, 44 Mo. 465.

(a) A guardian, unlike a trustee, has no title to his ward's property; suits must be brought in the latter's name; and contracts made by the guardian bind only himself. *Richmond v. Adams Nat. Bank*, 152 U. S. 359; *Lombard v. Morse*, 155 Mass. 136; *Dalton v. Jones*, 51 Miss. 585; *Kingsbury v. Powers*, 131 Ill. 182; *Poullain v. Poullain*, 76 Ga. 420. The probate court may authorize or ratify a guardian's conveyance of his ward's property. *Doty v. Hubbard*, 55 Vt. 278; *Hain's Estate*, 167 Penn. St. 55; *State v. Hamilton County Com'rs*, 39 Ohio St. 58.

full settlement has been made, and the ward has obtained the full control of his property, and if sufficient time has elapsed to emancipate the mind of the ward from all undue impressions and influences, it may not only be proper, but highly meritorious and honorable, for a ward to make a fitting gift to a guardian who has faithfully performed his trust; and a court fully satisfied upon these points would uphold it.¹

§ 201. In the same manner courts of equity carefully scrutinize contracts between parents and children by which the property of children is conveyed to parents. The position and influence of a parent over a child are so controlling, that the transaction should be carefully examined, and sales by a child to a parent must appear to be fair and reasonable.² Such contracts are not, however, *prima facie* void, but there must be some affirmative proof of undue influence or other improper conduct to render the transaction void; for while the parent holds a powerful influence over the child, the law recognizes it as a rightful and proper influence, and does not presume, in the first instance, that a parent would make use of his authority and parental power to coerce, deceive, or defraud the child.³ Therefore it is always necessary to prove some improper and undue influence, in order to set aside contracts between parents and children.⁴ (a) As purchases by a parent in the name of a child do not create a resulting trust, but are presumed, in the first instance, to be the advances made by the parent to the child, so convey-

¹ *Hylton v. Hylton*, 2 Ves. 547; *Hatch v. Hatch*, 9 Ves. 518.

² *Blunder v. Barker*, 1 P. Wms. 639; *Wallace v. Wallace*, 2 Dr. & W. 452; *Cocking v. Pratt*, 1 Ves. 401; *Heron v. Heron*, 2 Atk. 181; *Carpenter v. Heriot*, 1 Eden, 328; *Young v. Peachey*, 2 Atk. 258.

³ *Jenkins v. Pye*, 12 Pet. 253, 254.

⁴ *Cocking v. Pratt*, 1 Ves. 401; *Hawes v. Wyatt*, 3 Bro. Ch. 156; 2 Cox, 263; *Heron v. Heron*, 2 Atk. 161; *Young v. Peachey*, id. 254; *Carpenter v. Heriot*, 1 Eden, 328.

(a) If a father abandons the benefit which he unfairly obtains by a settlement from his child, the rest of the settlement may stand good. *Hoblyn v. Hoblyn*, 41 Ch. D. 200. See *Bainbrigge v. Browne*, 18 Ch. D. 188; *Readdy v. Pendergast*, 55 L. T. 767.

ances to the parent by the child may be a proper family arrangement, and for the best interest of the child.¹ If no such considerations can be found in the case, and the conveyance, after all allowances are made, is found to have been wrongfully obtained from the child, a court of equity will set it aside or convert the parent into a trustee.² But the proceedings must be had at once. The child cannot wait until the parent's death or until the rights of other parties have intervened.³ The same rules apply when contracts are made between children and those who have put themselves *in loco parentis*;⁴ and so when family relatives make use of their position and influence to obtain undue and improper advantages, as where two brothers obtained a deed from a sister, it was set aside.⁵

§ 202. The relation of attorney and client is one of especial confidence and influence, and while that relation continues the attorney cannot receive gifts or make pur-

¹ Blackborn v. Edgeley, 1 P. Wms. 607; Cooke v. Burtchaell, 2 Dr. & W. 165; Browne v. Carter, 5 Ves. 877; Tendrill v. Smith, 2 Atk. 85; Cory v. Cory, 1 Ves. 19; Kinchant v. Kinchant, 3 Bro. Ch. 374; Tweddell v. Tweddell, T. & R. 14; Hartopp v. Hartopp, 21 Beav. 259; Hannah v. Hodgson, 30 Beav. 19.

² King v. Savery, 1 Sm. & Gif. 271; 5 H. L. Ca. 627; Berdoe v. Dawson, 11 Jur. (N. S.) 254; Bury v. Oppenheim, 26 Beav. 594; Baker v. Bradley, 7 De G., M. & G. 597; 35 Eng. L. & Eq. 449; Field v. Evans, 15 Sim. 375; Slocumb v. Marshall, 2 Wash. C. C. 397; Brice v. Brice, 5 Barb. 533; Whelan v. Whelan, 2 Cow. 537; Young v. Peachey, 2 Atk. 254; Glisson v. Ogden, id. 258; Baker v. Tucker, 2 Eng. L. & Eq. 1; Blackborn v. Edgeley, 1 P. Wms. 607; Morris v. Burroughs, 1 Atk. 402; Tendrill v. Smith, 2 Atk. 85; Hoghton v. Hoghton, 15 Beav. 278; Cooke v. Lamotte, id. 234; Wallace v. Wallace, 2 Dr. & W. 452; Hunter v. Atkins, 3 M. & K. 146; Archer v. Hudson, 7 Beav. 551; Findley v. Patterson, 2 B. Mon. 76.

³ Wright v. Vanderplank, 2 K. & J. 1; 8 De G., M. & G. 133; Brown v. Carter, 5 Ves. 877; Taylor v. Taylor, 8 How. 201; Crispell v. Dubois, 4 Barb. 393.

⁴ Archer v. Hudson, 7 Beav. 551; Maitland v. Backhouse, 16 Sim. 68; Maitland v. Irving, 15 id. 437.

⁵ Sears v. Shafer, 2 Seld. 268; Hewitt v. Crane, 2 Halst. Ch. 159; Boney v. Hollingsworth, 23 Ala. 690.

chases from the client.¹ It has been said in some cases that the attorney is absolutely prohibited from entering into contracts with his clients.² If the rule is not quite so peremptory as this, it at least goes to the extent of prohibiting him from contracting with his client for an interest in the subject-matter of the litigation.³ The client is so completely in the hands of the attorney in relation to the subject-matter of litigation, that it would be almost impossible for him to enter into a free and fair contract in regard to it. Besides, it is against the policy of the law that attorneys should obtain interests in litigated claims, and exercise their offices under such influences of gain. In all cases the burden is upon the attorney making a purchase of a client, to vindicate the transaction from all suspicion.⁴ (a) And if the attorney

¹ *Welles v. Middleton*, 1 Cox, 125; *Wright v. Proud*, 13 Ves. 137; *Cheslyn v. Dalby*, 2 Y. & C. Ch. 194; *Hunter v. Atkins*, 3 M. & K. 113; *Wood v. Downes*, 18 Ves. 126; *Savery v. King*, 35 Eng. L. & Eq. 100; *De Montmorency v. Devereaux*, 7 Cl. & Fin. 188; *Jones v. Tripp*, Jac. 322; *Godard v. Carlisle*, 9 Price, 169; *Edwards v. Meyrick*, 2 Hare, 68.

² *Wright v. Proud*, 13 Ves. 138; *Holman v. Loynes*, 4 De G., M. & G. 270; *Thompson v. Judge*, 3 Dr. 306; 19 Jur. 583; 24 L. J. Ch. 785; *Henry v. Raiman*, 25 Penn. St. 354; *West v. Raymond*, 21 Ind. 305; *Atkins v. Delmage*, 12 Ir. Eq. 2; *Webster v. King*, 33 Cal. 148; *Frank's App.*, 59 Penn. St. 190; *Lovatt v. Kuipe*, 12 Ir. Eq. 124; *Purcell v. Buckley*, id. 55.

³ *Oldham v. Hand*, 2 Ves. 259; *Wood v. Downes*, 18 Ves. 120; *Hall v. Hallett*, 1 Cox, 134; *West v. Raymond*, 21 Ind. 305.

⁴ *Newman v. Payne*, 2 Ves. Jur. 199; *Welles v. Middleton*, 1 Cox, 112; 4 Bro. P. C. 245; *Harris v. Tremenheere*, 15 Ves. 34; *Hunter v. Atkins*, 3 M. & K. 135; *Cane v. Allen*, 2 Dow, 289; *Champion v. Rigby*, 1 R. & M. 539; *Bellow v. Russell*, 1 B. & B. 107; *Gibson v. Jeyes*, 6 Ves. 277; *Uppington v. Buller*, 2 Dr. & W. 184; *Walmsley v. Booth*, 2 Atk.

(a) See *Liles v. Terry*, [1895] 2 Q. B. 679; *United States v. Coffin*, 83 F. R. 337; *Donahoe v. Chicago Cricket Club (Ill.)*, 52 N. E. 351; *Gibson v. Gosson (Ark.)*, 47 S. W. 237; *Kofoed v. Gordon (Cal.)*, 54 Pac. 1115; *Morrison v. Thomas (Texas)*, 48 S. W. 500; *Brigham v. Newton*, 49 La. Ann. 1539; *infra*, § 212, n. (a). Contingent fees are

2 lawful, but a champertous trust is wholly void. *Johnson v. Van Wyck*, 4 App. D. C. 294; *Frink v. McComb*, 60 F. R. 486. If an attorney purchases his client's real estate at a judicial sale, the client may elect to hold him a trustee. *Olson v. Lamb (Neb.)*, 76 N. W. 433. See *Herr v. Payson*, 157 Ill. 244; *Ellis v. Allen*, 99 Wis. 598.

cannot produce evidence that puts the transaction clearly beyond all doubt or question, it will be set aside or he will be converted into a trustee.¹ This disability of an attorney continues as long as the relation of attorney and client continues, and as much longer as the influence of the relation can be supposed to extend. If the relation has ceased, but the influence of the relation continues to affect the minds of the parties, all contracts made under the influence will be avoided.² But if the relation has entirely ceased, and there can be supposed to be no influence remaining, the rule will not apply.³ And so, if an attorney makes a purchase of a client of property entirely disconnected with the subject of the litigation, and the transaction is in all respects as if it had taken place between strangers, the rule will not apply.⁴ So the rule does not apply to a gift to an attorney in the will of a client, if the will is a good and valid instrument in the courts where it is presented for probate;⁵ and a voidable conveyance to an attorney may be confirmed in the will of

30; *Montesquieu v. Sandys*, 18 Ves. 302; *Edwards v. Meyrick*, 2 Hare, 60; *Wood v. Downes*, 18 Ves. 120; *Lewis v. Hillman*, 3 H. L. Cas. 607; *Salmon v. Cutts*, 4 De G. & Sm. 131; *Holman v. Loynes*, 4 De G. M. & G. 270; *King v. Savery*, 5 H. L. Cas. 627; *Robinson v. Briggs*, 1 Sm. & Gif. 184; *Greenfield's Est.*, 2 Harris, 489; *Merritt v. Lambert*, 10 Paige, 357; *Wallis v. Loubat*, 2 Denio, 607; *Howell v. Ransom*, 11 Paige, 538; *Evans v. Ellis*, 5 Denio, 640; *Barry v. Whitney*, 3 Sand. S. C. 696; *Hawley v. Cramer*, 4 Cow. 717; *Mott v. Harrington*, 12 Vt. 199; *Miles v. Ervin*, 1 McCord, Ch. 524; *Waters v. Thorn*, 22 Beav. 547; *Bank v. Tyrrell*, 27 Beav. 273; 10 H. L. Cas. 26; *Wall v. Cockerell*, id. 229; *Brown v. Kennedy*, 33 Beav. 133; *Smedley v. Varley*, 23 Beav. 359; *O'Brien v. Lewis*, 4 Gif. 221; *Corley v. Stafford*, 1 De G. & J. 238; *Spring v. Pride*, 10 Jur. (N. S.) 646; *Gresley v. Mousley*, 4 De G. & J. 78; *Barnard v. Hunter*, 2 Jour. (N. S.) 1213; *Douglass v. Culverwell*, 31 L. J. Ch. 65, 543; *Brock v. Barnes*, 40 Barb. 521.

¹ *Ibid.*; *Smith v. Brotherline*, 62 Penn. St. 461.

² *Henry v. Raiman*, 25 Penn. St. 354; *Leisenring v. Black*, 5 Watts, 303; *Hockenbury v. Carlisle*, 5 Watts & S. 350.

³ *Wood v. Downes*, 18 Ves. 127.

⁴ *Edwards v. Meyrick*, 2 Hare, 60; *Bellows v. Russell*, 1 B. & B. 104; *Montesquieu v. Sandys*, 18 Ves. 302.

⁵ *Hindson v. Wetherell*, 5 De G., M. & G. 30; overruling same case, 1 Sm. & G. 604. But see 23 L. Rev. 442, and notes to 1 Sm. & G. 604.

the client.¹ But the rule will not apply to an attorney incidentally consulted concerning some point of the litigation, but who is not employed or confided in, for the management of the case,² nor will it apply to the attorney upon the other side.³ Nor will it apply after the relation has ceased and the attorney has assumed a hostile position in endeavoring to collect his fees.⁴ But it has been held that an attorney having a lien or an execution in favor of his client could not buy in land of his client at a sale thereof on execution.⁵ If an attorney takes an absolute deed from a client in payment of his fees, the court may order it to stand as a mortgage security,⁶ and where there was a fair agreement that an attorney's fees should be charged upon the estate, if recovered, the court allowed it to stand in the absence of undue influence,⁷ and so the court will not interfere after a great lapse of time where the sale was for full value.⁸ Where an attorney buys land at an execution sale in favor of his client, the latter may elect to hold the lawyer his trustee, but must make his choice within a reasonable time.⁹

§ 203. All the dealings between attorney and client will be carefully examined by courts, and no purchase of a client's property will be allowed to stand.¹⁰ Thus a bond obtained from a poor and distressed client, the consideration

¹ *Stump v. Gaby*, 2 De G., M. & G. 623. But see *Waters v. Thorn*, 22 Beav. 447.

² *Dobbins v. Stevens*, 17 S. & R. 13; *Devinney v. Norris*, 8 Watts, 314.

³ *Bank v. Foster*, 8 Watts, 305.

⁴ *Johnson v. Fesemeyer*, 3 De G. & J. 13; *Smith v. Brotherline*, 62 Penn. St. 461.

⁵ *Stockton v. Ford*, 11 How. 232.

⁶ *Pearson v. Benson*, 28 Beav. 598; *Morgan v. Higgins*, 5 Jour. (N. S.) 236.

⁷ *Moss v. Bainbridge*, 6 De G., M. & G. 292; *Blagrove v. Routh*, 2 K. & J. 509.

⁸ *Clanricarde v. Henning*, 30 Beav. 175.

⁹ *Ward v. Brown*, 87 Mo. 468.

¹⁰ *Moore v. Brackin*, 27 Ill. 23; *Smith v. Brotherline*, 62 Penn. St. 461.

not appearing with sufficient clearness, was set aside,¹ and so a bond was not allowed to stand except for the amount of fees actually due,² and a judgment was inquired into after a considerable lapse of time.³ And even where a barrister married a lady client, and undertook to draw the marriage settlement, according to the stipulations between them, it was held to be open to investigation by the court.⁴ (a) The same rules are applied to all persons standing in the relation of attorneys or confidential advisers, although they are not attorneys in fact; thus clerks in an attorney's office, who do business for the client and obtain a knowledge of his affairs and his confidence, cannot avail themselves of their position to make favorable bargains or purchases,⁵ and so one who acts as a confidential adviser in a matter before a magistrate, where attorneys are not employed, is under the same obligations and disabilities.⁶ Of course, if there is actual fraud committed by an attorney in a purchase of a client, the transaction will be summarily dealt with.⁷

§ 204. The same principles apply to transactions between all persons standing in confidential and influential relations to each other. The person thus possessing the confidence of another, and having an influence by reason of such confidence, cannot use his influence to obtain contracts, conveyances, or property, and the burden of proof is always on the

¹ *Proof v. Hines*, Cas. t. Talb. 111; *Walmesley v. Booth*, 2 Atk. 28.

² *Newman v. Payne*, 4 Bro. Ch. 350; 2 Ves. Jr. 200; *Langstaffe v. Taylor*, 14 Ves. 262; *Pitcher v. Rigby*, 9 Price, 79; *Jones v. Roberts*, 9 Beav. 419.

³ *Drapers' Company v. Davis*, 2 Atk. 295.

⁴ *Corley v. Stafford*, 1 De G. & J. 258.

⁵ *Hobday v. Peters*, 28 Beav. 349; 6 Jur. (N. S.) 794; *Cowdry v. Day*, 5 Jur. (N. S.) 1199; *Gardner v. Ogden*, 22 N. Y. 327; *Poillon v. Martin*, 1 Sandf. Ch. 569.

⁶ *Buffalow v. Buffalow*, 5 Dev. & Bat. Eq. 241.

⁷ *Webster v. King*, 33 Cal. 348.

(a) See *Clark v. Girdwood*, 7 Luddy's Trustee v. Peard, 33 Ch. D. Ch. D. 9; *Tyars v. Alsop*, 61 L. T. 500.
8; *James v. Kerr*, 40 Ch. D. 449;

party standing in the position of influence, to show the transaction just and fair.¹ *Quasi* guardians, husband and wife, confidential advisers, stewards, keepers of asylums in which the *quasi ward* may have been treated, and confidential medical advisers, all come within the rule.² But the mere fact that the donee is an attending physician, there being no confidential relation, will not avoid a deed.³ But the administrator of a deceased partner may buy the partnership property, although he may be a surviving partner.⁴

§ 205. Upon the same principles, administrators and executors cannot purchase the estate under their charge to administer. They cannot purchase directly of themselves, nor from the heirs, legatees, devisees, or other persons interested in the estate,⁵ nor can they purchase indirectly by

¹ *Holt v. Agnew*, 67 Ala. 368.

² *Trevelyan v. Charter*, 9 Beav. 140; 11 Cl. & Fin. 714; *Revett v. Harvey*, 1 S. & S. 502; *Huguenin v. Baseley*, 14 Ves. 273; *Gray v. Mansfield*, 1 Ves. 379; *Wright v. Proud*, 13 Ves. 136; *Ahearne v. Hogan*, 1 Dr. 310; *Billing v. Southee*, 9 Hare, 534; 16 Jur. 188; *Crispell v. Dubois*, 4 Barb. 393; *Blackie v. Clarke*, 22 L. J. Ch. 377; *Whitehorn v. Hines*, 1 Munf. 559; *Shalleross v. Oldham*, 2 John. & H. 609; *Dent v. Bennett*, 4 M. & Cr. 269; *Gibson v. Russell*, 2 Y. & C. N. R. 104; *Pratt v. Barker*, 1 Sim. 1; *Swisholm's App.*, 56 Penn. St. 475; *Falk v. Turner*, 101 Mass. 494; *Rhodes v. Bate*, L. R. 1 Ch. 252.

³ *Doggett v. Lane*, 12 Mo. 215.

⁴ *Savage v. Williams*, 15 La. An. 250; *Carter v. McManus*, id. 641; *Dugas v. Gilbeau*, id. 581.

⁵ *Davoue v. Fanning*, 2 Johns. Ch. 252; *Van Epps v. Van Epps*, 9 Paige, 237; *Ward v. Smith*, 3 Sandf. Ch. 592; *Ames v. Browning*, 1 Bradf. 321; *Rogers v. Rogers*, 3 Wend. 503; *Bostwick v. Atkins*, 1 Comst. 53; *Michoud v. Girod*, 4 How. 504; *Drysdale's App.* 14 Penn. St. 531; *Moody v. Vandyke*, 4 Binn. 31; *Beeson v. Beeson*, 9 Barr, 279; *Winter v. Geroe*, 1 Halst. Ch. 319; *Conway v. Green*, 1 H. & J. 151; *Bailey v. Robinson*, 1 Grat. 4; *Hudson v. Hudson*, 5 Munf. 180; *Baines v. McGee*, 1 Sm. & M. 208; *Baxter v. Costin*, 1 Busb. Eq. 262; *Breckenridge v. Holland*, 2 Blackf. 377; *Edmunds v. Crenshaw*, 1 McCord, Ch. 252. But in South Carolina an executor may purchase the personal property. *Stallings v. Foreman*, 2 Hill Eq. 401; and so in Alabama, *Julian v. Reynolds*, 8 Ala. 680; *Peyton v. Enos*, 16 La. An. 135; *Van Weckle v. Malla*, id. 325; *Huston v. Cassidy*, 2 Beas. 228; *Mulford v. Winch*, 3 Stockt. 16; *Culver v. Culver*, id. 215; *Dugas v. Gilbeau*, 15 La. An. 581.

procuring a third person to purchase in the first instance, and by receiving a conveyance from such third person.¹ This rule is so strict, that they cannot purchase any of the assets of the estate under their charge, although the assets are ordered by the court to be sold at public auction;² and even where a creditor seized a portion of the estate and exposed it to public sale, it was held that the executor or administrator could not purchase.³ So if an executor join with others in the purchase of the estate the sale may be avoided.⁴ If, however, the estate is sold in good faith to a stranger, with no collusion between him and the executor, there is nothing to prevent the executor from purchasing it afterwards like any other property.⁵ So an executor may purchase the interest of a third person in the estate.⁶ If fraud is superadded to a purchase by an executor, or any use of his situation is made to make a more favorable purchase, it will of course be avoided, or he will be ordered to account for the property and all the profits received.⁷ But generally a purchase of the assets of an estate by an executor is not void, but only voidable, and such sale may be confirmed by all the parties interested in the estate;⁸ and so a long acqui-

¹ *Davoue v. Fanning*, 2 Johns. Ch. 252; *Paul v. Squibb*, 12 Penn. St. 296; *Woodruff v. Cook*, 2 Edw. Ch. 259; *Hawley v. Cramer*, 4 Cow. 717; *Beaubien v. Poupard*, Harr. Ch. 206; *Buckles v. Lafferty*, 2 Rob. 292; *Hunt v. Bass*, 2 Dev. Eq. 292; *Forbes v. Halsey*, 26 N. Y. 53; *Miles v. Wheeler*, 43 Ill. 123; *Kruse v. Stephens*, 47 Ill. 112; *Smith v. Drake*, 23 N. J. Eq. 302; *Tiffany v. Clark*, 1 N. Y. Sup. Ct. Add. 9.

² *Wallington's Est.*, 1 Ashm. 307; *Beeson v. Beeson*, 9 Barr. 279; *Rham v. North*, 2 Yeates, 117; *Jewett v. Miller*, 10 N. Y. 402; *Fox v. Mackreth*, 1 Lead. Cas. Eq. 1; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Colburn v. Morton*, 1 N. Y. Dec. 378; *Farrar v. Farley*, 3 S. C. 11.

³ *Spindler v. Atkinson*, 3 Md. 410; *Fleming v. Teran*, 12 Ga. 394; *Wyncoop v. Wyncoop*, 12 Ind. 206. But the contrary rule was held in *Fisk v. Sarber*, 6 Watts & S. 18; *Prevost v. Gratz*, 1 Pet. C. C. 364; *Campbell v. Johnson*, 1 Sandf. Ch. 148; *Bank of Orleans v. Torrey*, 7 Hill, 260.

⁴ *Mitchum v. Mitchum*, 3 Dana. 260; *Paul v. Squibb*, 12 Penn. St. 296.

⁵ *Silverthorn v. McKinister*, 12 Penn. St. 67.

⁶ *Alexander v. Kennedy*, 3 Grat. 379.

⁷ *Vanhorn v. Fonda*, 5 Johns. Ch. 388; *Hudson v. Hudson*, 5 Munf. 180.

⁸ *Harrington v. Brown*, 5 Pick. 519; *Bruch v. Lantz*, 2 Rawle, 392;

escence in a purchase made by an executor, by all the heirs, would be held to be a confirmation.¹ If an administrator purchases the estate at his own sale, and afterwards conveys the estate to a third person, his vendee will be charged with notice of the defect of title, as it would be apparent upon the face of the deed.² But if the administrator should collusively convey to a third person and take back a deed from him, and then himself sell, the purchaser would not probably be charged with notice unless he had actual notice.³

§ 206. The relation of principal and agent is a fiduciary one, and the same observations apply as to other relations of trust and confidence. (a) Some have doubted whether it would not have been wiser to have prohibited all contracts

Pennock's App., 14 Penn. St. 446; *Longworth v. Goforth*, Wright, 192; *Dunlap v. Mitchell*, 10 Ohio, 117; *Williams v. Marshall*, 4 G. & J. 377; *Moore v. Hilton*, 12 Leigh, 2; *Scott v. Freeland*, 7 Sm. & M. 410; *Lyon v. Lyon*, 8 Ired. Eq. 201.

¹ *Jennison v. Hapgood*, 7 Pick. 1; *Hawley v. Cramer*, 4 Cow. 719; *Ward v. Smith*, 3 Sandf. Ch. 592; *Baker v. Read*, 18 Beav. 398; *Musselman v. Eshelman*, 10 Barr, 394; *Bell v. Webb*, 2 Gill, 164; *Todd v. Moore*, 1 Leigh, 457.

² *Lazarus v. Bryson*, 3 Binn. 59; *Ward v. Smith*, 3 Sandf. 592; *Smith v. Drake*, 23 N. J. Eq. 302; *Potter v. Pearson*, 60 Maine, 220.

³ *Johnson v. Bennett*, 39 Barb. 237.

(a) A mere agent is not a trustee when he does not claim or possess title. *Brown v. Brown*, 154 Ill. 35; *Stanford v. Mann*, 167 Ill. 79; *Comley v. Dazian*, 114 N. Y. 161. The cashier of a bank is not a legal trustee; and he may hold in his own right land bought with properly borrowed money of the bank. *Barth v. Koetting*, 99 Wis. 242. An agent cannot constitute himself a trustee against his principal. *Wright v. Mills*, 63 L. T. 186. An agent's possession of securities for a loan is deemed that of his principal. *Lowery v. Erskine*, 113 N. Y. 52. He is under the same duty as a trustee

not to attempt personal gain directly or indirectly by purchasing or dealing with his principal's property. *Lister v. Stubbs*, 45 Ch. D. 1; *Halsey v. Cheney*, 68 F. R. 763; *Stevenson v. Kyle*, 42 W. Va. 229; *Tyler v. Sanborn*, 128 Ill. 136; *Darlington's Estate*, 147 Penn. St. 624; *Luscombe v. Grigsby* (S. D.), 78 N. W. 357. He becomes a constructive trustee when, in violation of his duty to his principal, or by misusing the latter's funds, he purchases real estate for himself. *Ibid.*; *Gashe v. Young* (Ohio), 38 N. E. 20; *Boswell v. Cunningham*, 32 Fla. 277; *Lee v. Patten*, 34 Fla. 149; *Grouch*

between parties sustaining these relations to each other, and to have thus taken away all temptation to abuse the trust, *v. Hazlehurst L. Co. (Miss.)*, 16 So. 496; *Walter v. Jones*, 107 Ala. 331. Thus, an agent, purchasing as such at an auction sale, may be compelled to convey the purchased estate, if he takes the title in his own name. See *Fletcher v. Bartlett*, 157 Mass. 113; *Roby v. Colehour*, 135 Ill. 300; *Collins v. Williamson*, 94 Ga. 635; *Hughes v. Wilson*, 128 Ind. 491; *Chaffin v. Hull*, 42 F. R. 524; *Lee v. Patten*, 34 Fla. 149; *Bourke v. Callanan*, 160 Mass. 195. In such cases the trust can be enforced by the principal's grantee. *Milner v. Rucker*, 112 Ala. 360. In general, even a *bona fide* purchaser from any agent gets no better title than the agent had to personal property other than negotiable paper or money, and the principal may recover it. *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434; *Stevenson v. Kyle*, 42 W. Va. 229.

The statute of frauds distinguishes between an agency and a trust or confidence, and an agent, who buys for himself with his own money, when directed by his principal to buy for him, will not be required to convey to the principal. *James v. Smith*, [1891] 1 Ch. 384, 388, sustaining *Bartlett v. Pickergill*, 1 Eden, 515; 4 East, 577, n., which was doubted in *Heard v. Pilley*, L. R. 4 Ch. 548. See *Browne, St. of Frauds*, § 96; *Halsell v. Wise County Coal Co. (Tex. C. App.)*, 47 S. W. 1017. The principal may also ratify his agent's authorized acts, and his right to ratify and enforce the agent's contract is not affected by the fact that

the other party has already repudiated it. *Bolton v. Lambert*, 41 Ch. D. 295; 37 W. R. 236, 434; *Long v. King (Ala.)*, 23 So. 534; see *Clews v. Jamieson*, 89 F. R. 63.

The relation of a factor to his principal may be at the same time that of debtor and creditor and one of trust. See *Patapsco Guano Co. v. Bryan*, 118 N. C. 576. See *Leaphart v. Commercial Bank*, 45 S. C. 563; *Davis v. Scovern*, 130 Mo. 303; *Gisborn v. Charter Oak Life Ins. Co.*, 142 U. S. 326. When the legal title to the proceeds of consigned goods, deposited in a bank, is in a factor, and the principal is thereby prevented from suing the bank at law, the latter may maintain a bill in equity against the bank, if it receive the payment with knowledge that the money belongs equitably to the factor's consignor. *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411, 419.

When money is placed in the hands of one person to be delivered to another, a trust arises in the latter's favor, which he may enforce by bill in equity, if not by action at law; the acceptance of the money with notice of its ultimate destination being sufficient to create a duty on the bailee's part to devote it to the purposes intended by the bailor. In enforcing such trust, a court of equity may make such incidental orders as may be necessary for the proper protection and distribution of the fund. *Keller v. Ashford*, 133 U. S. 610; *Union Life Ins. Co. v. Hanford*, 143 U. S. 187; *McKee v. Lamon*, 159 U. S. 317, 322.

rather than to investigate each case as it arises.¹ But perhaps the entire freedom of trade and business, and the convenience of society, demand that there should be at least the possibility of dealing between persons bearing these relations, and thus there is no absolute prohibition. The principal may buy and sell of the agent, and he may make an agent the object of his bounty, but there must be the utmost good faith and frankness in the dealing.² The principal is entitled to the best skill and judgment of his agent in the conduct of his affairs. If at the same time the agent is at liberty to purchase the property of his principal, there would be such a conflict between his duty and his interest, that there could be no safety in business. An agent, therefore, if he purchases property of his principal, must communicate fully and truly every fact in relation to such property within his knowledge; and he must also be known as the purchaser, for if he acts secretly the contract will certainly be held to be fraudulent; and so if he is employed to purchase for another and he purchases for himself, he will be held to be a trustee.³ No person whose duty to another is inconsistent with his taking an absolute title to himself will be permitted to purchase for himself. For no one can hold a

¹ *Dunbar v. Tredennick*, 2 B. & B. 319; *Norris v. La Neve*, 3 Atk. 38; *Fairman v. Bavin*, 29 Ill. 75.

² *Selsey v. Rhoades*, 2 S. & S. 49; 1 Bligh, 1; *Kerr v. Dungannon*, 1 Dr. & W. 509, 541; *Huguenin v. Baseley*, 14 Ves. 273; *Molony v. Kernan*, 2 Dr. & W. 31; *Harris v. Tremeneere*, 15 Ves. 40; *Winchelsea v. Garrety*, 1 M. & K. 253; *Benson v. Heatham*, 1 Y. & C. Ch. 326; *Neeley v. Anderson*, 2 Strob. Eq. 262; *Brooke v. Berry*, 2 Gill, 83; *Persch v. Quiggle*, 57 Penn. St. 247.

³ *Lees v. Nuttall*, 1 R. & M. 53; Taml. 282; *Church v. Marine Ins. Co.*, 1 Mason, 341; *Crowe v. Ballard*, 3 Bro. Ch. 120; *Barker v. Ins. Co.*, 2 Mason, 369; *Massey v. Davies*, 2 Ves. Jr. 318; *Woodhouse v. Meredith*, 1 J. & W. 204; *Purcell v. Macnamara*, 14 Ves. 91; *Wott v. Grove*, 2 Sch. & Lef. 492; *Lowther v. Lowther*, 13 Ves. 102; *Green v. Winter*, 1 Johns. Ch. 27; *Morret v. Paske*, 2 Atk. 53; *Coles v. Trecothick*, 9 Ves. 246; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Gray v. Mansfield*, 1 Ves. 379; *Belt*, Suppl. 167; *Fox v. Mackreth*, 2 Bro. Ch. 400; 2 Cox. 320; 1 Lead. Cas. Eq. 92, and notes; *Dennis v. McCoy*, 32 Ill. 429; *Safford v. Hinds*, 39 Barb. 625; *Squire's App.*, 70 Penn. St. 268.

benefit acquired by fraud or a breach of his duty.¹ All the knowledge of the agent belongs to the principal for whom he acts, and if the agent use it for his own benefit, he will become a trustee for his principal.² Whenever one person is placed in a relation to another, by the act or consent of that other, or the act of a third person, or of the law, so that he becomes interested for him or with him in any subject of property or business, he will in equity be prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has been associated.³ Therefore, whatever an agent may be employed to do, he cannot use his position nor the knowledge obtained by his employment to obtain a bargain from his principal. Nor can he take advantage of his own negligence; as where an agent allowed his principal's property to be sold for taxes and bought it himself, he was held as a trustee, although the relation of principal and agent had ceased.⁴ In some cases he may innocently purchase of his principal; but if he conceals himself and acts through another, either in purchasing from or selling to his principal, he may be held as a trustee, or the contract may be entirely avoided;⁵ or if he

¹ *Reed v. Warner*, 5 Paige, 650; *Sweet v. Jacocks*, 6 Paige, 355; *Lees v. Nuttall*, 1 R. & M. 53; *Torrey v. Bank of Orleans*, 6 Paige, 650; *Greenfield's Est.*, 2 Harris, 489; *Sheriff v. Neal*, 6 Watts, 534; *Plumer v. Reed*, 2 Wright, 46; *Hoge v. Hoge*, 1 Watts, 163; *Swartz v. Swartz*, 4 Barr, 353; *Harrold v. Lane*, 3 Penn. St. 268; *Jenkins v. Eldredge*, 3 Story, 181; *Morris v. Nixon*, 1 How. 118; *Seichrist's App.*, 66 Penn. St. 237; *Squire's App.*, 70 id. 268.

² *Gillett v. Peppercorne*, 3 Beav. 78; *Taylor v. Salmon*, 2 Mee. & Comp. 139; 4 M. & C. 139; *Voorhees v. Church*, 8 Barb. 136; *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. Bank, &c.*, id. 649; *Cram v. Mitchell*, 1 Sandf. 251; *Dobson v. Racey*, 3 Sandf. 61; *Reed v. Norris*, 2 M. & Cr. 361; *Ringo v. Binns*, 10 Pet. 269; *Farnham v. Brooks*, 9 Pick. 212; *Davis v. Hamlin*, 108 Ill. 39.

³ *Davis v. Hamlin*, 108 Ill. 39; *Allen v. Jackson*, 122 Ill. 567.

⁴ *Morris v. Joseph*, 1 W. Va. 256.

⁵ *Winn v. Dillon*, 27 Miss. 494; *Lewis v. Hillman*, 3 H. L. Cas. 629; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Sweet v. Jacocks*, 6 Paige, 364; *Bank of Orleans v. Torrey*, 7 Hill, 260; 9 Paige, 653; *Myer's App.*, 2 Barr, 463; *Rankin v. Porter*, 7 Watts, 387; *Piatt v. Oliver*, 2 McLean, 267; 3 How. 353; *Church v. Ins. Co.*, 1 Mason, 341; *Teakle v. Barley*, 2 Brock.

accepts any benefits in conducting the business of his principal, he will hold them in trust for him,¹ or if he makes use of his position in any way to obtain a title to himself.² If in matters within the purposes of his agency he takes a conveyance in his own name, he is a trustee *ex maleficio*,³ as if he buys a tax certificate for his principal and then takes the deed in his own name.⁴ And where one partner C. gets a lease of the premises in his father's name when the other partner D. had a right to expect he would secure a joint lease for the partnership, C.'s father holds in trust not only for C. but for D. also.⁵ So if he buys for himself and his partner the land which he was engaged to buy for the plaintiff, and has the deed made to his partner and pays the money from his own funds, still a trust will result, and the payment will be considered only as a loan, on security of the title.⁶ But where one breaks a mere parol agreement to buy land for another and buys it himself, there is no trust, but only a breach of parol contract.⁷ The test is whether the act is inconsistent with duties resulting from a relation of confidence between the parties.⁸

§ 207. The directors of corporations are trustees and agents of the shareholders and of the corporation, and the same rules are applied to the contracts of directors with the corporation, as are applied to the dealings of other parties

44; *Oldham v. Jones*, 5 B. Mon. 467; *Banks v. Judah*, 8 Conn. 146; *Copeland v. Ins. Co.*, 6 Pick. 198; *McGregor v. Gardner*, 14 Iowa, 326; *Clark v. Lee*, *id.* 425.

¹ *Bailey v. Watkins*, Sug. Law of Prop. 726; *Gaskell v. Chambers* 26 Beav. 360.

² *Smith v. Wright*, 49 Ill. 403.

³ *Squire's App.*, 70 Penn. St. 268; *McMurry v. Mobley*, 39 Ark. 313; *Vallette v. Tedens*, 122 Ill. 607; *Byington v. Moore*, 62 Iowa, 470; *Kraemer v. Duestermann*, 37 Minn. 469.

⁴ *Collins v. Rainey*, 42 Ark. 531.

⁵ *Cushing v. Danforth*, 76 Maine, 114.

⁶ *Bryan v. McNaughton*, 38 Kans. 98.

⁷ *Hackney v. Butts*, 41 Ark. 394. See § 134.

⁸ *Farley v. Kittson*, 27 Minn. 102, at 105.

holding a fiduciary relation to each other.¹ (a) The directors are intrusted with the management of the property of the corporation for the best interests of all the members, and the directors are bound to execute their trust; nor must they allow their private interests to interfere with the duties of the trust that they have assumed, nor assume a position tending to produce a conflict between their private interests and the discharge of their fiduciary duties.² It is said that

¹ *Gaskell v. Chambers*, 26 Beav. 360; *Great Luxembourg R. Co. v. Magnay*, 586; *Ex parte Bennett*, 18 Beav. 339; *Cumberland Coal Co. v. Hoffman Steam Coal Co.*, 18 Md. 456; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; 25 Md. 117; *Aberdeen R. Co. v. Blaikie*, 1 McQueen, 461, *Michoud v. Girod*, 4 How. 544; *Hodges v. New Eng. Screw Co.*, 1 R. I. 321; *York & North Midland R. Co. v. Hudson*, 16 Beav. 485; 19 Eng. L. & Eq. 365; *Benson v. Heathorne*, 6 Y. & C. C. C. 326; *Verplanck v. Ins. Co.*, 1 Edw. Ch. 84; *Percy v. Milladon*, 3 La. 568; *Robinson v. Smith*, 3 Paige, 222; *Murray v. Vanderbilt*, 39 Barb. 237; *Flint, &c. R. R. Co. v. Dewey*, 14 Mich. 477; *European & N. Am. Railw. Co. v. Poor*, 59 Maine, 277; *Scott v. Depeyster*, 1 Edw. Ch. 513; *Butts v. Wood*, 38 Barb. 188; *Ashurst's App.*, 60 Pa. St. 290; *Drury v. Cross*, 7 Wall. 299; *Sawyer v. Hoag*, 17 Wall. 610; *Land Credit Co. v. Fermoy*, L. R. 8 Eq. 12; *Bank Com'rs v. Bank of Buffalo*, 6 Paige, 503.

² It is a breach of trust for railroad directors to assume inconsistent obligations by becoming members of a company with whom they have made a contract to build and equip their road; and in such case no question will be allowed to be raised as to the fairness of the transaction, and

(a) Promoters of a corporation cannot rightfully gain any advantage over other members and are liable for profits received by them in violating their duty. *In re North Australian Territory Co.*, [1892] 1 Ch. 322; *In re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 347; *Scadden Flat Co. v. Scadden*, 121 Cal. 33; see *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101; 35 Am. L., Reg. n. s. 713. Where a person who was promoter and president of a corporation agreed with the other members to

purchase a site for its plant with money to be treated as a payment on his subscription to its stock, and after making such payment, and secretly taking the deed in his own name, constructed the plant with corporate funds, leading the other members to suppose that the corporation owned the land, he was held to be a constructive trustee *ex maleficio* of the land for the corporation's benefit. *Nester v. Gross*, 66 Minn. 371. See *Palmetto L. Co. v. Risley*, 25 S. C. 309; *Halsell v. Wise County Coal Co. (Texas)*, 47 S. W. 1017; *supra*, § 178, n. (a).

the contracts of trustees are of two classes. One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void from the fact that no man can contract with himself. If, therefore, a board of directors should convey all the property of a corporation to themselves, the conveyance would be void, without any inquiry into its fairness, or whether it was beneficial to the corporation or not. And the same rule applies if a board of directors convey the property of a corporation, or any part of it, to one of their number, he being one of the trustees negotiating a contract with himself.¹ And the same rule was applied where the trustees of one corporation, being the trustees of another corporation, conveyed the property of the one corporation to another, although there was a decree of court.² The other class of contracts is where a trustee contracts with the *cestui que trust*, or a third person. These contracts are not void; as where a director makes a purchase of property from the corporation itself, acting independently of its directors, the contract is not void; but the same rules apply, that apply to other trustees purchasing of the *cestui que trust*: the burden is upon the trustee to vindicate the transaction from all suspicion.³ And so all advan-

no injury to the *cestui que trust* need be proved. *Gilman C. & S. R. R. Co. v. Kelly*, 77 Ill. 426. But where stockholders sanction a contract under which directors loan money to the corporation, and its bonds secured by mortgage are given, if the money is properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which directors sustain to it. *Hotel Co. v. Wade*, 97 U. S. 75. A director who receives paid-up shares from the promoters of the corporation for acting as director will hold as trustee, and may be required to pay the highest value of the shares at the election of the company. *Nant-y-Glo & Blaina Iron Works Co. v. Grave*, L. R. 12 Ch. 738.

¹ *Cumberland Coal Co. v. Sherman*, 30 Barb. 563; *Ogden v. Murray*, 39 N. Y. 202; *Bliss v. Matteson*, 45 N. Y. 22; *Buffalo, &c. R. R. Co. v. Lampson*, 47 Barb. 533; *Imperial Mer. Cred. Ass'n v. Coleman*, L. R. 6 Ch. 565.

² *St. James Church v. Church of the Redeemer*, 45 Barb. 356.

³ *Ibid.*; *Beeson v. Beeson*, 9 Penn. St. 280.

tages, all purchases, all sales, and all sums of money received by directors in dealing with the property of the corporation, are made and received by them as trustees of the corporation, and they must account for all such moneys, or advantages received by them by reason of their position as trustees.¹

§ 208. Again, if the parents, relations, agents, or friends of young persons hold out inducements of marriage by representing the amount of property that will come to one or the other of the parties; or if they hold out pecuniary considerations to induce the marriage, and if the marriage and a marriage settlement take place upon the faith of such representations and inducements, the persons making them will be bound to make them good: if the persons making the representations and holding out the inducements have the property referred to in their hands or under their control, a court of equity will construe them into trustees of such property for the parties to whom the inducements were held out; and the court will compel them to execute the trust by making good the representations or inducements, if they are of such a character that a party entering into a marriage might reasonably have relied upon them.² If, however, a person states his intention to confer property upon one of the parties to a marriage, as that he has made his will giving a certain estate to one of the parties, and that he does not know any reason, or have any intention of altering it, but at the same time refuses to make any contract or agreement, or to be bound in any way not to alter his will, equity will not compel the execution of such a representation or intention;

¹ *Gaskell v. Chambers*, 26 Beav. 360; *Bowers v. City of Toronto*, 11 Moore, P. C. Cas. 463; *Ex parte Hill*, 32 L. J. Ch. 154.

² *Hamersley v. De Biel*, 12 Cl. & Fin. 45; *Downes v. Jennings*, 32 Beav. 290; *Hunt v. Mathews*, 1 Vern. 408; *Walford v. Gray*, 11 Jur. (N. S.) 106, 403; *Jordan v. Money*, 5 H. L. Cas. 185; 8 Jur. (N. S.) 281; *Caton v. Caton*, L. R. 2 H. L. 127; *Coverdale v. Eastwood*, L. R. 15 Eq. 122; *Saunders v. Cramer*, 3 Dr. & War. 87; *Moorhouse v. Calvin*, 15 Beav. 341; *Laver v. Fielder*, 32 Beav. 1; 1 Story's Eq. Jur. §§ 268-272.

and the estate named cannot be affected by a constructive trust in favor of the party to the marriage, in case the will is afterwards altered, and the estate is given to some other person.¹

§ 209. These rules apply to every kind of fiduciary relation. The principle is the same in all of them. Assignees of bankrupt or insolvent estates are subject to the same rules, whether they are appointed by courts and by operation of law, or by voluntary assignments, or by deeds of trust for creditors.² So the solicitors of a bankrupt cannot purchase his property. Committees or guardians of a lunatic cannot obtain the ownership of the property,³ nor can the directors, trustees, or governors of a charity so deal with the funds of the charity, or take leases of the charity lands, as to make a profit to themselves.⁴ And so of partners and joint contractors, or purchasers and receivers. In all these cases the fiduciary must account for all the trust property that comes to his hands, whether by purchase or otherwise, and for all profits which may come to him by dealing with such property, and even for all bonuses or gratuities given to him by strangers for contracts made with them in relation to the trust property.⁵ For example, a bank officer cannot make a

¹ *Maunsell v. Hedges*, 4 H. L. Cas. 1039; 1 Lead. Cas. Eq. 782; *Kay v. Crook*, 3 Sm. & Gif. 407; *Stroughill v. Gulliver*, 2 Jur. (N. S.) 700; *Randall v. Morgan*, 12 Ves. 67; *De Biel v. Thompson*, 3 Beav. 469, 475; 1 Jon. & La. 539, 569.

² *Ex parte Hughes*, 6 Ves. 617; *Morse v. Royal*, 12 Ves. 372; *Ex parte Morgan*, id. 6; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Reynolds*, 5 Ves. 705; *Ex parte Bennett*, 10 Ves. 381; *Campbell v. McLain*, 23 Leg. Intel. 26, Phila.; *Fisk v. Sarber*, 6 W. & S. 18; *Beeson v. Beeson*, 9 Barr. 284; *Dorsey v. Dorsey*, 3 H. & J. 410; *Chapin v. Weed*, 1 Clark. 264; *Saltmarsh v. Beene*, 4 Porter, 283; *Harrison v. Mocks*, 10 Ala. 185; *Wade v. Harper*, 3 Yerg. 383.

³ *Wright v. Proud*, 13 Ves. 136; *Campbell v. McLain*, 51 Penn. St. 200.

⁴ *Att. Gen. v. Clarendon*, 17 Ves. 500.

⁵ *Bailey v. Watkins*, Sug. Law of Prop. 726; *Parshall's App.*, 65 Penn. St. 233; *Swissholm's App.*, 56 id. 475; *King v. Wise*, 43 Cal. 628; *Carr v. Houser*, 46 Ga. 477.

profit for himself by loaning the bank's money, but will have to bear all losses arising from the attempt.¹ Whenever two persons stand in such relation that confidence is necessarily reposed by one, and the influence growing out of that fact is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage.² Trustees cannot use their relations to the trust property for their personal advantage.³

§ 210. But equity goes even further than this. It not only watches over these defined relations of parties, but it scrutinizes the undefined relations of friendly habits of intercourse, personal reliance, and confidential advice.⁴ It is well known that habits of kindness, confidence, and trust grow between neighbors and friends; and if advantage is taken of such relations to obtain an unfair bargain, equity will set it aside or convert the offending party into a trustee.⁵ Of course no rules can be laid down by which to judge all such cases; for every case must of necessity depend upon its own facts.⁶ Nor will a gift or sale be set aside merely because it is to a confidential friend or adviser, even though it is made by an old and infirm person, or by one of weak mind; but if there is any proof of any superadded concealment, misrepresentation, or contrivance, or any art by which the party was thrown off his guard, or unduly influenced by his trust and confidence in, or partiality for a supposed friend, equity will interpose and correct the wrong.⁷ Dealings of ship-

¹ *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126. See also *Dowling v. Feeley*, 72 Ga. 557.

² *Bohm v. Bohm*, 9 Col. 100.

³ *Ellicott v. Chamberlin*, 38 N. J. Eq. 604.

⁴ *Hunter v. Atkins*, 3 M. & K. 140; *James v. Holmes*, 8 Jur. (N. S.) 553, 732; *Falk v. Turner*, 101 Mass. 194.

⁵ *Ibid.*; *Dent v. Bennett*, 4 M. & Cr. 277; *Smith v. Kay*, 7 H. L. Cas. 750.

⁶ *Hunter v. Atkins*, 3 M. & K. 140.

⁷ *Dent v. Bennett*, 7 Sim. 539; 4 M. & C. 269; *Huguenin v. Baseley*,

owners with their masters,¹ of parishioners with their clergymen,² of medical advisers with their patients,³ of friends and neighbors who by their situation and habits of intercourse have obtained the confidence of each other,⁴ and of a man and woman living together as husband and wife,⁵ come within this rule. And so the relation of landlord and tenant, partner and partner, principal and surety, and tenants in common may create such influences of trust and confidence that courts of equity will construe a trust to arise out of their contracts, or will decree such contracts to be set aside.⁶

§ 211. So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."⁷ This principle of course cannot prevail against a purchase. 14 Ves. 273; *Gibson v. Russell*, 2 N. C. C. 104; *Griffiths v. Robins*, 3 Madd. 191; *Popham v. Brooke*, 5 Russ. 8; *Maul v. Reder*, 51 Penn. St. 377; *Lengenfitter v. Ritching*, 58 Penn. St. 487.

¹ *Shalleross v. Oldham*, 2 John. & H. 609.

² *Greenfield's Estate*, 24 Penn. St. 232; *Scott v. Thompson*, 21 Iowa, 599.

³ *Pratt v. Barker*, 1 Sim. 1; 4 Russ. 507; *Crisspell v. Dubois*, 4 Barb. 393; *Billing v. Southee*, 10 Eng. L. & Eq. 37.

⁴ *Hunter v. Atkins*, 3 M. & K. 113; *Greenfield's Estate*, 14 Penn. St. 489; *Cooke v. Lamotte*, 15 Beav. 234; *Smith v. Kay*, 7 H. L. Cas. 750.

⁵ *James v. Holmes*, 8 Jur. (N. S.) 553, 732; 4 De G., F. & J. 470.

⁶ *Maddeford v. Austwick*, 1 Sim. 89; *Farnham v. Brooks*, 9 Pick. 212; *Oliver v. Court*, 8 Price, 127; *Griffiths v. Robins*, 3 Madd. 191; *People v. Jansen*, 7 Johns. 332; 2 Johns. 551; *Dawson v. Lawes*, Kay, 280; *Campbell v. Moulton*, 30 Vt. 667; *Boulton v. Stubbs*, 18 Ves. 23; *Ex parte Rushforth*, 10 Ves. 409; *Hayes v. Ward*, 4 Johns. Ch. 123; *Mayhew v. Crickett*, 2 Swanst. 186; *Keller v. Auble*, 58 Penn. St. 412; *Duff v. Wilson*, 72 id. 442; *Mandeville v. Solomon*, 33 Cal. 38.

⁷ *Bridgman v. Green*, 2 Ves. 627; *Wilm.* 58, 61; *Luttrell v. Olmius*, cited 11 Ves. 633; 14 Ves. 290; *Huguenin v. Baseley*, id. 289; *Graves v. Spier*, 58 Barb. 349; *Newton v. Porter*, 5 Laus. 417. But see *Dixon v. Caldwell*, 15 Ohio, 412.

chaser in good faith for a valuable consideration, and without notice of any fraudulent influence.

§ 212. So a contract intended to defraud third persons, who are not parties to it, will be set aside, or a trust will be declared for such third persons.¹ Thus, if property is conveyed by a debtor for the purpose of defrauding his creditors, the conveyance is void at law, and in some cases equity will construe it to create a trust for the creditors.² And so if in an arrangement and composition of creditors with the debtor, one of them secretly obtains an extra advantage for executing the composition deed, he will be converted into a trustee by reason of the fraud, and the agreement will be null and void.³ Again, a transfer in fraud of a wife, it being intended to prevent her from obtaining alimony, might raise a constructive trust in favor of the wife.⁴ In this connection it must be noted that on the same facts there is a decided difference as to the manner in which equity will treat persons standing in differing relations to those facts. In favor of the person defrauded a trust will be raised by law, but in favor of the fraudulent grantor none; although if there is an *express* trust in favor of the grantor, the trustee will not be excused from performance by showing that the transaction was a fraud on some third person.⁵ (a)

¹ See § 171.

² *Loomis v. Lift*, 16 Barb. 543; *Jones v. Reeder*, 22 Ind. 111. See 1 Story's Eq. Jur. §§ 350-381; *Buck v. Voreis*, 89 Ind. 116.

³ *Chesterfield v. Janssen*, 2 Ves. 156; 15 Ves. 52; *Mann v. Darlington*, 15 Penn. St. 310; *Case v. Gerrish*, 15 Pick. 50; *Ramsdell v. Edgerton*, 8 Met. 227; *Lothrop v. King*, 8 Cush. 382; *Partridge v. Messer*, 14 Gray, 180; *Kahn v. Gunherts*, 9 Ind. 430; *Spooner v. Whiston*, 8 Moore, 580; *Mallalieu v. Hodgson*, 16 Ad. & El. N. R. 689-715; *Turner v. Hoole*, Dowl. & Ry. N. P. 27; *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 M. & W. 492; *Alsager v. Spalding*, 6 Scott, 204; *Arnold*, 181; 4 Bing. N. C. 407; *Leicester v. Rose*, 4 East, 380; *Howden v. Haight*, 11 Ad. & El. 1038; *Fawcett v. Gee*, 3 Aust. 910; *Breck v. Cole*, 4 Sandf. 83; *Knight v. Hunt*, 5 Bing. 433; *Bliss v. Matteson*, 45 N. Y. 24.

⁴ *Tyler v. Tyler*, 25 Brad. Ill. 333.

⁵ *Ibid.*; *Fast v. McPherson*, 98 Ill. 496.

(a) A resulting trust does not the original transaction to be arise when the parties intended fraudulent, as in the case of a con-

§ 213. If a man or woman on the point of marriage privately convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust, or subject to the rights of the defrauded husband or wife.¹ (a) But such conveyance is not void at law unless there is an actual fraud.² Nor will such conveyance be avoided, if made for a good consideration;³ or for a

¹ *Hunt v. Mathews*, 1 Vern. 408; *England v. Downes*, 2 Beav. 522; *Ball v. Montgomery*, 2 Ves. Jr. 191; *Strathmore v. Bowes*, 2 Bro. Ch. 345; 2 Cox, 485; 1 Ves. Jr. 22; *Goddard v. Snow*, 1 Russ. 485; *Tucker v. Andrews*, 13 Maine, 124; *Waller v. Armistead*, 2 Leigh, 11; *Logan v. Simmons*, 3 Ired. Eq. 487; *Terry v. Hopkins*, 1 Hill, Eq. 1; *Duncan's App.*, 43 Pa. St. 68; *Wrigley v. Swainson*, 3 De G. & Sm. 458; *Manes v. Durant*, 2 Rich. Eq. 404; *McAfee v. Ferguson*, 9 Mon. 495; *Linker v. Smith*, 4 Wash. 224; *Ramsay v. Joyce*, 1 McMull. Eq. 237; *Williams v. Carle*, 2 Stockt. Ch. 543; *Lewellin v. Cobbald*, 1 Sm. & Gif. 376; *Cheshire v. Payne*, 16 B. Mon. 618; *Carleton v. Dorset*, 2 Vern. 17; 2 Cox, 63; *McDonnell v. Hesilridge*, 16 Beav. 346; *Howard v. Hooker*, 2 Ch. R. 81; *St. George v. Wake*, 1 M. & K. 622; *Taylor v. Pugh*, 1 Hare, 608; *Ashton v. McDougall*, 5 Beav. 56; *Griggs v. Staples*, 2 De G. & Sm. 572; *Smith v. Smith*, 2 Halst. Ch. 515; *Petty v. Petty*, 4 B. Mon. 215; *Belt v. Ferguson*, 3 Grant, 289.

² *Richards v. Lewis*, 11 C. B. 1035; *Logan v. Simmons*, 1 Dev. & Bat. Law, 13.

³ *De Manville v. Crompton*, 1 V. & B. 354; *England v. Downes*, 2 Beav. 522; *Smith v. Smith*, 2 Halst. Ch. 515; *Tucker v. Andrews*, 13 Me. 124; *Manes v. Durant*, 2 Rich. Eq. 404; *Terry v. Hopkins*, 1 Hill,

veyance to defraud creditors; such conveyance is void as to them, but binding upon the grantor. *Gilbert v. Stockman*, 81 Wis. 602; *Heinz v. White*, 105 Ala. 670; *Barber v. Barber*, 146 Ind. 390; *Springfield H. Ass'n v. Roll*, 137 Ill. 205; *Moore v. Horsley*, 156 Ill. 36; *Polley v. Johnson*, 52 Kansas, 478; *In re Camp*, 10 N. Y. S. 141; *Brown v. Brown*, 66 Conn. 493; *Snider v. Udell W. Co.*, 74 Miss. 353; *Sell v. West*, 125 Mo. 621. But, as against

a confidential adviser, like an attorney at law, such an agreement will be set aside and the property conveyed to defraud creditors will be restored to the client. *DeChambrun v. Schermerhorn*, 59 F. R. 504.

(a) See *supra*, § 122, n. (a). It is the husband's duty to have a provision in his favor, in a marriage settlement, explained to the wife in the clearest terms, and with due opportunity for deliberation. *Lovesy v. Smith*, 15 Ch. D. 655.

valuable consideration;¹ or with the knowledge or concurrence of the other party, although an infant;² and the party alleging fraud must prove it to the satisfaction of the court.³ For the same reasons a conveyance by a husband during the pendency of a divorce suit on the part of his wife, in order to avoid the payment of alimony, will be held to be fraudulent and void.⁴ If an intended husband has no knowledge of the particular property conveyed, and the negotiations for the marriage have no reference to that particular property, its conveyance is not fraudulent, unless it was actually intended as a fraud upon him;⁵ and so there must be an intent to defraud the individual who is afterwards married; for if a deed is made to defraud another individual who is not married, but a marriage afterwards takes place with a person, not in contemplation at the time, there is no fraud.⁶ If no notice of the conveyance is shown to have been given, it will be presumed that no notice was had;⁷ and it is always a question of fact upon the whole transaction whether the conveyance is fraudulent.⁸ If, however, the property is of that

Eq. 1; *Hunt v. Mathews*, 1 Vern. 408; *King v. Cotton*, 2 P. Wms. 674; Mos. 259.

¹ *Blanchet v. Foster*, 2 Ves. 264. But if the consideration is fraudulently stated in the deed, it will make the conveyance fraudulent. *Lewellin v. Cobbald*, 1 Sm. & Gif. 376.

² *St. George v. Wake*, 1 M. & K. 610; *McClure v. Miller*, 1 Bail. Eq. 108; *Knottman v. Peyton*, 1 Speer's Eq. 46; *Terry v. Hopkins*, 1 Hill, Eq. 1; *Cheshire v. Payne*, 16 B. Mon. 618; *Fletcher v. Ashley*, 6 Grat. 332; *Slocombe v. Glubb*, 2 Bro. Ch. 545.

³ *St George v. Wake*, 1 M. & K. 610; *England v. Downes*, 2 Beav. 522.

⁴ *Blenkinsop v. Blenkinsop*, 1 De G., M. & G. 495; *Krupp v. Scholl*, 10 Penn. St. 193.

⁵ *Thomas v. Williams*, Mos. 177; *DeManville v. Crompton*, 1 V. & B. 354; *St. George v. Wake*, 1 M. & K. 622; and see *Goddard v. Snow*, 1 Russ. 485.

⁶ *Strathmore v. Bowes*, 1 Ves. Jr. 22; 2 Bro. Ch. 345; 2 Cox, 28; 6 Bro. P. C. 427; 1 Lead. Cas. Eq. 325; *England v. Downes*, 2 Beav. 522; *Cheshire v. Payne*, 16 B. Mon. 618; *Wilson v. Daniel*, 13 B. Mon. 351.

⁷ *Cole v. O'Neill*, 3 Md. 174; *Wrigley v. Swainson*, 3 De G. & Sm. 458.

⁸ *Ibid.*

character that the husband could obtain no right over it by the marriage, the conveyance of it by the wife before marriage cannot be set aside.¹ In all ante-nuptial contracts there must be the utmost good faith between the parties, and a grossly disproportionate settlement may be evidence of a fraudulent concealment.²

§ 214. There are certain purposes for which neither express law nor public policy will allow parties to contract; thus, the law will not permit contracts for the procuring of marriages,³ or of public offices,⁴ or of legislation,⁵ or of illicit cohabitation.⁶ If, therefore, such contracts are entered into, equity will enjoin their performance.⁷ And the party creating the interest, although *in pari delicto*, may apply for an injunction. In such cases, the person applying must return any benefit that he may have received.⁸ Such contracts are equally void at law, and if the parties are *in pari delicto*, the law will leave them where it finds them. If one party has

¹ Ibid. Whether the deed on record is notice or not, is a question. *Cole v. O'Neill*, 3 Md. 174.

² *Kline's Est.*, 64 Penn. St. 122.

³ *Drury v. Hook*, 1 Vern. 412; *Cole v. Gibson*, 1 Ves. 507; *Debenham v. Ox*, id. 277; *Smith v. Aykweil*, 3 Atk. 566; *Smith v. Bruning*, 2 Vern. 392; *Williamson v. Gihon*, 2 Sch. & L. 357; *Roberts v. Roberts*, 3 P. Wms. 76.

⁴ *Hartwell v. Hartwell*, 4 Ves. 811; *Morris v. McCulloch*, Amb. 432; 2 Eden, 190; *Writhingham v. Burgoyne*, 2 Aust. 900; *Harrington v. Duchattel*, 1 Bro. Ch. 124.

⁵ *Robinson v. Cox*, 9 Mod. 263; *Walker v. Perkins*, 3 Burr. 1568; 1 Bla. 517; *Rex v. Inhabitants of Northwingfield*, 1 B. & Ad. 912; *Winebrinner v. Weiseger*, 3 Monr. 35; *Travinger v. McBurney*, 5 Cow. 253; *Cusack v. White*, 3 Const. Ct. R. 284; *Fuller v. Dame*, 18 Pick. 472; *Pingry v. Washburn*, 1 Aiken, 264; *Grolick v. Ward*, 5 Halst. 87; *Wood v. McCann*, 6 Dana, 366; *Clippinger v. Hipbaugh*, 3 W. & S. 315; *Harris v. Roop*, 10 Barb. 489; *Sedgwick v. Stanton*, 4 Kern. 289; *Frost v. Belmont*, 6 Allen, 152.

⁶ *Marshall v. Baltimore & Ohio Railw.*, 16 How. 153.

⁷ *Robinson v. Gee*, 1 Ves. 251; *Gray v. Mathias*, 5 Ves. 286; *Franco v. Bolton*, 3 Ves. 370.

⁸ *St. John v. St. John*, 11 Ves. 535; *Reynell v. Sprye*, 1 De G., M. & G. 660.

advanced money upon an immoral or illegal contract, the law will give him no aid to recover it back. But equity will sometimes fasten a trust upon the conscience of the party who has received money or property under such contracts, and compel him to repay or reconvey it,¹ especially if the illegal purpose fails.²

§ 215. If at a sale of an estate of a debtor upon execution, any one announces, for the purpose of preventing competition, that he is bidding or purchasing for the debtor;³ or if, upon the sale of the property of a deceased person, a bidder announces that he is purchasing for the benefit of children or heirs, or if at a mortgagee's sale a person announces that he is purchasing for the mortgagor, and thus prevents competition, the purchaser will be held to be a trustee for the benefit of the parties interested in the property.⁴ So if any one professing to act for another purchases for himself, he will be held as a trustee.⁵ But in such cases there must be some proof of fraud and deceit practised by the purchaser;

¹ *Smith v. Bruning*, 2 Vern. 302; *Morris v. McCulloch*, Amb. 432; *Owens v. Ownes*, 23 N. J. Eq. 60.

² *Symes v. Hughes*, L. R. 9 Eq. 475.

³ *Kinard v. Hiers*, 2 Rich. Eq. 423; *Lloyd v. Currin*, 3 Humph. 462; *Seichrist's App.*, 66 Penn. St. 237; *Miller v. Antle*, 2 Bush, 407; *Brannin v. Brannin*, 18 N. J. Ch. 282; *Crutcher v. Hord*, 4 Bush, 360; *Roach v. Hudson*, 8 Bush, 410; *Brown v. Lynch*, 1 Paige, 147; *Tankard v. Tankard*, 84 N. C. 286.

⁴ *Brown v. Dysinger*, 1 Rawle, 408; *Kellum v. Smith*, 9 Casey, 158; *Sheriff v. Neal*, 6 Watts, 534; *Sharp v. Long*, 4 Casey, 443; *Morey v. Herrick*, 6 Harris, 123; *Williard v. Williard*, 6 P. F. Smith, 119; *Robertson v. Robertson*, 9 Watts, 32; *Plumer v. Reed*, 2 Wright, 46; *Beegle v. Wentz*, 73 Penn. St. 369; *Kisler v. Kisler*, 2 Watts, 323; *McCaskey v. Graff*, 11 Harris, 321; *Abbey v. Dewey*, 1 Casey, 114; *McRarey v. Huff*, 32 Ga. 681; *Ryan v. Dox*, 34 N. Y. 307; *Mackay v. Martin*, 26 Tex. 225; *Dennis v. McCagg*, 32 Ill. 429; *Cook v. Cook*, 69 Penn. St. 443; *Jenckes v. Cook*, 9 R. I. 520. So, as to a party holding *bona fide* a claim upon the property, whether valid or not. *Wolford v. Hemington*, 86 Penn. St. 39.

⁵ *Rothwell v. Dawes*, 2 Black (U. S.), 613; *O'Neil v. Hamilton*, 44 Penn. St. 18; *Coe v. Bradley*, 49 Maine, 388; *Baylis v. Baxter*, 22 Col. 175; *Adams v. Bradley*, 12 Mich. 346; *Drennen v. Walker*, 21 Ark. 539.

the mere breach of a parol agreement will not create a constructive trust in such cases;¹ and if the conduct of the purchaser is not fraudulent and produces no injury, a trust is not raised.² If the parties for whom the purchaser pretends to buy have no interest in the property, they cannot establish a trust.³

§ 216. Again, if a testator make a devise, or a grantor a conveyance, upon a secret trust in fraud of the law, or for a purpose forbidden by law, or contrary to public policy, those interested may bring a bill alleging the secret trust, and the fraud upon the law, and the persons to whom the devise or conveyance was made must answer, notwithstanding the statute of frauds.⁴ (a) If such fraudulent trust appear by the answer,⁵ or by any clear and explicit proof in opposition to the answer,⁶ a trust will be declared and enforced in favor of those interested in the estate, or in the event of the failure of the illegal trust. In all cases of actual fraud parol evidence is admissible, otherwise a fraud put in writing would always escape.⁷

§ 217. Another large class of constructive trusts arises from purchases or conveyances from trustees, or other persons holding a fiduciary relation to property. It is a uni-

¹ *Minott v. Mitchell*, 30 Ind. 288.

² *Taylor v. Boardman*, 24 Mich. 287.

³ *Rogers v. Simmons*, 58 Ill. 76; *Walter v. Klock*, 55 Ill. 82.

⁴ *Muckleston v. Brown*, 6 Ves. 52; *Podmore v. Gunning*, 7 Sim. 614; *Chamberlain v. Agar*, 2 V. & B. 259; *Strickland v. Aldridge*, 9 Ves. 513; *Edwards v. Pike*, 1 Eden, 267; *Walgrave v. Tebbs*, 2 K. & J. 313; *Robinson v. King*, 6 Ga. 550.

⁵ *Cottingham v. Fletcher*, 2 Atk. 155; *Bozon v. Statham*, 1 Eden, 508; *Bishop v. Talbot*, cited 6 Ves. 60; *Adlington v. Cann*, 3 Atk. 141; *Paine v. Hall*, 18 Ves. 473; 1 Eden, 515, n. (a).

⁶ *How v. Camp*, Walk. Ch. 427; *Strickland v. Aldridge*, 9 Ves. 520; *Pring v. Pring*, 2 Vern. 99.

⁷ *Ibid.*

(a) See *Yardley v. Sibbs*, 84 F. R. 531; *Brown v. Bradford*, 103 Iowa, 378; *supra*, § 212, note (a).

versal rule, that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased.¹ And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person.² Of course, a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, *whether he have notice or not*; for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject. Such purchases from trustees, whether for value or not, are fraudulent, and equity will follow the property and fasten the original trust upon it for the security of the *cestui que trust*, or other person hold-

¹ *Le Neve v. Le Neve*, Amb. 436; 3 Atk. 646; 1 Ves. 64; 2 Lead. Cas. Eq. 23 and notes; *Merry v. Abney*, 1 Ch. Cas. 38; *Potter v. Sanders*, 6 Hare, 1; *Kennedy v. Daly*, 1 Sch. & L. 355; *Crofton v. Ormsby*, 2 Sch. & L. 583; *Ferras v. Cherry*, 2 Vern. 384; *Daniels v. Davidson*, 16 Ves. 249; *Brooke v. Bulkeley*, 2 Ves. 498; *Jennings v. Moore*, 2 Vern. 609; 2 Bro. P. C. 278; *Birch v. Ellames*, 2 Anst. 427; *Mackreth v. Symmons*, 19 Ves. 349; *Grant v. Mills*, 2 V. & B. 306; *Saunders v. Dehew*, 2 Vern. 271; *Mansell v. Mansell*, 2 P. Wms. 681; *Wigg v. Wigg*, 1 Atk. 382; *Dunbar v. Tredennick*, 2 B. & B. 319; *Pawlett v. Att. Gen.* Hardr. 465; *Burgess v. Wheate*, 1 Eden, 195; *Adair v. Shaw*, 1 Sch. & L. 262; *Mead v. Orrery*, 3 Atk. 238; *Bovey v. Smith*, 1 Vern. 149; *Phayre v. Peree*, 3 Dow, 129; *Wormley v. Wormley*, 8 Wheat. 421; *Oliver v. Piatt*, 3 How. 333; *Caldwell v. Carrington*, 9 Peters, 86; *Wright v. Dame*, 22 Pick. 55; *Clarke v. Hackerthorn*, 3 Yeates, 269; *Peebles v. Reading*, 8 S. & R. 495; *Reed v. Dickey*, 2 Watts, 495; *Hood v. Fannestock*, 1 Barr. 470; *Wilkins v. Anderson*, 1 Jones, 399; *Denn v. McKnight*, 6 Halst. 385; *Murray v. Ballou*, 1 Johns. Ch. 566; *Bailey v. Wilson*, 1 Dev. & Bat. 182; *Massey v. McIlwaine*, 2 Hill, Eq. 426; *Benzien v. Lenoir*, 1 Car. L. R. 504; *Pugh v. Bell*, 1 J. J. Marsh. 403; *Liggett v. Wall*, 2 A. K. Marsh. 149; *Truesdell v. Calloway*, 6 Miss. 605; *Suydam v. Martin*, Wright, 384; *Winged v. Lefebury*, 1 Eq. Ca. Abr. 32; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Case v. James*, 29 Beav. 512; *Cary v. Eyre*, 1 De G., J. & S. 149; *Jones v. Shaddock*, 41 Ala. 362; *Ryan v. Doyle*, 31 Iowa, 53; *Smith v. Walter*, 49 Mo. 250; *James v. Cowing*, 17 Hun (N. Y.), 256.

² *Ibid.*

ing an equitable interest.¹ The rule applies not only to express trusts, or those expressly declared by written instruments, but it applies to constructive trusts, or those trusts that arise from fraud. Thus, if a party procures a conveyance of property from another by fraud, he shall be held to be a constructive trustee; and if he sells such property to a third person who has full knowledge or notice of the fraud, such third person will be equally held as a trustee.² After a purchase is once made from a trustee with notice of the trust, the person taking the title cannot bar the interest of the *cestui que trust* by buying in other interests, or by levying a fine or suffering a recovery, obtaining a judgment, or by procuring the assignment to himself of outstanding mortgages or terms.³ Having once taken with notice of the trust, he is a trustee in law, and a trustee cannot defeat the interests of his *cestui que trust*; on the contrary, all the interest that the trustee, or constructive trustee, shall thus buy in, will inure to the benefit of the title for the *cestui que trust*.⁴

§ 218. Of course, the opposite proposition is also true, that a purchaser for a valuable consideration without actual or constructive notice of the trust, holds the property discharged of the interest of the *cestui que trust*. It is thus stated on great authority: "A purchaser, *bona fide* without notice of any defect in his title at the time he made the purchase, may buy in a statute or mortgage, or any other incumbrance, and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be aided in a court of equity for setting aside such incumbrance, for *equity will not disarm a purchaser, but assist him*; and precedents of this nature are very ancient and numerous; viz., where the court hath refused to give any assistance against a

¹ Ibid.; *Lyford v. Thurston*, 16 N. H. 399.

² *Pye v. George*, 1 P. Wms. 128; *Saunders v. Dehew*, 2 Vern. 271; *Mansell v. Mansell*, 2 P. Wms. 681; *Smith v. Bowen*, 35 N. Y. 83; *Lyons v. Bodenhamer*, 7 Kans. 455; *Sadler's Appeal*, 87 Penn. St. 154.

³ *Moloney v. Kernan*, 2 Dr. & W. 31; *Brook v. Bulkeley*, 2 Ves. 498.

⁴ *Bovey v. Smith*, 1 Vern. 145; *Kennedy v. Daly*, 1 Sch. & L. 37.

purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another." And it may be added that nothing is clearer than that a purchaser for valuable consideration without notice of a prior equitable right, obtaining the *legal* estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that *where equities are equal the law shall prevail*.¹ But while a purchaser for value without notice may lay hold upon any plank to save himself, he cannot, after notice of the trust, take any conveyances from the trustee of outstanding legal interests; for that is a breach of the trust, and he cannot

¹ *Bassett v. Nosworthy*, Ca. t. Finch, 102; 2 Lead. Cas. Eq. 1 & notes; *Jerrard v. Saunders*, 2 Ves. Jr. 457; *Goleborn v. Alcock*, 2 Sim. 552; *Sanders v. Deligne*, Freem. 123; *Fagg's Case*, 1 Vern. 52; 1 Ch. Cas. 68; *Harcourt v. Knowel*, 2 Vern. 159; *Siddon v. Charnells*, Bunb. 298; *Jones v. Powles*, 3 M. & K. 581; *Willoughby v. Willoughby*, 1 T. R. 763; *Blake v. Hungerford*, Pr. Ch. 158; *Charlton v. Low*, 3 P. Wms. 328; *Ex parte Knott*, 15 Ves. 609; *Shine v. Gough*, 1 B. & B. 436; *Bowen v. Evans*, 1 Jon. & La. 264; *Boone v. Chiles*, 10 Pet. 177; *Watson v. Le Roy*, 6 Barb. 485; *Walwyn v. Lee*, 9 Ves. 24; *Varick v. Briggs*, 6 Paige, 325; *Demarest v. Wynkoop*, 3 Johns. Ch. 147; *Dan v. McKnight*, 6 Halst. 385; *Howell v. Ashmore*, 1 Stockt. 82; *Heilner v. Imbrie*, 6 S. & R. 401; *Mundine v. Pitts*, 14 Ala. 84; *Tomkins v. Powell*, 6 Leigh, 576; *Woodruff v. Cook*, 1 Gill & J. 270; *Whittick v. Kane*, id. 202; *High v. Batte*, 10 Yerg. 335; *Jones v. Zollicoffer*, 2 Taylor, 214; *Owings v. Mason*, 2 A. K. Marsh. 384; *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 554; *Blight v. Banks*, 6 Mon. 198; *Hughson v. Mandeville*, 4 Des. 87; *Goodtitle v. Cummings*, 8 Blackf. 179; *Maywood v. Lubcock*, 1 Bail. Eq. 382; *Brown v. Budd*, 2 Cart. 442; *Fletcher v. Peck*, 6 Cranch, 36; *Alexander v. Pendleton*, 8 Cranch, 462; *Vattier v. Hinds*, 7 Pet. 252; *Dana v. Newhall*, 13 Mass. 498; *Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 406; *Boynton v. Rees*, 8 Pick. 29; *Gallatien v. Erwin*, Hopk. 48; 8 Cow. 36; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Griffith v. Griffith*, 9 Paige, 315; *Mott v. Clark*, 9 Barr. 399; *Brackett v. Miller*, 4 W. & S. 102; *Filby v. Miller*, 1 Casey, 264; *Rutgers v. Kingsland*, 3 Halst. Ch. 178, 658; *Holmes v. Stout*, 3 Green, Ch. 492; *City Council v. Paige*, Spear, Ch. 159; *Lacy v. Wilson*, 4 Munf. 412; *Curtis v. Lanier*, 6 id. 42; *Dixon v. Caldwell*, 15 Ohio St. 412; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *Carter v. Carter*, 3 K. & J. 639; *Sugd. V. & P.* 470; *Colesbury v. Dart*, 58 Ala. 573; *Hamilton v. Mound City Mut. Life Ins. Co.*, 3 Tenn. Ch. 124.

commit a breach of the trust to protect himself.¹ But a purchase of an equitable interest only, although for a valuable consideration and without notice, cannot prevail against a legal title. In law the legal title must always prevail, and in equity the legal title will prevail if the equities are equal.²

§ 219. This protection of a *bona fide* purchaser for value without notice is clear and certain, but it is hedged about with great care. *It is said to be a shield to protect, and not a sword to attack.* It is surrounded with restrictions, so that it may not become a cloak for fraud. The defendant in a suit in equity must clearly and unequivocally swear in his answer that he is a purchaser for value without notice,³ and he must set forth all the particulars of the purchase, and the title or pretended title of the person from whom he purchased.⁴ He must show an actual conveyance and not merely an agreement for a conveyance;⁵ and it must be shown that the consideration-money named in the deed was paid in good faith. It is not enough that the consideration was secured to be paid; nor is a recital of payment in the

¹ *Saunders v. Dehew*, 2 Vern. 271; *Freem.* 123; *Allen v. Knight*, 5 Hare, 272; *Terrett v. Crombie*, 6 Lans. 82.

² *Snelgrove v. Snelgrove*, 4 Des. 274; *Daniel v. Hollingshead*, 16 Ga. 196; *Larrow v. Beam*, 10 Ohio, 148; *Jones v. Zollicoffer*, 2 Taylor, 214; *Brown v. Wood*, 6 Rich. Eq. 155; *Blake v. Heyward*, 1 Bail. Eq. 208; *Shirras v. Caig*, 7 Cranch, 48; *Jones v. Jones*, 8 Sim. 633; *Pensouneau v. Bleakley*, 14 Ill. 15; *Boone v. Chiles*, 10 Pet. 177; *Kramer v. Arthurs*, 7 Barr, 165; *Wailes v. Cooper*, 24 Miss. 208; *Sergeant v. Ingersoll*, 7 Barr, 340; 3 Harris, 343; *Flagg v. Mann*, 2 Sumn. 486, 556; *Cottrell v. Hughes*, 15 C. B. 532; *Vattier v. Hinde*, 7 Pet. 252; *Parsons v. Jury*, 1 Yerg. 296; *Gallion v. McCaslin*, 1 Blackf. 91; *Marles v. Cooper*, 22 Miss. 208.

³ *Sugd. V. & P.* 507; *Marshall v. Frank*, 8 Pr. Ch. 480; 1 Anst. 14; *Blacket v. Langlands*, Sel. Cas. Ch. 51; *Gilb.* 58.

⁴ *Walwyn v. Lee*, 9 Ves. Jr. 26; *Story v. Winsor*, 3 P. Wms. 279; *Head v. Egerton*, 1 Vern. 246; *Trevanion v. Morse*, 3 Ves. 32, 226; *Amb.* 421; *Jackson v. Rowe*, 4 Russ. 514; *Lanesborough v. Kilmaine*, 2 Moll. 403; *Hughes v. Garth*, *Amb.* 421; *Page v. Lever*, 2 Ves. Jr. 450; *Dobson v. Leadbeater*, 13 Ves. 230.

⁵ *Head v. Egerton*, 1 P. Wms. 281; *Brandlyn v. Ord*, 1 Atk. 571.

deed sufficient: there must be an actual payment.¹ Then he must also make an explicit denial of notice of the title which is attempted to be set up. A denial of knowledge of the particular person who might assert such title is not sufficient;² notice must be positively and affirmatively denied, and not evasively or inferentially.³ If particular instances or circumstances of notice or of fraud are alleged, there must be clear, special, and particular denials of each and every circumstance.⁴ These stringent rules are necessary for the protection of the equitable interests of one person, where the legal title is in the hands of another.⁵

§ 220. These leading propositions are simple and plain enough, but difficulties frequently arise as to what is a valuable consideration, and whether a purchaser had notice of the equitable estate, and when and how he obtained it. It is well established that a conveyance, to be good against the equitable interest of a *cestui que trust*, must be for a *valuable* consideration, and that a conveyance for a *good* consideration, as for love and affection, is not sufficient.⁶ But if the consideration is valuable, it need not be adequate: mere in-

¹ Millard's Case, Freem. 43; Wagstaff v. Read, 2 Ch. Cas. 156; More v. Mayhow, 1 id. 34; 2 Freem. 175; Day v. Arundel, Hard. 510; Hardingham v. Nichols, 3 Atk. 304; Maitland v. Wilson, id. 814; Moloney v. Kernan, 2 Dr. & War. 31. But see Parker v. Crittenden, 37 Conn. 148.

² Kelsal v. Bennett, 1 Atk. 522; Brompton v. Barker, cited 2 Vern. 159, is not law.

³ 3 P. Wms. 244, n. (f); Bran v. Marlborough, 2 P. Wms. 492 (6 Res.); Hughes v. Garner, 2 Y. & Col. Exch. 328.

⁴ Pennington v. Beechey, 2 S. & S. 282; Anon. 2 Ch. Cas. 161; Price v. Price, 1 Vern. 185; Hardman v. Ellames, 5 Sim. 650; 2 M. & K. 732.

⁵ Alexander v. Pendleton, 8 Cranch, 462; Hunter v. Simrall, 5 Litt. 62; Boone v. Chiles, 10 Pet. 177; Bush v. Bush, 3 Strobr. Eq. 131; Blight v. Bank, 6 Mon. 698; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 554; Moore v. Clay, 7 Ala. 142; Pillow v. Shannon, 3 Yerg. 308; Nantz v. McPherson, 7 Munf. 599; Dillard v. Crocker, 1 Spear, Eq. 20; Vattier v. Hinde, 7 Pet. 252; Jackson v. Rowe, 2 S. & S. 472; Jones v. Powles, 3 M. & K. 581.

⁶ Upshaw v. Hargrove, 6 Sm. & M. 292; Frost v. Beekman, 1 Johns. Ch. 288; Patten v. Moore, 32 N. H. 382; Boone v. Baines, 23 Miss. 136; Everts v. Agnes, 4 Wis. 343; Swan v. Ligan, 1 McCord, Ch. 232.

adequacy of consideration will not defeat a purchase for a valuable consideration without notice; but gross inadequacy of a valuable consideration would be evidence affecting the good faith of the transaction.¹ Marriage is a valuable consideration for a conveyance; but if a conveyance after marriage is made in pursuance of an agreement before marriage, it must be made clearly to appear.² The general definition of a valuable consideration embraces not only some valuable thing or property given or transferred to another, but also some loss of property or right, or the forbearing of some legal right or remedy.³

§ 221. In order that one may claim protection as a *bona fide* purchaser, the money must have been actually paid and the conveyance taken before notice is received of the trust. If the money is secured, but not paid, notice of the trust will convert the purchaser into a trustee,⁴ and so if the money is paid, but the conveyance is not executed, the weight of authority is that notice of the trust will destroy

¹ *More v. Mayhow*, 1 Ch. Cas. 34; *Wagstaff v. Read*, 2 Ch. Cas. 156; *Bullock v. Sadlier*, Amb. 764; *Mildmay v. Mildmay*, cited Amb. 767.

² *Harding v. Hardrett*, t. Finch, 9; *Lord Keeper v. Wyld*, 1 Vern. 139.

³ It is impossible to pursue this subject in all its details and distinctions in a work of this character without exceeding all reasonable limits. The cases will be found most industriously collected in the notes to *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. 103-109, and the distinctions and qualifications are fully discussed.

⁴ *Tourville v. Naish*, 3 P. Wms. 387; *Story v. Winsor*, 2 Atk. 630; *More v. Mayhow*, 1 Ch. Cas. 34; *Jones v. Stanley*, 2 Eq. Cas. Ab. 685; *High v. Batte*, 10 Yerg. 555; *Christie v. Bishop*, 1 Barb. Ch. 105; *Murray v. Ballou*, 1 Johns. Ch. 566; *Jackson v. Cadwell*, 1 Cow. 622; *Jewett v. Palmer*, 7 Cow. 65, 265; *Heatley v. Finster*, 2 Johns. Ch. 19; *Harris v. Norton*, 16 Barb. 264; *Patten v. Moore*, 32 N. H. 382; *McBee v. Loftes*, 1 Strob. Eq. 90; *Hunter v. Simrall*, 5 Litt. 62; *Palmer v. Williams*, 24 Mich. 333; *Blanchard v. Tyler*, 12 Mich. 339; *Stone v. Welling*, 14 Mich. 514; *Dixon v. Hill*, 5 Mich. 404; *Warner v. Whittaker*, 6 Mich. 133; *Thomas v. Stone*, Walk. Ch. 117; *Lewis v. Phillips*, 17 Ind. 108; *Rhodes v. Green*, 36 Ind. 10; *Dugan v. Vattier*, 3 Blackf. 245; *Perkinson v. Hanna*, 7 Blackf. 400. But see *Parker v. Crittenden*, 37 Conn. 148; 2 Dart, V. & P. 760.

the protection of the purchaser.¹ It is held that the money must be wholly paid before notice.² This rule proceeds upon the ground, that, as the purchaser is taking the transfer of a title that defeats the equitable right of a third person, he shall be held to take such title subject to all the equities that attach to it at the time it passes. If, therefore, he pays no money at the time the title passes, he has no equity to set up against the equity of a third person, and if he has notice before he pays the money, he pays in his own wrong. And so, if he has paid his money, but has not yet taken the title when he receives notice, he takes the title subject to all the equities that attach to it when the conveyance is actually made to him, as he then has a right to refuse the conveyance and to demand back his money.³ In Pennsylvania, however, it is established that part-payment of the purchase-money before notice will give the purchaser an equity *pro tanto*.⁴ So, if a purchaser without notice make improvements on the land, not having paid the purchase-money in full, he will have an equitable lien on the land for the amount of his expenditures, although he has no defence to a bill to enforce the rights of the *cestui que trust*.⁵ This is in analogy to the statutes that give a defendant in a real action a claim for improvements upon an estate, which he has made in ignorance of the title against him.

§ 222. The notice of the trust may be either to the purchaser himself, or to his agent, counsel, or attorney. The

¹ Wigg v. Wigg, 1 Atk. 384; 2 Sugd. V. & P. 274.

² Wormley v. Wormley, 8 Wheat. 421; Wood v. Mann, 1 Sumn. 506.

³ Warner v. Winslow, 1 Sandf. Ch. 430; Vattier v. Hinde, 7 Pet. 252; Bush v. Bush, 3 Strob. Eq. 131; Kyle v. Tait, 6 Grat. 44; Doswell v. Buchanan, 3 Leigh, 362; Dillard v. Crocker, 1 Spear, Eq. 20; Duncan v. Johnson, 2 Eng. 190; Cook v. Bronaugh, 8 Eng. 190; Frost v. Beekman, 1 Johns. Ch. 288; Cole v. Scott, 2 Wash. 141; Abell v. Howe, 43 Vt. 403.

⁴ Youst v. Martin, 3 Serg. & R. 423; Lewis v. Bradford, 10 Watts, 67; Bellas v. McCarthy, 10 Watts, 13; Juvenal v. Jackson, 2 Harris, 519; Urich v. Beck, 1 Harris, 631; 4 Harris, 499; Paul v. Fulton, 25 Mo. 156.

⁵ Boggs v. Varner, 6 Watts & S. 469; Farmers' Loan Co. v. Maltby, 8 Paige, 563; Frost v. Beekman, 1 Johns. Ch. 288; Doswell v. Buchanan, 3 Leigh, 361; Flagg v. Mann, 2 Sumn. 486; Everts v. Agnes, 4 Wis. 343.

general rule is that notice to an agent is notice to his principal.¹ The notice, if to an agent, must be to an agent for the purpose of the purchase, and the notice must be to him while engaged in the transaction,² for the reason that notice to agents generally, without reference to the particular business in hand, is not binding upon the principal.³ Notice to a husband is not notice to a wife, unless he is her agent, and is engaged upon the business when he receives the notice.⁴ Upon the same principle, knowledge by an executor before the death of his testator is not notice to him after his appointment as executor.⁵ It has been held in some cases, that the notice to the principal, to convert him into a trustee, must be given to him during the progress of the transaction, as he might have known the facts long before and forgotten them.⁶ If the first purchaser from the trustee take the property, *bona fide* for value and without notice, all pur-

¹ Hovey v. Blanchard, 13 N. H. 145; Aster v. Wells, 4 Wheat. 466; Bank of U. S. v. Davis, 2 Hill, 451; Griffith v. Griffith, 9 Paige, 315; Jackson v. Winslow, 9 Cow. 13; Jackson v. Sharp, 9 Johns. 163; Jackson v. Leek, 19 Wend. 339; Westerwelt v. Hoff, 2 Sandf. 98; Barnes v. McChristie, 3 Penn. 67; Blair v. Owles, 1 Munf. 38; Brotherton v. Hutt, 2 Vern. 574; Newstead v. Searles, 1 Atk. 265; Le Neve v. Le Neve, 3 Atk. 646; 1 Ves. 64; 2 Lead. Cas. Eq. 165, notes; Tunstall v. Trappes, 3 Sim. 301; Maddox v. Maddox, 1 Ves. 61; Ashley v. Bailey, 2 Ves. 368; Bracken v. Miller, 4 Watts & S. 108; Espin v. Pemberton, 3 De G. & J. 547.

² Howard Ins. Co. v. Halsey, 4 Seld. 271; Bracken v. Miller, 4 Watts & S. 102; Bank of U. S. v. Davis, 2 Hill, 451; Hood v. Fahnestock, 8 Watts, 489; Winchester v. Baltimore R. R. Co., 4 Md. 231; Preston v. Tubbin, 1 Vern. 286; Mountford v. Scott, 3 Madd. 34; Warwick v. Warwick, 3 Atk. 291; Ashley v. Bailey, 2 Ves. 368; Worsley v. Scarborough, 3 Atk. 392; Tylee v. Webb, 6 Beav. 552; 14 Beav. 14; Finch v. Shaw, 19 Beav. 500; 5 H. L. Cas. 905; Fuller v. Bennett, 2 Hare, 394. But see Abell v. Howe, 43 Vt. 403.

³ Ibid.; U. S. Insurance Co. v. Schriver, 3 Md. Ch. 381; Fulton Bank v. New York Coal Co., 4 Paige, 127; Bank v. Payne, 25 Conn. 444; North River Bank v. Aymar, 3 Hill, 362; Henry v. Morgan, 2 Benn. 497; Ross v. Horton, 2 Cushman, 591.

⁴ Snyder v. Sponable, 1 Hill, 56; 77 Hill, 427.

⁵ Gold v. Death, Cro. Jac. 381; Hob. 92.

⁶ Hamilton v. Royse, 2 Sch. & Lef. 377; 2 Sugd. V. & P. 277; Henry v. Morgan, 3 Binn. 497; Boggs v. Varner, 6 Watts & S. 469; Bracken v. Miller, 4 Watts & S. 111.

chasers from him will take the property discharged of the equitable claims, although they have notice of them at the time they purchase of the first purchaser, and such notice to them cannot convert them into trustees.¹ But if the property comes back into the hands of the original trustee, or into the hands of any one affected with the guilt of the original sale, he will be a trustee for the defrauded party, although the property may have passed through several innocent hands.² (a)

§ 223. Notice to the purchaser may be either actual or constructive. Actual notice is a knowledge of the facts of the trust brought home to the purchaser, or a knowledge of such facts as should lead him to a knowledge of the actual facts of the case.³ Constructive notice is a legal presumption of notice unless controlled, and in most cases it is not susceptible of rebuttal, even by evidence that in fact there was no actual knowledge.⁴ (b) Thus, by statutes of the

¹ *Harrison v. Forth*, Pr. Ch. 51; *Sweet v. Southcote*, 2 Bro. Ch. 66; *Brandlyn v. Ord*, 1 Atk. 571; *Lowther v. Charlton*, 2 Atk. 242; *Lacy v. Wilson*, 4 Munf. 313; *Fletcher v. Peck*, 6 Cranch, 87; *Boone v. Chiles*, 10 Pet. 187; *Truluck v. Peoples*, 3 Kelly, 446; *Griffith v. Griffith*, 9 Paige, 315; *Boynton v. Reese*, 8 Pick. 329; *Mott v. Clarke*, 9 Barr, 399; *Trull v. Bigelow*, 16 Mass. 406; *Parker v. Crittenden*, 37 Conn. 145; *Terrett v. Crombie*, 6 Lansing, 82.

² *Bovey v. Smith*, 1 Vern. 149; *Schutt v. Large*, 6 Barb. 373; *Lawrence v. Stratton*, 6 Cush. 163; *Church v. Ruland*, 64 Penn. St. 441.

³ *Mayor v. Williams*, 6 Md. 235.

⁴ *Rogers v. Jones*, 8 N. H. 264; *Plumb v. Fluitt*, 2 Anst. 432; *Griffith v. Griffith*, 1 Hoff. 153; *Farnsworth v. Child*, 4 Mass. 637.

(a) *Williams v. Williams* (Mich.), 156 N. Y. 459; *Trinidad v. Milwaukee, &c. Co.* 63 F. R. 883; notice to the *cestui que trust* is notice to the trustee. *Coryell v. Klehm*, 157 Ill. 462. *Condit v. Maxwell*, 142 Mo. 266; *Swasey v. Emerson*, 168 Mass. 118.

(b) Constructive notice of the terms and conditions of a trust arises from such circumstances as would lead a reasonably cautious person to investigate. *First Nat'l Bank v. Nat'l Broadway Bank*, 156 N. Y. 459; *Trinidad v. Milwaukee, &c. Co.* 63 F. R. 883; *Condit v. Maxwell*, 142 Mo. 266; *Swasey v. Emerson*, 168 Mass. 118. Persons who deal with trustees acting under a recorded deed are affected with notice of its contents defining their powers. *Stark v. Olsen*, 44 Neb. 646. A purchaser at a sale under a power must ascertain at his peril the extent of the power

several States the recording of a deed is made notice to all subsequent purchasers, though it frequently happens that purchasers have no actual knowledge from the record; but that does not rebut the fact of notice, for the reason that it is their duty to examine the records; they are therefore conclusively affected with notice of all of the record which is legally made, and which it was their duty to examine.¹ *Lis pendens* is constructive notice; that is, a suit pending in the public courts, concerning the title of the property purchased, is constructive notice to the purchaser.² (a) Actual possession by the *cestui que trust*, or some person other than the vendor, is constructive notice to the purchaser that there

¹ *Maul v. Reder*, 59 Penn. St. 167; *Smith v. Burgess*, 133 Mass. 511, 514.

² *Drew v. Norbury*, 9 Ir. Eq. 176. Upon the filing of a bill in equity, and before the service of the subpoena, a suit is *lis pendens*. *Ibid.* See *Leitch v. Wells*, 48 N. Y. 591.

and whether it still continues. *Harmon v. Smith*, 38 F. R. 482; *Saurez v. De Montigny*, 37 N. Y. S. 503.

Neither a trustee nor a *cestui que trust* can take an acknowledgment thereof so as to make the recording of the deed notice. *Bowden v. Parrish*, 86 Va. 67; *Rothschild v. Daugher*, 85 Texas, 332; *Wasson v. Connor*, 54 Miss. 351.

(a) *Lis pendens* is confined to realty and leaseholds, and does not apply to personal property. *Wigram v. Buckley*, [1894] 3 Ch. 483; see *Price v. Price*, 35 Ch. D. 297; *Norris v. Ile*, 152 Ill. 190; *State v. Commissioners (Kans.)*, 53 Pac. 526; *Osborn v. Glasscock*, 39 W. Va. 749, 760. It relates only to suits that proceed to a final decree, and not to those in which the bill is dismissed without service or appearance. *Allison v. Drake*, 145 Ill. 500. In equity, contrary to the rule at law, it does not exist until the subpoena is served. See *Hol-*

land v. Citizens' Bank, 16 R. I. 734; *Burt v. Gamble*, 98 Mich. 402; *Duff v. McDonough*, 155 Penn. St. 10; *Baker v. Bartlett*, 18 Mont. 446; *Stout v. Philippi Manuf. Co.*, 41 W. Va. 339; *Alliance Trust Co. v. Nettleton Hardwood Co.*, 74 Miss. 584; *Burleson v. McDermott*, 57 Ark. 229; *Zieverink v. Kemper*, 50 Ohio St. 208. It does not affect one who purchases in good faith after final decree and before a bill of review is brought. *Rector v. Fitzgerald*, 59 F. R. 808; see *Cook v. French*, 96 Mich. 525; *Pipe v. Jordan*, 22 Col. 392; 47 Cent. L. J. 408. The modern rule depends upon the inability of litigants to alienate contested property, rather than upon express or implied notice. See *McIlwrath v. Hollander*, 73 Mo. 105; *Oliphant v. Burns*, 146 N. Y. 218; *Jaycox v. Smith*, 45 N. Y. S. 299; *Jewett v. Iowa Land Co.*, 64 Minn. 531.

is some claim, title, or possession of the property adverse to his vendor; and this fact should put him upon his inquiry, for if he had inquired he would have discovered the exact title and the equitable claims upon it; he therefore has constructive notice. There are many other facts and circumstances from which courts will presume that a purchaser had notice of the equities attached to an estate.¹ If in any way a person purchases, with what the law construes to be full notice that another has a legal or equitable title to the property, or that he has been deprived of his interest by accident, mistake, or fraud, he will be held as a trustee.²

§ 224. The same general principles affect the sales of property by executors or administrators. Executors can deal with real estate only as they are empowered to do so by the will of testators. Purchasers must therefore look to the will for the power of the executor. If they purchase in good faith from an executor with power to sell, they will take a good title; but if they make a fraudulent or collusive purchase from an executor with full power to sell, they still hold the estate upon the same trusts to which it was subject in the hands of the executor. If there are no powers to sell real estate given to executors in the will, they have no authority to deal with it, unless it is wanted to pay debts or legacies, in which case both executors and administrators must obtain an order or license from the court of probate to sell. In such case the purchaser must see that the order of the court was regularly obtained, and that it is properly complied with. Any fraud or collusion on the part of the executor or administrator, in procuring the decree of the court or in the conduct of the sale, would convert the purchaser into a trustee for heirs-at-law or other persons

¹ It is impossible to state all the distinctions that have been established upon this fruitful source of litigation. The principles are most ably stated in the notes to *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 23; *Calhoun v. Burnett*, 40 Miss. 599; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; *Carter v. Carter*, 3 K. & J. 687; *Farris v. Dunn*, 7 Bush, 276.

² *Forbes v. Hall*, 34 Ill. 159.

interested.¹ So, if an executor or administrator purchases indirectly of himself through a third person, and takes a deed to himself through such third person, the sale will be void, or the estate will be held in trust by such administrator or executor for the heirs-at-law or other persons interested.

§ 225. An executor or administrator generally has full power over the personal estate under his charge. Therefore he may sell the same and give a good title to a purchaser.² This is the rule at common law, and it prevails in all States where it is not changed by statute. In some States there are statutes that direct executors or administrators to sell the personal estate of the deceased at public auction, or in such manner as the court having jurisdiction over the administration shall order. In such States, purchasers must see to it that executors and administrators, in making sales, pursue the course marked out for them by the statutes or by the orders of the court, or they will take no title.³ In all sales by executors and administrators *good faith* is indispensable. If therefore a purchaser knows, or has notice, that a sale by an administrator is fraudulent or collusive, or is a *devastavit*, or is for the purpose of a misapplication of the assets, his title will not be allowed to prevail against the beneficial interests of creditors, specific or residuary legatees, or next of kin or heirs.⁴ Equity will examine the

¹ *Brush v. Ware*, 15 Pet. 93; *Brock v. Phillips*, 2 Wash. 68.

² *Field v. Schieffelin*, 7 Johns. Ch. 155; *Rayner v. Pearsall*, 3 Johns. Ch. 578; *Hertell v. Bogert*, 9 Paige, 57; *Yerger v. Jones*, 16 How. 37; *Miles v. Durnford*, 2 Sim. (N. S.) 234; *Tyrrell v. Morris*, 1 Dev. & Batt. 559; *Hunter v. Lawrence*, 11 Grat. 117; *Bond v. Ziegler*, 1 Kelly, 324; *Crane v. Drake*, 2 Vern. 616; *Ewer v. Corbett*, 2 P. Wms. 148; *Newland v. Champion*, 1 Ves. 105; *Jacomb v. Harwood*, 2 Ves. 268; *Elmlie v. McAulay*, 3 Bro. Ch. 626; *Utterson v. Maire*, 4 Bro. Ch. 270; 2 Ves. Jr. 95; *Scott v. Tyler*, 2 Dick. 725; *Bonney v. Ridgard*, 1 Cox, 145; *Dickson v. Lockyer*, 4 Ves. 42; *Doran v. Simpson*, id. 665; *Hill v. Simpson*, 7 Ves. 152.

³ *Fambro v. Gantt*, 12 Ala. 305; *Bond v. Barksdale*, 4 Des. 526; *Bond v. Ziegler*, 1 Kelly, 324; *Baines v. McGee*, 1 Sm. & M. 208.

⁴ *Petrie v. Clark*, 11 Serg. & R. 388; *Wylson v. Moore*, 1 M. & K. 337;

transaction; and if circumstances appear sufficient to put the purchaser on his guard or upon his inquiry, the sale will be avoided or the purchaser will be held as a trustee.¹ If the transfer is by way of pledge or sale for the security or payment of the private debt of the administrator, it will be equivalent to full notice of the illegality of the transaction, and fraudulent.² But if an administrator make a pledge of the assets for a contemporaneous advance of money for the use of the estate, it will be held to be a valid transaction; or if the sale or pledge or mortgage is afterwards made for a previous advance made in good faith for the alleged benefit of the estate, it will be valid.³ Of course knowledge on the part of the purchaser, that the executor or administrator is dealing with the assets in a fiduciary capacity, is not enough to raise any suspicion, for the reason that it is the duty of the administrator to dispose of the assets and settle the estate; and so a trustee may sell and transfer absolutely the personal property of his trust, if he have power to vary the securities; and if he sells and transfers notes, stocks, or other securities standing in his name as trustee, the purchaser, from that fact alone, cannot be holden as a construc-

Cole v. Miles, 10 Hare, 179; *Saxon v. Barksdale*, 4 Des. 526; *McNair's App.*, 4 Rawle, 155; *Johnson v. Johnson*, 2 Hill, Eq. 277; *Mead v. Orrery*, 3 Atk. 235; *McLeod v. Drummond*, 14 Ves. 361; 17 Ves. 169; *Field v. Schieffelin*, 7 Johns. Ch. 155; *Colt v. Lasnier*, 9 Cow. 320; *Sacia v. Berthoud*, 17 Barb. 15; *Williamson v. Branch Bank*, 7 Ala. 906; *Swink v. Snodgrass*, 17 Ala. 653; *Garnett v. Macon*, 6 Call. 361; *Dodson v. Simpson*, 2 Rand. 294; *Graff v. Castleman*, 5 Rand. 204; *Parker v. Gillian*, 10 Yerg. 294; *Williamson v. Morton*, 2 Md. Ch. 94; *Lowry v. Farmers' Bank*, 10 P. L. J. 3; *Am. L. J. (N. S.)* 111.

¹ *McNeillie v. Acton*, 4 De G., M. & G. 744.

² *Petrie v. Clark*, 11 Serg. & R. 388; *Shaw v. Spencer*, 100 Mass. 382; *Judson v. National City Bank*, 8 Blatch. 430, and cases cited; *Pendleton v. Fay*, 2 Paige, 202; *Bayard v. Farmers', &c. Bank*, 52 Penn. St. 232; *Baker v. Bliss*, 39 N. Y. 76; *Carr v. Hilton*, 1 Curtis, 390-393; *Field v. Schieffelin*, 7 Johns. Ch. 155; *Williamson v. Morton*, 2 Md. Ch. 94; *Garrard v. R. R. Co.*, 29 Penn. St. 154; *Collinson v. Lister*, 7 De G., M. & G. 634; *Dodson v. Simpson*, 2 Rand. 294; *Williamson v. Branch Bank*, 7 Ala. 906.

³ *Petrie v. Clark*, 11 Serg. & R. 388; *Miles v. Durnford*, 2 Sim. (N. S.) 234; *Russell v. Plaice*, 18 Beav. 21; 11 Jur. 124; 19 Jur. 445.

tive trustee, although the trustee in fact transfers such securities or order to obtain money for his own personal use. The mere fact that the word "trustee" is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. (a) If he has such power, a purchaser in *good faith* will be protected, although the trustee use the money for his private purposes.¹ But if a purchaser takes securities from a trustee, with the word "trustee" upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the purchaser may be held as a trustee.² And so, if an executor, guardian, or trustee hold certificates of shares in a corporation, he may sell the same, and the corporation would be protected in issuing new certificates to the purchaser, but if the corpora-

¹ Ashton v. Atlantic Bank, 3 Allen, 217; Creighton v. Ringle, 3 S. C. 77; Dillaye v. Com. Bank, 51 N. Y. 355.

² Shaw v. Spencer, 100 Mass. 388; Jaudon v. National Bank, 8 Blatch. 430; Duncan v. Jaudon, 14 Wall. 15.

(a) A promissory note in which the payee's name is followed by the word "trustee," is negotiable. See Fox v. Citizens' Bank & Trust Co. (Tenn.), 35 L. R. Ann. 678, and note. A deposit of money in bank as trustee does not alone establish a trust, but the addition of the word "trustee" to the grantee's name in a conveyance is notice that there is a trust. Marbury v. Ehlen, 72 Md. 206; Mercantile Nat. Bank v. Parsons, 54 Minn. 56; Parkman v. Suffolk S. Bank, 151 Mass. 218; Shepard v. Creamer, 160 Mass. 496; Cunningham v. Davenport, 147 N. Y. 43; Beaver v. Beaver, 117 id. 421; Macy v. Williams, 83 Hun, 243; Isham v. Post, 71 id. 184; Hart v. Seymour, 147 Ill. 598; Johnson v. Calnan, 19 Col. 168; Hahn v. Hutchinson, 159 Penn. St. 133; Wal-

lace v. Langston, 52 S. C. 133. It may, however, be mere surplusage. See *supra*, § 82, n. A mere recital in a bond that it and others of the same series are secured by trust deed does not put the holder on inquiry as to the terms and conditions of the deed. Guilford v. Minneapolis, &c., Ry. Co., 48 Minn. 560. See De Voss v. Richmond (Va.), 98 Am. Dec. 646, 684; McClelland v. Norfolk So. R. Co., 110 N. Y. 469. The transferee of a promissory note which is secured by deed of trust may require the enforcement of the trust. Clark v. Jones, 93 Tenn. 639. Judgment recovered upon a debt so secured does not so merge the debt as to take away such security. Gibson v. Green, 89 Va. 524. See McComb v. Frink, 149 U. S. 629.

tion knew that the sale or transfer was a breach of the trust or a *devastavit*, it might be held as a constructive trustee for the persons beneficially interested; but the mere fact that the fiduciary character of the vendor appeared upon the face of the transaction would put the corporation upon no inquiry beyond ascertaining whether he had authority to change the securities.¹

§ 226. The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property.² Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive.³ Lord Hardwicke stated "that the court adhered to this principle, that the statute of frauds should never be understood to protect fraud, and therefore wherever a case is infected with fraud, the court will not suffer the statute to protect it."⁴ Lord Thurlow added, that "the moment you impeach a deed for fraud you must either deny the effect of fraud upon the deed, or you must admit parol evidence to prove it."⁵ If this was not so, the law would be reduced to this absurdity, — if a fraud could once succeed in procuring the transaction to be reduced to writing and signed by the parties, it would be protected by the law itself, and there would be no possible means of reaching and correcting the wrong. But in such case the bill must contain a clear and distinct charge of fraud.⁶ Therefore, whenever the bill sets out a clear case

¹ *Ashton v. Atlantic Bank*, 3 Allen, 217, and cases cited note 1.

² *Kayser v. Maugham*, 8 Col. 232; *Bohm v. Bohm*, 9 id. 100.

³ *Hall v. Livingston*, 3 Del. Ch. 348.

⁴ *Reach v. Kennigate*, 1 Ves. 125; *Young v. Peachey*, 2 Atk. 258; *Walker v. Walker*, id. 98; *Hutchins v. Lee*, 1 Atk. 448; *Montacute v. Maxwell*, 1 P. Wms. 620; *Lincoln v. Wright*, 4 De G. & J. 16; *Childers v. Childers*, 1 De G. & J. 482; *Davis v. Oty*, 35 Beav. 208; *Ryan v. Dox*, 34 N. Y. 307; *Haigh v. Kaye*, L. R. 7 Ch. 474.

⁵ *Shelborne v. Inchiquin*, 1 Bro. Ch. 350; *Hare v. Sherewood*, 1 Ves. Jr. 243; *Townshend v. Stangroom*, 6 Ves. 333; *Pym v. Blackburn*, 3 Ves. 38, n.; and see *Conolly v. Howe*, 5 Ves. 701.

⁶ *Irnham v. Child*. 1 Bro. Ch. 94; *Portmore v. Morris*, 2 Bro. Ch. 219;

of fraud, parol evidence will be admitted to prove it, even if the effect of such evidence is to contradict, vary, alter, or destroy written instruments.¹ The mere refusal of a grantee to execute, or the denial of the existence of an invalid parol trust upon which she promised to hold the property, is not such a fraud as will take the case out of the statute.² But where a valuable interest passes to one on the faith of a contract he refuses to perform, equity will compel restitution or give other appropriate relief.³ (a) In any case if the trust arises from the acts of the parties, and not exclusively from their agreements, the statute of frauds is not a bar to the proof.⁴ But where a conveyance in trust is made volun-

Forsyth v. Clark, 3 Wend. 637; *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79; *Kennedy v. Kennedy*, 2 Ala. 571; *Skrine v. Simmons*, 11 Ga. 401; *McCalmont v. Rankin*, 8 Hare, 18.

¹ *Young v. Peachey*, 2 Atk. 257; *Thynn v. Thynn*, 1 Vern. 296; *Irham v. Child*, 1 Bro. Ch. 93; *Cripps v. Gee*, 4 Bro. Ch. 475; *Oldham v. Lechford*, 2 Vern. 506; *Drakeford v. Wilks*, 3 Atk. 539; *Reach v. Kenigate*, 1 Ves. 125; *Amb. 67*; *Pember v. Mathers*, 1 Bro. Ch. 52; *Wilkinson v. Bradfield*, 1 Vern. 307; *Miller v. Cotton*, 5 Ga. 346; *Christ v. Diffenbach*, 1 Serg. & R. 464; *Watkins v. Stockett*, 6 H. & J. 345; *Elliott v. Connell*, 5 Sm. & M. 91; *Barrell v. Hanrick*, 42 Ala. 60; (b) *Judd v. Mosely*, 31 Iowa, 433.

² *Scott v. Harris*, 113 Ill. 447; *Tatge v. Tatge*, 34 Minn. 275; *Townsend v. Fenton*, 32 Minn. 482.

³ *Randall v. Constans*, 33 Minn. 329; *Johnson v. Krassin*, 25 Minn. 118.

⁴ *Judd v. Mosely*, 30 Iowa, 428; *Bryant v. Hendricks*, 5 Iowa, 256; *Kincell v. Feldman*, 22 Iowa, 363; *Ferguson v. Hass*, 64 N. C. 772; *Squire's App.*, 70 Penn. St. 268; *Reese v. Wallace*, 113 Ill. 595. And so the statute of frauds is not a bar to relief in other cases of absolute deeds, where they are used in a manner and for purposes not contemplated at the time of their execution. Thus a deed may be shown to be a mortgage or security for a debt, although there was no written defeasance, and no fraud, accident, or mistake. This proposition has been much discussed.

(a) When a grantor in trust has conveyances. *Judge v. Pfaff*, 171 Mass. 195.

the fund as he finds it, subject to any changes in form lawfully made by the trustee, including contracts which in equity have the effect of (b) *Barrell v. Hanrick* was overruled in *Brock v. Brock*, 90 Ala. 86; *Manning v. Phippen*, 86 Ala. 357; 95 Ala. 537.

tarily without solicitation or undue influence, a mere promise to hold in trust is within the statute.¹ If a bill is brought

The latest case, *Campbell v. Dearborn*, 109 Mass. 130, contains a review of the authorities and a succinct statement of the doctrine; and as it is upon a subject closely connected with constructive trusts, the case is given at large.

"From those facts, and from the bill and answer, we think these points must be taken to be established; to wit, 1st, that the plaintiff had purchased the parcel of land in controversy, and held a contract from Tirrill for its conveyance to himself upon payment of the sum of \$5500; 2d, that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, 'from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe' this to be the case.

"From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

"The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery. *Hughes v. Edwards*, 9 Wheat. 489; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 How. 139; *Taylor v. Luther*, 2 Sumner, 228; *Flagg v. Mann*, id. 486; *Jenkins v. Eldredge*, 3 Story, 181; *Bentley v. Phelps*, 2 Wood. & M. 426; *Wyman v. Babcock*, 2 Curtis C. C. 386, 398; s. c. 19 How. 289. Although not bound by the authority of the courts of the United States in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the State and federal courts. We are disposed, therefore, to yield much deference to the decisions above referred to, and to follow them unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

"We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud or breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the

¹ *McClain v. McClain*, 57 Iowa, 167.

for relief, on the ground that the instrument is framed contrary to the intention of the parties through mistake, acci-

right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

“The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance ‘be omitted by design upon mutual confidence between the parties.’ In *Russell v. Southard*, 12 How. 139, 148, it is declared to be the doctrine of the court, ‘that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage.’ The conclusion of the court was, ‘that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.’

“This doctrine is analogous, if not identical, with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void. 4 Kent, Com. 159; Cruise, Dig. (Greenl. ed.) tit. xv. c. 1, § 21; 2 Washb. Real Prop. (3d ed.) 42; Williams on Real Prop. 353; Story, Eq. § 1019; Adams, Eq. 112; 3 Lead. Cas. in Eq. (3d Am. ed.); White & Tudor’s notes to *Thornbrough v. Baker*, pp. 605 [*874] *et seq.*; Hare & Wallace’s notes to s. c. pp. 624 [*894] *et seq.*

“The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed

dent, surprise, or fraud, in such case, Lord Hardwicke said "that a mistake could never be proved but by parol evi-

or some other instrument under seal. *Erskine v. Townsend*, 2 Mass. 493; *Killaran v. Brown*, 4 Mass. 443; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Parks v. Hall*, 2 Pick. 206, 211; *Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Eaton v. Green*, 22 Pick. 526. The case of *Flagg v. Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact and not a mere security for a loan.

"By the statute of 1855, c. 194, § 1, jurisdiction was given to this court in equity 'in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages.' Gen. Sts. c. 113, § 2. The authority of the courts under this clause is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

"If, then, the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. 'For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud.' *Cotterell v. Purchase*, Cas. temp. Talbot, 61. See also *Barnhart v. Greenshields*, 9 Moore, P. C. 18; *Baker v. Wind*, 1 Ves. Sen. 160; *Mahlor v. Lees*, 2 Atk. 494; *Williams v. Owen*, 5 Myl. & Cr. 303; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

"As a question of evidence, the principle is the same. In either case the parol evidence is admitted, not to vary, add to, or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings by restricting their operation, or defeating them altogether.

dence, consequently it must be received.”¹ But where through mistake of law, or carelessness or inattention, an

This is a general principle of evidence, well established and recognized, both at law and in equity. *Stackpole v. Arnold*, 11 Mass. 27; *Fletcher v. Willard*, 14 Pick. 464; 1 Greenl. Ev. § 284; *Perry on Trusts*, § 226.

“The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam v. Hearne*, 2 Lead. Cas. in Eq. (3d Am. ed.) 676, and to *Thornbrough v. Baker*, 3 id. 624. See also *Adams Eq.* 111; 1 Sugd. Vend. (8th Am. ed.), Perkins’s notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other States. Mr. Washburn, in his chapter on mortgages, § 1, has exhibited the law as held in the different States, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here. 2 Washb. Real Prop. (3d ed.) 35 *et seq.*

“Upon the whole, we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

“It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.

“The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterwards. If the purchaser, instead

¹ *Baker v. Paine*, 1 Ves. 457; *Towers v. Moor*, 2 Vern. 98; *Langley v. Brown*, 2 Atk. 203; *Townshend v. Stangroom*, 6 Ves. 328; *Taylor v. Radd*, 5 Ves. 595, 596, n.; *Henkle v. Royal Ins. Co.*, 1 Ves. 318; *Rogers v. Earl*, 1 Dick. 294; *Barstow v. Kilvington*, 5 Ves. 593; *Hunt v. Rousmanier*, 8 Wheat. 174; *Gower v. Sternes*, 2 Whart. 75; *Keisselbroek v. Livingston*, 4 Johns. Ch. 144; *Peterson v. Grover*, 20 Maine, 363; *Newson v. Bufferlow*, 1 Dev. Eq. 379; *Goodell v. Freed*, 15 Vt. 448; *Harrison v. Howard*, 1 Ired. Eq. 407; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Perry v. Pearson*, 1 Humph. 431.

important provision is omitted from a deed, and no fraud is charged or proved, parol evidence cannot be received against

of taking the risk of the subject of the contract on himself, takes a security for repayment of the principal, that will not vitiate the transaction, and render it a mortgage security.' 1 Sugd. Vend. (8th Am. ed.) 302, in support of which the citations by Mr. Perkins are numerous. But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment. *Eaton v. Green*, 22 Pick. 526, 530.

"Although proof of the existence and continuance of the debt, for which the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect, yet the absence of such proof is far from being conclusive to the contrary. *Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Russell v. Southard*, 12 How. 139; *Browne v. Dewey*, 1 Sandf. Ch. 56. When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed, to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

"A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists: *Story*, Eq. §§ 239, 245, 246; and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so. *Kerr on Fraud and Mistake*, 186 and note; *Wharf v. Howell*, 5 Binn. 499.

"Another circumstance that may and ought to have much weight is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance. *Cotterell v. Purchase*, Cas. temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

"These several considerations have more or less weight, according to the circumstances of each case. *Conway v. Alexander*, 7 Cranch, 218; *Bentley v. Phelps*, 2 Wood. & M. 426. It is not necessary that all should concur to the same result in any case. Each case must be determined

the denial of the defendant in his answer to reform, vary, or defeat the instrument.¹ Parol evidence, however, is not favorably received by courts in any case, and they will not act upon it against written instruments, unless it is exceedingly clear and certain, and uncontradicted by other evidence.² In Pennsylvania, however, a different rule prevails, and parol evidence of the verbal agreements and stipulations upon the faith of which the contract was made, is received in evidence to control its operation or to explain its meaning.³

§ 227. The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised.⁴ In the

upon its own special facts ; but those should be of clear and decisive import." So, if it is necessary for an absolute grantee to come into a court of equity for relief, as for a loss of the deeds, the court can compel him to do equity, as to make a settlement upon parties entitled to a settlement by parol understanding. *Phillips v. Phillips*, 50 Mo. 603.

¹ *Lemon v. Whitely*, 4 Russ. 423; *Irnham v. Child*, 1 Bro. Ch. 92; *Portmore v. Morris*, 2 id. 219; *Rich v. Jackson*, 4 id. 614; 6 Ves. 334, n.; *Jackson v. Cator*, 5 Ves. 688; *Hare v. Sherwood*, 1 Ves. Jr. 241; *Anon. Skin.* 159; *Mortimer v. Shortall*, 2 Dr. & W. 363; *Alexander v. Crosbie, Llo. & Co.* 145; *London R. Co. v. Winter*, 1 Cr. & Phil. 57; *Garwood v. Eldridge*, 1 Green, Ch. 146; *Lyon v. Richmond*, 2 Johns. Ch. 60; *Wheaton v. Wheaton*, 9 Conn. 96; *Hunt v. Rousmanier*, 1 Pet. 1; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282; *Westbrook v. Harberson*, 2 McCord, Ch. 112; *Dwight v. Pomroy*, 17 Mass. 303; *Robson v. Harwell*, 6 Ga. 589; *Chamness v. Crutchfield*, 2 Ired. Eq. 148; *Movan v. Hayes*, 1 Johns. Ch. 339; *Ratcliff v. Ellison*, 3 Rand. 537; *Richardson v. Thompson*, 1 Humph. 151.

² *Barrow v. Greenhough*, 3 Ves. 154; *Townshend v. Stangroom*, 6 Ves. 334; *Shelborne v. Inchiquin*, 1 Bro. Ch. 341; *Miller v. Cotten*, 5 Ga. 346. See the whole matter elaborately discussed and all the authorities collected in notes to *Woollam v. Hearne*, 2 Lead. Cas. Eq. 684; *Barkley v. Lane*, 6 Bush, 58; *Collier v. Collier*, 30 Ind. 32; *Lingenfitter v. Richings*, 62 Penn. St. 128.

³ *Chalfant v. Williams*, 35 Penn. St. 212; *Clark v. Partridge*, 2 Barr, 13; 4 Barr, 166; *Oliver v. Oliver*, 4 Rawle, 141; *Rearick v. Swinehart*, 1 Jones, 238; *Christ v. Dffenbach*, 1 Serg. & R. 464.

⁴ *Stump v. Gaby*, 2 De G., M. & G. 623; *McKissick v. Pickle*, 4 Harris, 140; *Kane County v. Herrington*, 50 Ill. 232.

view of a court of equity, he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee. And so the equitable interest of a purchaser under a contract of sale is of that character that it may be assigned or devised.¹

§ 228. Time does not bar a direct trust where the relation of trustee and *cestui que trust* is admitted to exist, but diligence must be used to establish a constructive trust on the ground of fraud. A court of equity will refuse its aid to stale demands, where a party has slept upon his rights, or has acquiesced for a great length of time.² And so a constructive trust will be barred by long acquiescence, although the fraud was evident and the relief was originally clear.³

¹ *Stump v. Gaby*, 2 De G., M. & G. 623; *Morgan v. Halford*, 1 Sm. & Gif. 101; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Malin v. Malin*, 1 Wend. 625; *Clapper v. House*, 6 Paige, 149; *Kent v. Mehaffey*, 10 Ohio St. 204.

² *Smith v. Clay*, 3 Bro. Ch. 639, n.; *Cholmondeley v. Clinton*, 1 J. & W. 151; *Chalmer v. Bradley*, id. 59; *Beckford v. Wade*, 17 Ves. 97; *Portlock v. Gardner*, 1 Hare, 594; *Hawley v. Cramer*, 4 Cow. 117; *Dobson v. Racey*, 3 Sandf. Ch. 61; *Powell v. Murray*, 2 Edw. Ch. 644; 10 Paige, 256; *Piatt v. Vatier*, 9 Pet. 405; *McKnight v. Taylor*, 1 How. 161; *Wagner v. Baird*, 7 How. 234; *Veasie v. Williams*, 8 How. 134; *Hallett v. Collins*, 10 How. 174; *Hough v. Richardson*, 3 Story, 659; *Gould v. Gould*, 3 Story, 516; *Peebles v. Reading*, 8 Serg. & R. 484; *Irvine v. Robertson*, 3 Rand. 519; *Colman v. Lyne*, 4 Rand. 454; *Anderson v. Burchell*, 6 Grat. 405; 2 Story's Eq. Jur. § 1520, notes.

³ *Bonny v. Ridgard*, cited 4 Bro. Ch. 138; *Andrew v. Wrigley*, 4 Bro. Ch. 124; *Blennerhassett v. Day*, 2 B. & B. 118; *Gregory v. Gregory*, Cowp. 201; *Jac.* 631; *Selsey v. Rhoades*, 1 Bligh (n. s.), 1; *Champion v. Rigby*, 1 R. & M. 539; *Ex parte Granger*, 2 Deac. & Ch. 459; *Collard v. Hare*, 2 R. & M. 675; *Norris v. Neve*, 3 Atk. 38; *Pryce v. Byrn*, 5 Ves. 681, cited *Campbell v. Campbell*, id. 678, 682; *Morse v. Royal*, 12 Ves. 355; *Medlicott v. O'Donnell*, 1 B. & B. 156; *Hatfield v. Montgomery*, 2 Porter, 58; *Bond v. Brown*, 1 Harp. Eq. 270; *Edwards v. Roberts*, 7 Sm. & M. 544; *Peacock v. Black*, Halst. Eq. 535; *Steele v. Kinkle*, 3 Ala. 352; *Smith v. Clay*, Amb. 645; *Bond v. Hopkins*, 1 Sch. & Lef. 413; *Hoven-den v. Annesley*, 2 Sch. & Lef. 630-640; *Stackhouse v. Barnston*, 10 Ves. 466; *Ex parte Dewdney*, 15 Ves. 496; *Kane v. Bloodgood*, 7 Johns. Ch. 93; *Dexter v. Arnold*, 3 Sumn. 152; *Decouche v. Savetier*, 3 Johns. Ch. 190; *Murray v. Coster*, 20 Johns. 576; *Prevost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Wheat. 489; *Elmendorf v. Taylor*, 10 Wheat. 168;

It is difficult to state as a general proposition what length of time will bar relief from the consequences of a fraud. It is necessarily subject to the equitable discretion of the court, and must depend upon the nature of each case and the circumstances of the parties.

§ 229. Therefore no certain time can be stated as a limit beyond which relief will not be given. In several cases twenty years has been held to be a bar;¹ and so where one had acquiesced for twenty-five years,² and twenty-one years,³ and in another case the lapse of eighteen years was held to be a bar.⁴ So a delay of thirty years,⁵ of thirty-eight years,⁶ of forty-six years,⁷ of fifty years,⁸ of twenty-seven years,⁹ and of seventeen years,¹⁰ has been held to be such *laches*, if unex-

Miller v. McIntire, 6 Pet. 61; Sherwood v. Sutton, 5 Mason, 143; Williams v. First Pres. Soc., 1 Ohio St. 478.

¹ Smith v. Clay, 3 Bro. Ch. 639, n.; Hovenden v. Annesley, 2 Sch. & Lef. 636; Stackhouse v. Barnston, 10 Ves. 466; Pryce v. Byrn, 5 Ves. 681; Ward v. Van Bokkelen, 1 Paige, 100; Thompson v. Blair, 3 Murph. 593; Farr v. Farr, 1 Hill, Eq. 391; Field v. Wilson, 6 B. Mon. 479; Bruce v. Child, 4 Hawks, 372; Perry v. Craig, 3 Miss. 525; Ferris v. Henderson, 12 Penn. St. 54; Bank of U. S. v. Biddle, 2 Pars. Eq. 31; Walker v. Walker, 16 Serg. & R. 379; McDowell v. Goldsmith, 2 Md. Ch. 370; Norris's App., 71 Penn. St. 124. In Paschall v. Hinderer, 28 Ohio St. 568, it is said: The statute does not apply in equity to bar a trust except in three classes of cases: first, where there is a concurrent remedy at law to which there is a fixed limitation; second, where there is an open denial of the trust, with notice which requires action by the *cestui que trust*, and afterwards a lapse of time which would amount to a bar in law; and third, where there are circumstances shown which with lapse of time raise a presumption that the trust has been extinguished.

² Blennerhassett v. Day, 2 B. & B. 118.

³ Selsey v. Rhoades, 1 Bligh (n. s.), 1.

⁴ Gregory v. Gregory, Coop. 201; Jac. 631; Champion v. Rigby, 1 R. & M. 539; Roberts v. Tunstall, 4 Hare, 257.

⁵ Harrod v. Fountleroy, 3 J. J. Marsh. 548; Phillips v. Belden, 2 Edw. Ch. 1; Page v. Booth, 1 Rob. Va. 161; Bond v. Brown, Harp. Eq. 270.

⁶ Powell v. Murray, 10 Paige, 256.

⁷ Maxwell v. Kennedy, 8 How. 210.

⁸ Anderson v. Barwell, 6 Grat. 405.

⁹ Hayes v. Goode, 7 Leigh, 486.

¹⁰ Baker v. Read, 18 Beav. 398; Emerick v. Emerick, 3 Grant. 295.

plained, as would be a bar to a bill for relief. Under the circumstances of other cases, a delay of twelve years,¹ of eleven years,² of eighteen years, was held to be no bar.³ In *Michoud v. Girod* the law was elaborately examined and stated by Mr. Justice Wayne as follows, "that within what time a constructive trust will be barred must depend upon the circumstances of the case."⁴ There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."⁵ If there is no fraud chargeable on any party, but a simple mistake or accident is made by which a title is changed, more diligence is required, and acquiescence for a less time will bar the suffering party of his relief. An acquiescence for seventeen years,⁶ or for nineteen years,⁷ has been held to be fatal to an application for relief. But where trustees without actual fraud conveyed to themselves, a sleeping on their rights for five years after knowing of the

¹ *Butler v. Haskell*, 4 Des. 651; *Newman v. Early*, 3 Tenn. Ch. 714.

² *Rhinlander v. Barrow*, 17 Johns. Ch. 538; *Mulhallen v. Marum*, 3 Dr. & W. 317.

³ *Bell v. Webb*, 2 Gill, 263; *Grisby v. Mousley*, 4 De G. & J. 78.

⁴ *Boone v. Chiles*, 10 Pet. 177; *Trafford v. Wilkinson*, 3 Tenn. Ch. 701.

⁵ *Michoud v. Girod*, 4 How. 561; *Trevelyan v. Charter*, 11 Cl. & Fin. 714; *Pryn v. Byrne*, 5 Ves. 681; *Malony v. L'Estrange*, Beat. 406; *Carpenter v. Canal Co.*, 35 Ohio St. 307. Lapse of time is no bar to a trust clearly established; and in cases where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successful is rather an aggravation, and calls more loudly for decisive and ample relief. Per Story, J., in *Prevost v. Gratz*, 6 Wheat. 481. In this case forty years and the death of all the parties was held sufficient to warrant the presumption of the discharge and extinguishment of a trust, proved to have existed by strong circumstances.

⁶ *Hite v. Hite*, 1 B. Mon. 177; *Emerick v. Emerick*, 3 Grant, 295.

⁷ *Bruce v. Child*, 4 Hawks, 372.

transaction was held not to bar the *cestuis*, the court intimating that where no conduct of the *cestuis* indicated acquiescence, mere delay for less time than twenty years would not affect them.¹ Where there are two remedies, pursuing one first and waiting till it has run its course before making trial of the other is not *laches*.²

§ 230. The statute of limitations is not necessarily controlling, as to the time within which relief is to be sought, in the case of a constructive trust by reason of fraud. A demand may be stale, and not entitled to relief under the circumstances of the case, although much less than the time allowed by the statute of limitations has elapsed; and so a party may be entitled to relief although much more than the statute limit has gone by.³ In some States, however, the statute is applied to constructive trusts, unless they are concealed or undiscovered. In such States, relief must be sought within six years if it is sought by bill in equity to set aside a deed, or to establish a trust.⁴ In Pennsylvania, the limit is five years.⁵ In other States, it has been decided in analogy to the statute which bars a real action after twenty years, that relief must be sought within the twenty years named in the statute.⁶ In South Carolina, it is held that an action to set aside a deed as fraudulent is equivalent to an action for deceit, and must be brought within the limit of the statute for personal actions.⁷ But if the fraud is unknown to the

¹ *Morse v. Hill*, 136 Mass. 60, 66, and cases cited.

² *Blake v. Traders' Nat'l Bk.*, 145 Mass. 13, 17.

³ *Mason v. Crosby*, 1 Wood. & M. 342; *Piatt v. Vatie*, 1 McLean, 116; 9 Pet. 405; *Juzan v. Toulmin*, 9 Ala. 662.

⁴ *Farnham v. Brooks*, 9 Pick. 212; *Sears v. Shafer*, 2 Seld. 268; *Williamson v. Field*, 2 Sandf. Ch. 534; *Pilcher v. Flinn*, 30 Md. 202.

⁵ *Miller v. Franciscus*, 40 Penn. St. 335; *Rider v. Maul*, 46 Penn. St. 376; *Ashurst*, App. 60 id. 290.

⁶ *Ward v. Van Bokkelen*, 1 Paige, 100; *Walker v. Walker*, 16 Serg. & R. 379; *Ferris v. Henderson*, 12 Penn. St. 54; *Bank of U. S. v. Biddle*, 2 Pars. Eq. 31; *Thompson v. Blair*, 3 Murph. 593; *Farr v. Farr*, 1 Hill, Eq. 391; *Perry v. Craig*, 3 Miss. 525; *Field v. Wilson*, 6 B. Mon. 479; *Bruce v. Child*, 4 Hawks, 372; *McDowel v. Goldsmith*, 2 Md. Ch. 370.

⁷ *Parkam v. McCravy*, 6 Rich. Eq. 143; *McDonald v. May*, 1 Rich. Eq. 91; *Bradley v. McBride*, Rich. Eq. Cas. 202, is overruled.

injured party, or is concealed, or he is under disability, or out of the country, or the delay is caused by the defendant,¹ the lapse of time will not be *laches* which bar relief. If a party has knowledge of the fraud, a want of evidence will not excuse his delay,² nor will poverty and an inability to prosecute the action.³ If there has been great delay, courts will require very clear evidence to impeach a transaction as fraudulent, and to convert the fraudulent party into a trustee.⁴ So, if a great length of time has elapsed, courts will sometimes grant the relief prayed for by setting aside the conveyance, but will decree an account for only six years,⁵ or from the time of filing the bill,⁶ and without costs.⁷

¹ *Sears v. Shafer*, 2 Seld. 268; *Richardson v. Jones*, 3 G. & J. 163; *Doggett v. Emerson*, 3 Story, 700; *Callender v. Calgrove*, 17 Conn. 1; *Phalen v. Clarke*, 19 Conn. 421; *Hallett v. Collins*, 10 How. 174; *Rider v. Bickerton*, 3 Swanst. 81, n.; *Blennerhassett v. Day*, 2 B. & B. 118; *Trevelyan v. Charter*, 11 Cl. & Fin. 714; *Bowen v. Evans*, 2 H. L. Cas. 257; *Warner v. Daniels*, 1 W. & M. 111; *Murray v. Palmer*, 2 Sch. & Lef. 487; *Aylewood v. Kearney*, 2 B. & B. 263; *Pickett v. Loggan*, 14 Ves. 215; *Purcell v. McNamara*, id. 91; *Ferris v. Henderson*, 12 Penn. St. 49; *Michoud v. Girod*, 4 How. 561; *Henry County v. Winnebago, &c.*, 52 Ill. 299.

² *Parkam v. McCravy*, 6 Rich. Eq. 114.

³ *Roberts v. Tunstall*, 4 Hare, 357; *Maxwell v. Kennedy*, 8 How. 210; *Locke v. Armstrong*, 2 Dev. & Bat. 147; *Perry v. Craig*, 3 Miss. 516.

⁴ *Chalmers v. Bradley*, 1 J. & W. 59; *Powell v. Murray*, 10 Paige, 256; *Bowen v. Evans*, 2 H. L. Cas. 257; *Westbrook v. Harwell*, 2 McCord, Eq. 112; *Phillips v. Belden*, 2 Edw. Ch. 1; *Jennings v. Broughton*, 3 De G., M. & G. 126; *Chandos v. Brownlow*, 2 Ridg. P. C. 397; *Montgomery v. Hobson*, Meigs, 437; *Page v. Booth*, 1 Rob. 161.

⁵ *Pearce v. Newlyn*, 3 Madd. 189.

⁶ *Pickett v. Loggan*, 14 Ves. 215; *Malony v. L'Estrange*, Beatt. 406; *Mulhallen v. Marum*, 3 Dr. & W. 317.

⁷ *Pearce v. Newlyn*, 3 Madd. 189; *Att. Gen. v. Dudley*, Coop. 146.

CHAPTER VII.

TRUSTS THAT ARISE BY EQUITABLE CONSTRUCTION IN THE ABSENCE OF FRAUD.

- § 231. Trust by equitable construction. Illustration.
- § 232. Vendor's lien for the purchase-money of this description. States in which it exists.
- § 233. This lien does not contravene the statute of frauds.
- § 234. The nature of the interest of the vendor under this lien.
- §§ 235-237. When the lien exists and when not.
- §§ 238, 239. The parties between whom the lien exists.
- § 240. Trust by construction where a conveyance is made that cannot operate at law.
- § 241. Constructive trust where trust property is transferred by gift from the trustee.
- § 242. Constructive trust where a corporation distributes its capital stock without paying its debts.
- § 243. A person holding the legal title as security is a constructive trustee.
- § 244. Executor indebted to the testator's estate is a constructive trustee.
- § 245. A person may become a trustee *de son tort* by construction.
- § 246. An agent may become a constructive trustee.
- § 247. A person holding deeds or papers or property belonging to another may be a constructive trustee.
- § 246 a. Other equitable trusts. See § 247 a.

§ 231. It frequently happens that courts of equity construe a trust to arise from the contracts and dealings of parties, although a trust is not within their contemplation, and there is no fraud, actual or constructive. In this respect, courts of equity proceed in a manner and upon principles entirely unknown to courts of law. Thus, if the intention of the testator cannot be carried out without appointing a trustee, that will be done.¹ So, if parties enter into a valid contract for the sale and conveyance of lands, and the vendor neglects or declines to convey, courts of law can only give the vendee an action for damages for a breach of the contract, but the legal title to the property will not be affected; it will still

¹ Quigley v. Gridley, 132 Mass. 39, 40.

remain in the vendor. A court of equity, however, looks upon that as already done, which was agreed to be done.¹ From the date of the contract it looks upon the beneficial interest as in the vendee, and the legal title only as in the vendor. By construction the vendor holds the legal title in trust for the vendee.² Equity proceeds, *in personam*, against the vendor and makes him a trustee, and then orders him to execute the trust by conveying the legal title to the person to whom he has agreed to convey it. The purchaser is in like manner a trustee of the purchase-money, and the court will order him to pay it over, and receive a conveyance of the legal title to the land.³ And, *a fortiori*, if the purchaser has paid the purchase-money the vendor becomes a mere trustee of the legal title for the purchaser;⁴ so, if the purchaser has paid part of the purchase-money, the vendor becomes a trustee to the extent of the money paid.⁵ If the vendor does not own the land, or some part of that which he agrees to convey, and afterwards obtains the title, he will immediately become a trustee for the purchaser.⁶ This equity will not be affected by the death or bankruptcy of either party. If the vendor dies before he has conveyed the land, the legal title will descend to his heirs subject to the trust; and they or his legal representatives will be ordered to

¹ Fonbl. Eq. Tr. B. 1, c. 6, § 8.

² Wall v. Bright, 1 J. & W. 500; Green v. Smith, 1 Atk. 572; Davie v. Beardsham, 1 Ch. Cas. 39; Atcherley v. Vernon, 10 Mod. 518; McKay v. Carrington, 1 McLean, 50; Crawford v. Bertholf, Saxt. 458; Ten Eyck v. Simpson, 1 Sandf. Ch. 244; Kerr v. Day, 14 Penn. St. 112; Moore v. Burrows, 34 Barb. 173; Adams v. Green, id. 176; Wickman v. Robinson, 14 Wis. 493; Conway v. Kinsworthy, 21 Ark. 9; Dana v. Petersham, 107 Mass. 598; Currie v. White, 45 N. Y. 822; Reed v. Lukens, 44 Penn. St. 200; Lamb v. Davenport, 1 Sawyer, 609; Potter v. Jacobs, 111 Mass. 32.

³ Green v. Smith, 1 Atk. 572; Pollexfen v. Moore, 3 Atk. 272; Dexter v. Stewart, 7 Johns. Ch. 52.

⁴ Waddington v. Banks, 1 Brock. 97; Fenno v. Sayre, 3 Ala. 458; Brown v. East, 5 Mon. 415; Payne v. Atterbury, Harring. Ch. 414; Neeson v. Clarkson, 4 Hare, 97.

⁵ Wythes v. Lee, 3 Drew. 396; Westmacott v. Robins, 4 De G., F. & J. 390.

⁶ Tyson v. Passmore, 2 Barr, 122; McCall v. Coover, 4 Watts & S. 151.

execute the trust.¹ But the lien or trust will not exist where the purchaser by his own fault abandons the contract,² or where the contract is for any cause illegal.³ If the purchaser abandons the contract because the vendor cannot fulfil it as agreed upon, as if it is to give a good title, the trust or lien will not continue.⁴ Wherever one wrongfully obtains the legal title to land which in equity and good conscience belongs to another, equity will raise a constructive trust.⁵

§ 232. Similar to this is the constructive lien or trust in favor of a vendor for his unpaid purchase-money; for the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. To the extent of the lien, the vendee becomes a trustee for the vendor; and the vendee's heirs, and all other persons claiming under him or them with notice, are construed by courts of equity to be trustees. This doctrine is well established in the jurisprudence of England,⁶ and it has been recognized, and acted upon, in many of the United States.⁷ The principle upon which the lien depends

¹ *Paul v. Wilkins*, Toth. 106; *Barker v. Hill*, 2 Ch. R. 113; *Winged v. Lefebury*, 2 Eq. Cas. Ab. 32, pr. 43; *Orlebar v. Fletcher*, 1 P. Wms. 737; *Bowles v. Bowles*, 6 Ves. 95, n.; *Whitworth v. Davis*, V. & B. 545; *Tiernan v. Roland*, 15 Penn. St. 429; *Rutherford v. Green*, 2 Ired. Eq. 121; *Jacobs v. Lake*, id. 286; *Newton v. Swazey*, 8 N. H. 9; *Glaze v. Drayton*, 1 Dev. 109. In Massachusetts, the probate court or the supreme judicial court may authorize the executor or administrator, or the guardian of an insane person, to convey in such cases. Public Stat. 1882.

² *Dinn v. Grant*, 5 De G. & Sm. 451.

³ *Ewing v. Osbaldiston*, 2 My. & Cr. 88.

⁴ *Wythes v. Lee*, 3 Drew. 396.

⁵ *Lakin v. S. B. M. Co.*, 11 Sawy. (U. S.) 231.

⁶ See *Mackreth v. Symmons*, 15 Ves. 329, where Lord Eldon cited and commented upon all the cases previous to that time. See s. c. 1 Lead. Cas. Eq. 336, where the later English cases are quoted and also the American cases. *Lemon v. Whitely*, 4 Rus. 423; *Chapman v. Tanner*, 1 Vern. 267; *Blackburn v. Gregson*, 1 Bro. Ch. 420; *Burgess v. Wheat*, 1 Eden, 211; 1 W. Black. 150.

⁷ In Maine the doctrine is entirely rejected as inconsistent with the

is this: that a person who has obtained the estate of another ought not, in conscience, to keep it, and not pay the consid-

registry laws and policy of the State; *Philbrook v. Delano*, 29 Maine, 415. In New Hampshire the court has left it undecided: *Arlin v. Brown*, 44 N. H. 102, and see *Buntin v. French*, 16 N. H. 592. In Vermont the doctrine was established in an able judgment by Ch. J. Redfield: *Manly v. Slason*, 21 Vt. 271, but abolished by Stat. 1851. In Massachusetts it is rejected: *Ahrend v. Odiorne*, 118 Mass. 261. In Connecticut it is undecided: *Atwood v. Vincent*, 17 Conn. 575. See *Watson v. Wells*, 5 Conn. 468; *Dean v. Dean*, 6 Conn. 285; *Meigs v. Dimock*, id. 458; *Chapman v. Beardsley*, 31 Conn. 115. In Rhode Island it is recognized: *Kent, Adm'r, v. Gerhard, et ux.* 12 R. I. 92. In New York it is well established: *Stafford v. Van Renselaer*, 9 Cow. 316; *Garson v. Green*, 1 Johns. Ch. 308; *White v. Williams*, 1 Paige, Ch. 502; *Fish v. Howland*, id. 20; *Warner v. Van Alstyne*, 3 id. 513; *Shirly v. Sugar Ref.*, 2 Edw. Ch. 505; *Dubois v. Hall*, 43 Barb. 26; *Warren v. Fenn*, 28 id. 333; *Champion v. Brown*, 6 Johns. 402. In New Jersey, also: *Vandoren v. Todd*, 2 Green, Ch. 397; *Brinkerhoff v. Vanseiven*, 3 id. 251; *Herbert v. Scofield*, 1 Stockt. Ch. 492. In Pennsylvania the doctrine is rejected, though there may be such a conditional title conveyed, as will give the vendor a preference for the purchase-money over all others claiming under the vendee: *Irvine v. Campbell*, 6 Binn. 118; *Stouffer v. Coleman*, 1 Yeates, 393; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Semple v. Burd*, id. 286; *Bear v. Whisler*, 7 Watts, 147; *Zentmyer v. Miltower*, 5 Penn. St. 403; *Stephen's App.*, 38 id. 9; *Springer v. Walters*, 34 id. 328; *Hepburn v. Snyder*, 3 id. 72; *Megargel v. Saul*, 3 Whar. 19; *Cook v. Trimble*, 9 Watts, 15; *Heist v. Baker*, 49 Penn. St. 9; *Straus's App.*, id. 353. In Delaware the point is undecided: *Budd v. Basti*, 1 Harr. 69. In Maryland it is well established: *White v. Casanave*, 1 Har. & J. 106; *Ghiselin v. Ferguson*, 4 Har. & J. 522; *Pratt v. Van Wyck*, 6 id. 495; *Magruder v. Peter*, 11 id. 217; *Repp v. Repp*, 12 id. 341; *Moreton v. Harrison*, 1 Bland, Ch. 491; *Carr v. Hobbs*, 11 Md. 285; *Hummer v. Schott*, 21 Md. 307; *Hall v. Jones*, id. 439; *Bratt v. Bratt* id. 578. In Virginia it was long acted upon: *Graves v. McCall*, 1 Call, 414; *Handley v. Lyons*, 5 Munf. 342; *Duvall v. Bibb*, 4 Hen. & M. 113; *Hatcher v. Hatcher*, 1 Rand. 53; *Redford v. Gibson*, 12 Leigh, 332. But it is now abolished by the code: *Yancy v. Manck*, 15 Grat. 300; *Hempfield R. R. Co. v. Thornbury*, 4 W. Va. 261. In North Carolina, after being acted upon for some time, it was overruled: *Cameron v. Mason*, 7 Ired. Eq. 180; *Gabee v. Sneed*, 1 Dev. & B. 333; *Wamble v. Battle*, 3 Ired. Eq. 182; *Henderson v. Burton*, id. 259. In South Carolina it was never acted upon: *Wragg v. Comptroller-Gen.*, 2 Des. 509. In Georgia it is acted upon: *Marine Fire Ins. Co. v. Early*, Charl. 279; *Hampden v. Miller*, Dud. 120; *Mounce v. Byars*, 16 Ga. 469; *Chance v. McWharter*, 26 Ga. 315; *Stile v. Griffin*, 27 Ga. 504; *Mims v. Lockett*,

eration-money in full; and a third person, who receives the estate with full knowledge that it has not been paid for, ought not, as a matter of equity, to be allowed to keep it

23 Ga. 237; *Mims v. Macon and Western Railroad*, 3 Kelly, 333. Also in Florida: *Woods v. Bailey*, 3 Fla. 41. And so in Alabama: *Burns v. Taylor*, 23 Ala. 255; *Haley v. Bennett*, 5 Porter, 452; *Roper v. McCook*, 7 Ala. 318; *Griffin v. Camack*, 36 Ala. 695. So in Mississippi: *Trotter v. Erwin*, 27 Miss. 772; *Stewart v. Ives*, 1 Sm. & M. 197; *Tanner v. Hicks*, 4 id. 294; *Upshaw v. Hargrave*, 6 id. 286; *Dunlop v. Burnett*, 5 id. 702; *Servis v. Beatty*, 32 Miss. 52. It is established in Texas: *Pinchain v. Collard*, 13 Tex. 333; *Wheeler v. Lane*, 21 Tex. 583; *McAlpin v. Burnett*, 23 Tex. 649. So in Arkansas: *English v. Russell*, Hemp. 35; *Scott v. Orbinson*, 2 Ark. 202; *Shall v. Biscoe*, 18 Ark. 112. So in Missouri: *Marsh v. Turner*, 4 Mo. 53; *McKnight v. Brady*, 2 Mo. 110; *Davis v. Laub*, 30 Mo. 441; *Bledsoe v. Games*, id. 448; *Delassus v. Poston*, 19 Mo. 425. So in Tennessee: *Brown v. Vanlier*, 7 Humph. 239; *Eskridge v. McClure*, 2 Yerg. 84; *Marshall v. Christmas*, 3 Humph. 616; *Campbell v. Baldwin*, 2 Humph. 218; *Uzzell v. Mack*, 4 Humph. 319; *Medley v. Davis*, 5 Humph. 387; *Norvell v. Johnson*, id. 489; *Taylor v. Hunter*, id. 569. So in Kentucky: *Muir v. Cross*, 10 B. Mon. 277; *Fowler v. Rust*, 2 A. K. Marsh. 294; *Taylor v. Alloway*, 2 Litt. 216; *Mosely v. Garrett*, 1 J. J. Marsh. 212; *Richardson v. Baker*, 5 id. 323; *Cox v. Fenwick*, 3 Bibb, 183. So in Ohio: *Williams v. Roberts*, 5 Ohio, 35; *Tiernan v. Bean*, 2 Ham. 383; *Magham v. Coombs*, 14 Ohio, 428; *Neil v. Kinney*, 11 Ohio St. 58. So in Indiana: *McCarty v. Pruet*, 4 Ind. 46; *Lagow v. Badollet*, 1 Blackf. 416; *Evans v. Goodlett*, id. 246; *Merritt v. Wiles*, 18 Ind. 171; *Cox v. Wood*, 20 Ind. 54. So in Illinois: *Trustees v. Wright*, 11 Ill. 603. So in Michigan: *Sears v. Smith*, 2 Mich. 243; *Carroll v. Van Renselaer*, Harring. Ch. 225. Also in Iowa: *Pierson v. David*, 1 Iowa, 23; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Patterson v. Linder*, id. 414; *Tupple v. Viers*, id. 515; *Grapengether v. Fejervary*, 9 Iowa, 163; *Hays v. Horine*, 12 Iowa, 61. So in Wisconsin: *Toby v. McAllister*, 9 Wis. 463. Also in Minnesota: *Daughaday v. Payne*, 6 Minn. 413. In Kansas there is no lien: *Simpson v. Munder*, 3 Kans. 172. And so in Nebraska: *Edminster v. Higgins*, 6 Neb. 265. The lien exists in California: *Truebody v. Jacobson*, 2 Cal. 269; *Taylor v. McKinney*, 20 Cal. 618; *Baum v. Grigsby*, 21 Cal. 172; *Sparks v. Hess*, 15 Cal. 186; *Walker v. Sedgwick*, 8 Cal. 398; *Cahoon v. Robinson*, 6 Cal. 225; *Salmon v. Hoffman*, 2 Cal. 138; *Burt v. Wilson*, 28 Cal. 632. The same doctrine is held in the courts of the United States: *Chilton v. Braiden*, 2 Black. 458; *Gilman v. Brown*, 1 Mason, 191; 4 Wheat. 255; *Bayley v. Greenleaf*, 7 Wheat. 46; *Bush v. Marshall*, 6 How. 284; *Galloway v. Finley*, 12 Pet. 264; *McLearn v. McLellan*, 10 Pet. 640; *Cole v. Scott*, 2 Wash. 141.

without paying for it.¹ It will at once be seen, that, as between the parties, this lien is founded in natural justice.² The civil law gave a lien on both real and personal property to the vendor for the purchase-money, and the principle was early introduced into English equity, as to real estate.³ Courts administer the equity by converting the purchaser into a trustee.⁴ They, in effect, say, that if one conveys his land and takes no security for the purchase-money, the purchaser shall be a trustee of the land for the vendor until it is paid.⁵

§ 233. It has been objected that the creation of this lien or trust by courts of equity is a repeal of the statute of frauds. It is answered, that the raising of such a trust is no more in contravention of the statute than the creation of any other resulting or constructive trust by operation of law upon the acts and contracts of parties, where they do not contemplate or intend a trust.⁶ It is further objected, in the United States, that the raising of such trusts is contrary to the policy of the registry laws which require all deeds and liens to be matter of record.⁷ But, as between the parties, the raising of a trust to secure the purchase-money is no more against the policy of the registry laws than is the raising of a resulting trust to secure the actual purchaser, where the deed is taken in the name of another, or the raising of a constructive trust where one man has defrauded another of his title. In either case there is a secret trust that does not appear upon the records of the registry. So, as against third

¹ *Hughes v. Kearney*, 1 Sch. & Lef. 135; *Chilton v. Braiden*, 2 Black. 458.

² Inst. Lib. 2, tit. 1, § 41; *Blackburn v. Gregson*, 1 Cox, 100; *Chapman v. Tanner*, 1 Vern. 267.

³ *Mackreth v. Symmons*, 15 Ves. 337; Dig. Lib. 18, tit. 1, c. 19, 22, 53; *Domat*, B. 3, tit. 1, § 5, art. 4.

⁴ *Ibid.*; *Blackburn v. Gregson*, 1 Bro. Ch. 420; *Walker*, Am. Law, 315.

⁵ *Ibid.*

⁶ *Mackreth v. Symmons*, 15 Ves. 329; *Manly v. Slason*, 15 Vt. 271.

⁷ *Philbrook v. Delano*, 29 Maine, 415.

persons who take the land with notice that the purchase-money is unpaid, the policy of the registry laws applies in the same manner that it applies to other unrecorded deeds or liens.¹ Thus, if a second purchaser or mortgagee has notice of a prior sale or mortgage for a valuable consideration, he cannot, by putting his deed or mortgage first on record, deprive the prior purchaser or mortgagee of his title or security.² It is, however, true that many courts have looked upon this trust with disfavor, although they have recognized its existence,³ and some States have formally abolished it by statute.⁴ (a) While other courts deem it highly equitable, and eminently consistent with the most perfect ideas of moral justice.⁵

§ 234. In most cases the *cestui que trust* has an equitable estate in the land to which his trust attaches, an estate which he may sell, assign, or devise; but a vendor having only a lien for his purchase-money, has no estate in the land. It is neither *jus in re* nor *jus ad rem*. It is the mere possibility of a right, until it is established by a final decree of a court in each case.⁶ (b) It is not a direct trust in the land

¹ *Manly v. Slason*, 21 Vt. 271.

² *Bayley v. Greenleaf*, 7 Wheat. 51; *Conover v. Warren*, 1 Gil. 502; *Brawley v. Catron*, 8 Leigh, 527; *Moore v. Halcombe*, 3 Leigh, 600.

³ *Vermont and Virginia, ut sup.*

⁴ *Ibid.*

⁵ *Manly v. Slason*, 21 Vt. 278.

⁶ *Gilman v. Brown*, 1 Mason, 21; 1 Lead. Cas. in Eq. 272-275; *Williams v. Young*, 17 Cal. 403; 21 Cal. 227.

(a) In some of the States, as, *e.g.* 43 W. Va. 162; *Ansley v. Pasahro*, 22 Neb. 662.

this lien does not exist unless expressly reserved in a conveyance; when so reserved it amounts to a mortgage. See *Fisher v. Shropshire*, 147 U. S. 133; *Roanoke B. & L. Co. v. Simmons* (Va.), 20 S. E. Rep. 955; *McKeown v. Collins*, 38 Fla. 276; *Scrags v. Hill*, 100 W. Va. 609; and to conveyances by quit-claim as well as warranty deeds. *Robinson v. Appleton*, 124 Ill. 276. The lien is joint, when different vendors join in one contract. *Briscoe v. Minah*

itself, but a collateral trust for the security of the debt. It is in fact a remedy for a debt, and not a right of property. It follows, that the remedy can be enforced only so long as the debt can be enforced; that where an action for the purchase-money is gone, the right to enforce the lien, or the lien itself, is gone also. This lien or trust continues so long as the purchase-money remains unpaid, or so long as an action can be maintained for its collection. If the action is barred by the statute of limitations, the remedy to enforce the lien is gone also.¹ In this respect the vendor's lien differs from a mortgage, which may be enforced against the land after all right to enforce the debt against the mortgagor is barred by the statute of limitations, or by his discharge in bankruptcy. If a *cestui que trust* conveys his equitable estate in land, he will have the same lien upon it for the purchase-money as in the case of a legal estate.²

§ 235. The lien exists, notwithstanding the deed recites³ or acknowledges⁴ that the consideration is paid, and notwithstanding a receipt of the payment is indorsed upon the back

¹ *Borst v. Corey*, 15 N. Y. 505; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Trotter v. Erwin*, 27 Miss. 772; *Addams v. Hefferman*, 9 Watts, 530; *Alexander v. McMurray*, 8 Watts, 504. But in Maryland it was held to be a direct trust and property in the land, like a mortgage, which could be enforced after the personal obligation of the vendee was gone. *Moreton v. Harrison*, 1 Bland, 491; *Lingan v. Henderson*, id. 236. And see *Relfe v. Relfe*, 34 Ala. 500.

² *Iglehart v. Armiger*, 1 Bland, 519; *Galloway v. Hamilton*, 1 Dana, 576; *Lignon v. Alexander*, 7 J. J. Marsh. 288; *Stewart v. Hatton*, 3 id. 178. But see *Bayley v. Greenleaf*, 7 Wheat. 46; *Schnebly v. Ragan*, 7 Gill & J. 120.

³ *Thornton v. Knox*, 6 B. Mon. 74; *Mackreth v. Symmons*, 15 Ves. 337; *Hughes v. Kearney*, 1 Sch. & Lef. 135; *Winter v. Auson*, 3 Russ. 488; 1 Sim. & S. 434; *Saunders v. Leslie*, 2 B. & B. 514.

⁴ *Gilman v. Brown*, 1 Mason, C. C. 214; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Ewbank v. Poston*, 5 Mon. 287; *Redford v. Gibson*, 12 Leigh, 344; *Tribble v. Oldham*, 5 J. J. Marsh. 144.

C. M. Co., 82 F. R. 952; 89 id. 891. not apply in favor of agreements
Its amount must be capable of ex- to support during life. *Peters v.*
act ascertainment; hence it does *Tunell*, 43 Minn. 473.

of the deed,¹ if in fact it is not paid. And if the consideration is not to be paid until after the death of the grantor, and then only upon a contingency, as if no claim for dower is made in the mean time, the lien will arise;² but if the consideration of the sale is something other than money, as if the vendor makes the sale for the consideration of his future support, no lien will arise;³ nor if in consideration that his debts are paid;⁴ nor if the amount of the consideration is uncertain and unliquidated.⁵ Nor if it appears that the consideration is that the vendee shall enter into covenants to do certain things.⁶ If a note or bond is taken for the consideration, and includes anything other than the price of the land sold, the lien will not attach.⁷

§ 236. Where a vendor takes security for the purchase-money, it is often a difficult question to determine whether he has thereby abandoned or waived his lien. Much of the litigation upon vendor's liens has arisen over this question, — whether the lien was abandoned or not by the parties. Of course, it is a pure question of fact or intention. By the civil law, the taking of any kind of security was an abandonment of the lien upon the property; this rule has not prevailed in England. The rule in England is, that *prima facie* the vendor has a lien for the purchase-money: the presumption in favor of this lien continues until it is displaced by satisfactory evidence that the lien has been abandoned or extinguished. The burden is on the vendee to repel the presumption. The taking of security by the vendor is evi-

¹ Ibid.

² Redford v. Catron, 8 Leigh, 528.

³ Arlin v. Brown, 41 N. H. 105; McCandlish v. Keen, 13 Grat. 615; Brawley v. Catron, 8 Leigh, 528; McKillip v. McKillip, 8 Barb. 552.

⁴ Chapman v. Beardsley, 3 Conn. 115.

⁵ Ibid.

⁶ Buckland v. Pocknell, 13 Sim. 406; Dixon v. Gayfere, 17 Beav. 421; 21 Beav. 118; Clarke v. Boyce, 3 Sim. 499; Parrott v. Sweetland, 3 My. & K. 655. In Alabama the lien was held to arise in case of an exchange of lands. Burns v. Taylor, 23 Ala. 255.

⁷ McCandlish v. Keen, 13 Grat. 605; James v. Bird, 8 Leigh, 51.

dence upon that question, more or less satisfactory according to the nature of the security taken and the circumstances under which it is taken.¹ It has been held that the taking of a mortgage on another estate was not conclusive evidence that the lien was abandoned;² and so, bills or notes indorsed by third persons, or bonds with a surety, are not necessarily conclusive evidence that the vendor in taking them waives his lien.³ It may be, in such cases, that the vendor accepted them as evidences of the amount of the purchase-money and debt, or as security in addition to his lien. But if the security taken is totally distinct and independent, it will be very strong evidence that it was intended to be substituted in place of the lien;⁴ and if it is in any way inconsistent with the continued existence of the lien, it will, of course, be conclusive evidence that the lien was abandoned or extinguished.⁵ Lord Eldon, after a careful review of the authorities, came to the conclusion that every case depended upon its own peculiar facts and circumstances; that different judges would have determined the same case differently; and that there was no general rule that was satisfactory; and he adds, "If I had found it laid down in distinct and inflexible

¹ *Nairn v. Prowse*, 6 Ves. 759; *Mackreth v. Symmons*, 15 Ves. 342; *Garson v. Green*, 1 Johns. Ch. 308; *Lewis v. Caperton*, 8 Grat. 148; *Plowman v. Riddle*, 14 Ala. 169; *Hughes v. Kearney*, 1 Sch. & Lef. 136; *Saunders v. Leslie*, 2 B. & B. 514; *Bradford v. Marvin*, 2 Fla. 463.

² *Ibid.*; *Saunders v. Leslie*, 2 B. & B. 514.

³ *Hughes v. Kearney*, 1 Sch. & Lef. 135; *Gibbons v. Baddall*, 2 Eq. Ab. 682; *Grant v. Mills*, 2 Ves. & B. 306; *Cooper v. Spottiswood*, Taml. 21; *Ex parte Peake*, 1 Madd. 349; *Ex parte Loring*, 2 Rose, 79; *Saunders v. Leslie*, 2 B. & B. 514; *Winter v. Anson*, 3 Russ. 488; 1 S. & S. 434; *Fawell v. Heelis*, Amb. 724; *Frail v. Ellis*, 17 Eng. L. & Eq. 457; *Buckland v. Pocknell*, 13 Sim. 406; *Blair v. Bromley*, 5 Hare, 542; 2 Phill. 354; *Hewitt v. Loosemore*, 9 Hare, 449; *Kyles v. Tait*, 6 Grat. 44; *Blackburn v. Gregson*, 1 Bro. Ch. 420; *Coppin v. Coppin*, 2 P. Wms. 291; *Clark v. Royle*, 3 Sim. 499; *Elliott v. Edwards*, 3 Bos. & P. 181.

⁴ *Ibid.*; *Gilman v. Brown*, 1 Mason, 191; *Cood v. Pollard*, 9 Price, 544; 10 Price, 109; *Parrott v. Sweetland*, 3 My. & K. 655; *Nairn v. Prowse*, 6 Ves. 752; *Mackreth v. Symmons*, 15 Ves. 342.

⁵ *Manly v. Slason*, 21 Vt. 271; *Hallock v. Smith*, 3 Barb. 267; *Ex parte Parkes*, 1 Glyn. & Jam. 228.

terms, that when the vendor takes security for the consideration he has no lien, that would be satisfactory."¹

§ 237. In the United States, the rule that Lord Eldon said would be satisfactory substantially prevails. Thus, if the vendor does any act which manifests an intention to rely upon any security independent of the lien, he will be held to have waived it;² as if he accept a mortgage on other property,³ or a bond or note with a third person as surety⁴ or indorser,⁵ or if he takes a pledge of stock as collateral,⁶ (a) he will be held to have waived his lien. So, if he takes a

¹ *Mackreth v. Symmons*, 15 Ves. 342.

² *Blackburn v. Gregson*, 1 Bro. Ch. 424, and notes by Perkins; *Buntin v. French*, 16 N. H. 592; *Coit v. Fougere*, 36 Barb. 195; *Griffin v. Blanchard*, 17 Cal. 70; *Phelps v. Conover*, 25 Ill. 309; *Selby v. Stanley*, 4 Minn. 65; *Hane v. Van Deusen*, 32 Barb. 92; *Parker v. Sewell*, 24 Tex. 238; *Dibble v. Mitchell*, 15 Ind. 435.

³ *Richardson v. Ridgely*, 8 Gill & J. 87; *White v. Dougherty*, 1 Mart. & Y. 309; *Young v. Wood*, 11 B. Mon. 123; *Mattix v. Weand*, 19 Ind. 151; *Harris v. Harlan*, 14 Ind. 104; *Shelby v. Perrin*, 18 Tex. 515; *Camden v. Vail*, 23 Cal. 633; *Hadley v. Pickett*, 25 Ind. 450.

⁴ *Boon v. Murphy*, 6 Blackf. 272; *Williams v. Roberts*, 5 Ohio. 35; *Mayham v. Coombes*, 14 Ohio, 428; *Wilson v. Graham*, 5 Munf. 297; *Francis v. Hazelrigg's Ex'rs*, Hardin, 48; *Way v. Patty*, 1 Carter. 102; *Burger v. Potter*, 32 Ill. 66; *Sears v. Smith*, 2 Mich. 243; *Porter v. Dubuque*, 20 Iowa, 440.

⁵ *Foster v. Trustees*, 3 Ala. 302; *Gilman v. Brown*, 1 Mason. 191; 4 Wheat. 255; *Marshall v. Christmas*, 3 Humph. 616; *Burke v. Gray*, 6 How. (Miss.) 527; *Conover v. Warren*, 1 Giln. 498; *Bradford v. Marvin*, 2 Fla. 463.

⁶ *Lagow v. Badollet*, 1 Blackf. 416.

(a) Or obtains a judgment for the price in whole or in part, and sells the land thereunder. *Dickason v. Fisher*, 137 Mo. 342. Merely obtaining judgment on the note does not waive the lien. *Zwingle v. Wilkinson*, 94 Tenn. 246; *Strain v. Walton*, 11 Texas C. App. 624.

The lien is waived by accepting in place thereof security by a mort-

gage upon the land or by a surety. *Boies v. Benham*, 127 N. Y. 620; *Baker v. Updike*, 155 Ill. 54; *Robbins v. Masteller*, 147 Ind. 122; *Kinney v. Ensminger*, 94 Ala. 536; *Hammett v. Stricklin*, 99 Ala. 616; *Fields v. Drennen*, 115 Ala. 558; see *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509

mortgage on the same land sold for part of the purchase-money, or for the whole,¹ he will be held to have waived his lien for the remainder.² But in these cases the presumption that the vendor intended to waive his lien by taking such securities may be rebutted by any satisfactory evidence that it was not intended that the lien should be waived.³ On the other hand, the presumption of a lien may be rebutted, though no security is taken, by satisfactory evidence that it was intended that the lien should not be relied on.⁴ But, generally, the mere taking of the vendee's note, or bond, or bill, or check,⁵ (a) or the renewal of these evidences of debt,⁶ will not be sufficient evidence that the vendor intended to waive his lien.⁷ But any conduct in the vendor that makes it unjust, unfair, or inequitable for him to insist upon the lien, will discharge it.⁸ If worthless securities are

¹ *Little v. Brown*, 2 Leigh, 355; *Hadley v. Pickett*, 25 Ind. 450. But see to the contrary, *Boos v. Ewing*, 17 Ohio, 520; *Baum v. Grigsby*, 21 Cal. 172.

² *Brown v. Gilman*, 4 Wheat. 291; *Fish v. Howland*, 1 Paige, 30; *Phillips v. Saunderson*, 1 Sm. & M. 465. Even if the mortgage is void. *Camden v. Vail*, 23 Cal. 633; *Way v. Patty*, 1 Ind. 102.

³ *Mims v. Macon and Western R. R.*, 3 Kelly, 333; *Campbell v. Baldwin*, 2 Humph. 248; *Kyles v. Tait*, 6 Grat. 48; *Tiernan v. Thurman*, 14 B. Mon. 277; *Sears v. Smith*, 2 Mich. 243; *Daughaday v. Paine*, 6 Minn. 443.

⁴ *Clark v. Hunt*, 3 J. J. Marsh. 553; *Phillips v. Saunderson*, 1 Sm. & M. 462; *Redford v. Gibson*, 12 Leigh, 332; *Scott v. Orbinson*, 21 Ark. 202.

⁵ *Honore v. Bakewell*, 6 B. Mon. 67; *Baum v. Grigsby*, 21 Cal. 172; *Walker v. Sedgwick*, 8 Cal. 398.

⁶ *Mims v. Lockett*, 23 Ga. 237.

⁷ *Cox v. Fenwick*, 3 Bibb, 183; *Evans v. Goodlet*, 1 Blackf. 246; *Taylor v. Hunter*, 5 Humph. 569; *Garson v. Green*, 1 Johns. Ch. 308; *White v. Williams*, 1 Paige, 502; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Thornton v. Knox*, 6 B. Mon. 74; *Aldridge v. Dunn*, 7 Blackf. 249; *Ross v. Whitson*, 6 Yerg. 50; *Tompkins v. Mitchell*, 2 Rand. 428; *Truebody v. Jacobson*, 2 Cal. 269; *Pinchain v. Collard*, 13 Tex. 333; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Manly v. Slason*, 2 Vt. 271; *Baum v. Grigsby*, 21 Cal. 172.

⁸ *Redford v. Gibson*, 12 Leigh, 343; *Fowler v. Rust*, 2 Marsh. 294;

(a) *Mansfield v. Dameron*, 42 W. Va. 794; *Knight v. Knight*, 113 Ala. 597.

fraudulently imposed upon the vendor, he will retain his lien.¹

§ 238. It has been said before, that the lien for the purchase-money is not an estate in the land, nor is it a charge on the land; but it is an equity between the parties, their representatives or privies in law or estate, to be resorted to in case of failure of payment by the vendee. It is a possibility that may be perfected by proceedings in equity into an actual estate or interest in the land.² (a) Having such a character, it is generally considered to be a personal privilege in the vendor, which descends to his heirs or representatives with the debt for the purchase-money, but which cannot be assigned to a third person, with or without the bond, note, bill, or check which the vendee gave for the consideration.³ (b) If one of several purchasers pays the

Clark v. Hunt, 3 J. J. Marsh. 553; Phillips v. Saunderson, 1 Sm. & M. 462; McCown v. Jones, 14 Tex. 682; Scott v. Orbinson, 21 Ark. 212; Clamer v. Rawlings, 9 S. & M. 122; Lynch v. Dearth, 2 Penn. St. 101.

¹ Coit v. Fougere, 36 Barb. 195; Toby v. McAllister, 9 Wis. 463.

² Young v. Williams, 17 Cal. 403; 21 Cal. 227; Keith v. Horner, 32 Ill. 524.

³ Dixon v. Dixon, 1 Md. Ch. 220; Wellborn v. Williams, 8 Ga. 258; Green v. Demoss, 10 Humph. 371; Walker v. Williams, 30 Miss. 165; Briggs v. Hill, 6 How. (Miss.) 362; Shall v. Biscoe, 18 Ark. 142; Brush v. Kinsley, 14 Ohio, 20; Horton v. Horner, id. 437; Sheratz v. Nicode-

(a) The lien is enforceable in equity, although the legal remedy has not been exhausted. Burgess v. Fairbanks, 83 Cal. 215. But not when the legal remedy is adequate, as by action on the vendee's covenant. Whiteley v. Central Trust Co., 76 F. R. 74.

(b) A vendor's lien goes to his personal representatives, and not to the heir. Robinson v. Appleton, 124 Ill. 276; Evans v. Enloe, 70 Wis. 345. It passes by a transfer of the notes for the purchase-money,

though not itself assignable. First Nat. Bank v. Salem Capital F. M. Co., 39 Fed. Rep. 89; Law v. Butler, 44 Minn. 482; Elmendorf v. Beirne, 4 Tex. Civ. App. 188; Gruhn v. Richardson, 128 Ill. 178; Martin v. Martin, 164 Ill. 640. If several notes thus secured are assigned to different persons, the assignees are *prima facie* to share *pro rata* in the proceeds of the land when sold to satisfy the lien. Nashville Trust Co. v. Smythe, 94 Tenn. 513.

whole purchase-money, he does not thereby secure a lien on his co-purchasers' shares;¹ nor does a lien accrue to a third person who loans the purchase-money to the vendee and takes his note therefor;² but if it is agreed by the vendor that a note for the purchase-money shall be given to a third person, it seems that the vendor's lien will go with the note.³ If the note given to the vendor for the purchase-money is indorsed by him, and afterwards paid by him, his lien will revive and attach to it.⁴ If a surety to the vendee's note or bond for the purchase-money is obliged to pay the debt, he will be subrogated to the vendor's lien, and will have a right to have it enforced for his benefit.⁵ If a vendor having a

mus, 7 Yerg. 9; *Gann v. Chester*, 5 Yerg. 205; *White v. Williams*, 1 Paige, 502; *Hallock v. Smith*, 3 Barb. 267; *Green v. Crockett*, 2 Dev. & Bat. Eq. 390; *Moreton v. Harrison*, 1 Bland, 491; *Webb v. Robinson*, 14 Ga. 216; *Dickinson v. Chase*, 1 Morris (Iowa), 492; *Jackman v. Hallock*, 1 Ohio, 318; *Tiernan v. Beam*, 2 Ohio, 383; *Clairhorn v. Crockett*, 3 Yerg. 27; *Briggs v. Planters' Bank*, 1 Freem. Ch. 574; *Iglehart v. Aminger*, 1 Bland, 519; *Hayden v. Stuart*, 4 Md. Ch. 280; *Hall v. Maccubbin*, 6 Gill & J. 107; *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covilland*, id. 178; *Williams v. Young*, id. 227; *Keith v. Horner*, 32 Ill. 524; *Richards v. Leaming*, 27 Ill. 431; *Watson v. Bane*, 7 Md. 117. But in Alabama, Texas, Kentucky, Indiana, and Iowa, a different rule prevails. In those States, the assignment of the note given for the purchase-money carries with it to the assignee the vendor's lien. *Roper v. McCook*, 7 Ala. 318; *White v. Stover*, 10 Ala. 441; *Grigsby v. Hair*, 25 Ala. 327; *Griffin v. Camack*, 36 Ala. 695; *Murray v. Able*, 18 Tex. 515; *McAlpin v. Burnett*, 19 Tex. 497; *Moore v. Raymond*, 15 Tex. 554; *Edwards v. Bohannon*, 2 Dana, 98; *Honore v. Bakewell*, 6 B. Mon. 67; *Lagow v. Badollet*, 1 Blackf. 417; *Brumfield v. Palmer*, 7 id. 227; *Fisher v. Johnson*, 5 Ind. 492; *Kern v. Hazlerigg*, 11 Ind. 443; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Pierson v. David*, 1 Clarke, 23.

¹ *Glasscock v. Glasscock*, 17 Tex. 480.

² *Stansell v. Roberts*, 13 Ohio, 148; *Skeggs v. Nelson*, 25 Miss. 88; *Crane v. Caldwell*, 14 Ill. 468.

³ *Dryden v. Frost*, 3 My. & Cr. 670. In this case the third person was a prior mortgagee, and had the title-deeds in his possession. *Colcord v. Seamonds*, 5 B. Mon. 265.

⁴ 1 Lead. Cas. in Eq. 368.

⁵ *Kleiser v. Scott*, 6 Dana, 137; *Welch v. Parran*, 2 Gill, 329; *Ghise-lin v. Ferguson*, 4 Har. & J. 522; *Magruder v. Peter*, 11 Gill. & J. 228; *Burke v. Chrisman*, 3 B. Mon. 50; *Freeman v. Mebane*, 2 Jones, Eq. 44;

lien on real estate for his purchase-money enforces his debt against the personal assets of a deceased vendee, and thereby deprives creditors or legatees of the deceased vendee of the chance of being paid their debts or legacies, equity will substitute them in the place of the vendor, or will marshal the assets in order to do justice to all.¹

§ 239. This equitable lien or trust prevails against the purchaser, his heirs, and all persons claiming under him or them with notice that the purchase-money is unpaid.² It prevails against the right of dower of the widow of the vendee,³ also against a voluntary donee, or a purchaser without notice,⁴ as also against a purchaser for value, if he had notice that the purchase-money remained unpaid.⁵ If the

Jordan v. Hudson, 11 Tex. 82; *Eddy v. Traver*, 6 Paige, 521; *In re McGill*, 6 Barr, 504; *Kinney v. Harvey*, 2 Leigh, 70; *Haffey v. Birchetts*, 11 Leigh, 83; *Schermerhorn v. Barhydt*, 9 Paige, 30; *Tompkins v. Mitchell*, 2 Rand. 428; *Melery v. Cooper*, 2 Bland, 199.

¹ 2 Sugd. V. & P. 873-878 (7th Am. ed.), where the cases are collected and commented on.

² *Hearle v. Botelers*, Cary, Ch. 25; *Mackreth v. Symmons*, 15 Ves. 329; *Gibbons v. Baddall*, 2 Eq. Cas. Ab. 682; *Walker v. Preswick*, 2 Ves. 622; *Elliot v. Edwards*, 3 Bos. & P. 181; *Winter v. Anson*, 3 Russ. 493; *Garson v. Green*, 1 Johns. Ch. 308; *Warner v. Van Alstyne*, 3 Paige, 513; *Wade v. Greenwood*, 2 Robin. 475; *Ewbank v. Poston*, 5 Mon. 285; *Neil v. Kinney*, 11 Ohio St. 58.

³ *Warner v. Van Alstyne*, 3 Paige, 513; *Wilson v. Davidson*, 2 Rob. 385; *Ellicott v. Welch*, 2 Bland. 213; *Nazareth, &c. v. Lowe*, 1 B. Mon. 257; *Fisher v. Johnson*, 5 Ind. 492; *Crane v. Palmer*, 8 Blackf. 120; *Williams v. Wood*, 1 Humph. 408; *Besland v. Hewett*, 11 Sm. & M. 164.

⁴ *Upshaw v. Hargrave*, 6 Sm. & M. 286; *High v. Batte*, 10 Yerg. 186, 335; *Mounce v. Byars*, 16 Ga. 469; *Burlingame v. Robbins*, 21 Barb. 327; *Hallock v. Smith*, 3 Barb. 267.

⁵ *Wileox v. Calloway*, 1 Wash. 38; *Graves v. McCall*, 1 Call, 414; *Redford v. Gibson*, 12 Leigh, 332; *Wright v. Woodland*, 10 Gill & J. 388; *Ghiselin v. Ferguson*, 4 Har. & J. 522; *Mounce v. Byars*, 11 Ga. 180; *Thornton v. Knox*, 6 B. Mon. 74; *Honore v. Bakewell*, id. 67; *Tiernan v. Thurman*, 14 B. Mon. 279; *Eskridge v. McClure*, 2 Yerg. 84; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Pierce v. Gates*, 7 Blackf. 162; *Brunfield v. Palmer*, id. 227; *McKnight v. Brady*, 2 Mo. 110; *Briscoe v. Bronaugh*, 1 Tex. 326; *Pintard v. Goodloe*, Hemp. 527; *Amory v. Reilly*, 9 Ind. 499; *Manly v. Slason*, 21 Vt. 271; *Hallock v. Smith*, 3 Barb. 267; *Cator v. Pembroke*,

purchaser from the vendee has not paid over the purchase-money, equity will attach the lien or trust to the money in his hands.¹ But a *bona fide* purchaser for value from the vendee, without notice, will take the estate unaffected by the trust or lien;² (a) or if by intermediate conveyances through persons who have notice the estate finally comes to a *bona fide* purchaser for value without notice, it will be discharged of the lien.³ A *bona fide* purchaser is defined to be one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside;⁴ of course, a mortgagee without notice for a new consideration comes within this definition.⁵ So, a conveyance or mortgage to individual creditors without notice is held to prevail against the lien, as where the equities are equal the legal title prevails.⁶ But the lien prevails against

1 Bro. Ch. 302; *Ewbank v. Poston*, 5 Mon. 291; *McAlpin v. Burnett*, 19 Tex. 497; *Pierson v. David*, 1 Clarke, 23; *Grapengether v. Fejervary*, 9 Iowa, 163; *Merritt v. Wells*, 18 Ind. 171.

¹ *Ripperdon v. Cozine*, 8 B. Mon. 465.

² *Bayley v. Greenleaf*, 7 Wheat. 46; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Duval v. Bibb*, 4 Hen. & M. 113; *Wood v. Bank of Kentucky*, 5 Mon. 194; *Blights, &c. v. Bank, &c.*, 6 Mon. 192; *Taylor v. Hunter*, 5 Humph. 569; *Stewart v. Ives*, 1 Sm. & M. 197; *Carnes v. Hubbard*, 2 S. & M. 108; *Dunlop v. Burnett*, 5 Sm. & M. 702; *Work v. Brayton*, 5 Ind. 396; *Carter v. Bank of Georgia*, 24 Ala. 37; *Bradford v. Harper*, 25 Ala. 337; *Webb v. Robinson*, 14 Ga. 216; *Champion v. Brown*, 6 Johns. Ch. 402; *Collier v. Harkness*, 26 Ga. 362; *Selby v. Stanley*, 4 Miss. 65; *Scott v. Orbinson*, 21 Ark. 202.

³ *Boon v. Barnes*, 23 Miss. 136.

⁴ *Ibid.*

⁵ *Duval v. Bibb*, 4 Hen. & M. 113; *Wood v. Bank of Kentucky*, 5 Mon. 194; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Growing v. Behn*, 10 B. Mon. 383.

⁶ *Bayley v. Greenleaf*, 7 Wheat. 56; *Mitford v. Mitford*, 9 Ves. 100; *Moore v. Holcombe*, 3 Leigh, 597; *Webb v. Robinson*, 14 Ga. 216; *Dunlop v. Burnett*, 5 Sm. & M. 702; *Johnson v. Cawthorn*, 1 Dev. & Bat. 32; *Harper v. Williams*, *id.* 179; *Roberts v. Rose*, 2 Humph. 145; *Gann v.*

(a) See *Koch v. Roth*, 150 Ill. 473; *Hawes v. Chaille*, 129 Ind. 212; *Hertzfeld v. Bailey*, 103 Ala. 435.

assignees in bankruptcy or insolvency, and against a general assignment by a failing debtor, in trust for all his creditors. In these cases the vendees are looked upon as volunteers, and, as such, they have the rights only of the debtor himself.¹ Notice to the agent of the purchaser is notice to the purchaser,² and if the vendor remain in possession it will be sufficient to put a purchaser upon his inquiry and is constructive notice,³ and any fact that would put a reasonable man upon his inquiry will affect the purchaser with notice.⁴ So, if a purchaser knows that a part of the purchase-money is unpaid, he is put upon his inquiry;⁵ and such purchaser is bound to take notice of all the recitals in the deed to the vendee.⁶

§ 240. A person may also become a trustee by construction, in the absence of fraud, where a trust is created; but *Chester*, 5 Yerg. 205; but see *Brown v. Vanlier*, 7 Humph. 239; *Shirley v. Sugar Ref.*, 2 Edw. 505; *Repp v. Repp*, 12 Gill & J. 341; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Aldridge v. Dunn*, 7 Blackf. 249; but see *Chance v. McWortee*, 26 Ga. 315.

¹ *Mitford v. Mitford*, 9 Ves. 100; *Fawell v. Heelis*, Amb. 726; *Blackburn v. Gregson*, 1 Bro. Ch. 420; *Grant v. Mills*, 2 Ves. & B. 306; *Ex parte Peake*, 1 Madd. 356; *Chapman v. Tanner*, 1 Vern. 267; *Bayley v. Greenleaf*, 7 Wheat. 51; *Green v. Demoss*, 10 Humph. 371; *Brown v. Heathcote*, 1 Atk. 160; *Simond v. Hilbert*, 1 Russ. & My. 729; *Jewson v. Moulson*, 2 Atk. 417; *Scott v. Surman*, Willes, 402; *Warrall v. Morlar*, 1 P. Wms. 459. And so of judgment creditors. *Flanders v. Thompson*, 3 Woods. 9; *Rodgers v. Bowner*, 45 N. Y. 379; *Birkhard v. Edwards*, 11 Ohio, 84; *St. Bank v. Campbell*, 2 Rich. (S. C. Eq.) 179; *Watkins v. Russell*, 15 Ark. 73; *Thomas v. Kennedy*, 24 Iowa, 397; *Dunlop v. Burnett*, 5 Sm. & M. 702.

² *Mounce v. Byars*, 11 Ga. 180; *Frail v. Ellis*, 17 Eng. L. & Eq. 457.

³ *Ringgold v. Bryan*, 3 Md. Ch. 488; *Hamilton v. Fowlkes*, 16 Ark. 340; *Hopkins v. Garrard*, 6 B. Mon. 67.

⁴ *Frail v. Ellis*, 17 Eng. L. & Eq. 457; *Briscoe v. Bronaugh*, 1 Tex. 328.

⁵ *Manly v. Slason*, 21 Vt. 271.

⁶ *Kilpatrick v. Kilpatrick*, 23 Miss. 124; *Thornton v. Knox*, 6 B. Mon. 74; *Woodward v. Woodward*, 7 B. Mon. 116; *McRemmon v. Martin*, 14 Tex. 318; *Tiernan v. Thurman*, 14 B. Mon. 277; *Honore v. Bakewell*, 6 B. Mon. 67; *Hutchinson v. Patrick*, 22 Tex. 318; *McAlpin v. Burnett*, 23 Tex. 649.

if no trustee is appointed,¹ or the trustee named is incapable of taking,² or refuses to act,³ or dies,⁴ or the office becomes vacant in any other way;⁵ in all such cases every person to whom the trust property comes, by reason of there being no trustee, will be treated as a trustee, and he may be ordered to account, and to convey the property to such other persons as trustees as the court may appoint.⁶ As where a man makes a devise in trust by his will, but names no trustee, the land descends to his heirs, but in trust for the purposes named in the will; and his heirs would be required to account for the property, and to convey the same to such trustees as the court might appoint.⁷ Courts of equity have inherent jurisdiction over all matters of trust and trustees, and they never allow a trust to fail for want of a trustee.⁸ So, if a party forbidden by law to convey his property to some person standing in a certain relation to him, as if a husband who cannot convey to his wife should make an absolute conveyance directly to her, the conveyance would not pass the legal title, but equity would construe it into a declaration of trust, and the husband into a trustee for the wife.⁹ Therefore if, upon the death of the trustee without heirs, the legal title should escheat to the Crown or the State, equity would fol-

¹ *White v. White*, 1 Bro. Ch. 12; *Dodkin v. Brunt*, L. R. 6 Eq. 580.

² *Sonley v. Clockmakers' Co.*, 1 Bro. Ch. 81; *Ex parte Turner*, 1 Bailey, Ch. 395.

³ *King v. Donnelly*, 5 Paige, 46; *Hawley v. James*, id. 318; *De Peyster v. Clendining*, 8 Paige, 295; *Lee v. Randolph*, 2 Hen. & M. 12; *Ex parte Kunst*, 1 Bailey, 489; *Dawson v. Dawson*, Rice, 243; *Field v. Arrow-smith*, 3 Humph. 448.

⁴ *Dunscomb v. Dunscomb*, 2 Hen. & M. 11.

⁵ *Gibson's Case*, 1 Bland, 138.

⁶ *Ibid.*; *Cushney v. Henry*, 4 Paige, 345; *McIntire School v. Zan. Canal, &c.*, 9 Ham. 203; *White v. Hampton*, 13 Iowa, 259; *McKenna v. Phillips*, 6 Whart. 571; *Boykin v. Ciples*, 2 Hill, Eq. 200; *Wilson v. Towle*, 36 N. H. 129; *Pool v. Cummings*, 20 Ala. 563; *Griffith v. Griffith*, 5 B. Mon. 113.

⁷ *Stone v. Griffin*, 3 Vt. 400.

⁸ *McCartney v. Bostwick*, 32 N. Y. 53; *Vidal v. Girard*, 2 How. 128.

⁹ *Huntly v. Huntly*, 8 Ired. Eq. 250; *Garner v. Garner*, Busbee, Eq. 1.

low the property and execute the trust by the appointment of new trustees or otherwise.¹

§ 241. Another instance of a constructive trust without fraud is where a person receives the trust property from the trustee without notice of the trust, by way of voluntary gift or without paying a valuable consideration. If such person had notice of the trust, it would be a fraud to receive the trust fund even if he paid a valuable consideration, and he would be held as a constructive trustee;² but if he paid a valuable consideration without notice, he would hold the property unaffected by the trust.³ And if he receives the property without paying a valuable consideration, and without notice, equity holds the absence of a consideration as equivalent to notice, and construes the taker into a trustee, and liable as such to the same extent as the trustee from whom he took it.⁴ But if a person comes into possession of the trust property, not by, under, or through the trustee, but against him, as by disseizing or ousting him, he will not be bound by the trust, although he have notice of it; for the disseizor creates a title for himself paramount to the title of the trustee,⁵ and all outstanding terms attending the inheritance will attend the title of the disseizor until he is dispossessed by some other paramount title.⁶ In States where registry laws are in force, the registry of a deed from a grantor who had no right to the land is not constructive notice to the true owner that such deed has been made, and it is constructive notice only to subsequent purchasers under the same grantor.⁷

¹ Stat. 4 & 5 Will. IV. c. 23; *Hughes v. Wells*, 9 Hare, 749; 13 Eng. L. & Eq. 389.

² *Ante*, § 220.

³ *Ante*, §§ 217, 218.

⁴ *Mansell v. Mansell*, 2 P. Wms. 691; *Pye v. George*, 1 P. Wms. 128.

⁵ *Finch's Case*, 4 Inst. 85; *Sugd. Gilb. Uses*, 429.

⁶ *Reynolds v. Jones*, 2 S. & S. 206.

⁷ *Bates v. Norcross*, 14 Pick. 225; *Tilton v. Hunter*, 11 Shep. 29; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Keller v. Nutz*, 5 S. & R. 246; *Woods v. Farmene*, 7 Watts, 382; *Crockett v. McGuire*, 10 Miss. 34.

§ 242. Analogous to the gift or sale of the trust property by trustees is the right of dealing with its property by a corporation. A corporation holds its property in trust, *first*, to pay its creditors, and, *second*, to distribute to its stockholders *pro rata*.¹ (a) If therefore a corporation should dissolve, and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom its property had come, into trustees, and

¹ National Bank, &c. v. Lake Shore, &c. R. R. Co., 21 Ohio St. 232.

(a) A corporation is so far a trustee for its stockholders that a minority thereof may have relief in equity when the acts of the corporation, through the majority of its stockholders, is fraudulent or oppressive towards them. *Menier v. Hooper's Tel. Works*, L. R. 9 Ch. 350; *Gamble v. Queen's County W. Co.*, 123 N. Y. 91; *Sage v. Culver*, 147 N. Y. 241; *Hawes v. Oakland*, 104 U. S. 450; *Mason v. Pewabic M. Co.*, 133 U. S. 50; 145 U. S. 348; *Brewer v. Boston Theatre*, 104 Mass. 378. And a corporation which purchases a majority of the stock of another corporation assumes the same trust relation towards the latter's minority stockholders. *Farmers' L. & T. Co. v. New York & N. Ry. Co.*, 150 N. Y. 410.

A corporation is sometimes said to hold its property as a trust fund for its creditors; but this applies no more strongly than in the case of an ordinary debtor, and only when the corporation is insolvent. *Hollins v. Brierfield Coal Co.*, 150 U. S. 371; *Handley v. Stutz*, 139 U. S. 417; *Walker v. Miller*, 59 F. R. 869; *Chattanooga, &c. R.*

Co. v. Evans, 66 id. 809; *In re Brockway Manuf. Co.*, 89 Maine, 121; *Fear v. Bartlett*, 81 Md. 435; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; *Ballin v. Merchants' Exchange Bank*, 89 Wis. 278; *John V. Farwell Co. v. Sweetzer*, 10 Col. App. 421; *Hospes v. Northwestern Manuf. Co.*, 48 Minn. 174; *Memphis Barrel Co. v. Ward*, 99 Tenn. 172; 25 Am. L. Rev. 749. A foreign corporation may be a trustee. See *Pennsylvania Ins. Co. v. Bauerle*, 143 Ill. 459; *Farmers' L. & T. Co. v. Lake St. Ry. Co.*, 68 Ill. App. 666; *Glaser v. Priest*, 29 Mo. App. 1; *Butler v. Harrison Land Co.*, 139 Mo. 467; *Peynado v. Penaydo*, 82 Ky. 5; *Deringer v. Deringer*, 5 Houst. 416; *Ames v. Heslet*, 19 Mont. 188.

Where numerous copies of a pamphlet were issued by a fraternal beneficiary association, stating that a certain fund was held by it as a trust fund solely for the payment of matured certificates, &c., the pamphlet was held admissible in evidence to show that its chief officer knew the fund to be held in trust. *Putnam v. Gunning*, 162 Mass. 552, 554.

would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands.¹ In England, the doctrine of constructive trusts is not enforced against the Bank of England in regard to its stock standing upon its books; the bank is bound to recognize only the person who has the legal title.² But Chief Justice Taney said that the decisions as to the Bank of England were exceptions depending upon the policy of the acts of parliament in reference to the bank, and that certainly none of the English cases convey the idea that, upon general principles of law, a bank is not bound to notice a trust of its own stocks, and must look only at the legal estate.³ In the United States it is well established, that if a corporation that requires a transfer of its stock to be made by its own officers upon its own books permits a transfer to be made, by an executor, trustee, or guardian, of stock held by such persons in a fiduciary capacity, such corporation, knowing the trust, and that the transfer is made for purposes other than such trust, will be held in equity as a constructive trustee of the stock thus wrongfully conveyed, and will be liable to make it good to the *cestui que trust*.⁴ (a) And if a

¹ *Mumma v. Potomac Co.*, 8 Pet. 281; *Vose v. Grant*, 15 Mass. 515; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer*, 3 Mason, 308; 2 Story's Eq. Jur. § 1252; *Hill v. Fogg*, 41 Mo. 562; *Hastings v. Drew*, 76 N. Y. 9.

² *Pearson v. B'k of Eng.*, 2 Bro. Ch. 529; *Hartga v. B'k of Eng.*, 3 Ves. Jr. 55; *B'k of Eng. v. Parsons*, 5 Ves. 668; *Austin v. B'k of Eng.*, 8 Ves. 522; *B'k of Eng. v. Lunn*, 15 Ves. 583; *Bristed v. Williams*, 3 Hare, 235; *Humberstone v. Chase*, 2 Y. & C. 209; *Franklin v. B'k of Eng.*, 9 B. & C. 156; *B'k of Eng. v. Moffat*, 3 Bro. Ch. 260; *Pearson v. B'k of Eng.*, 2 Cox, 178; *Rider v. Kidder*, 10 Ves. 369; *Ripley v. Waterworth*, 7 Ves. 440; Stat. 4 W. & M. c. 3, § 10; 5 W. & M. c. 20, § 20; 1 Geo. I. St. 2, c. 19, § 12; 30 Geo. II. c. 19, § 49; 7 Will. IV. & 1 Vic. c. 26; 8 & 9 Vic. c. 97; *Lewin on Trusts* (2d Am. ed.), 32.

³ *Lowry v. Commercial B'k*, 3 Bankers' Mag. 201; 10 Pa. Law Jour. (3 Am. L. J. n. s.) 111.

⁴ *Mechanics' B'k v. Seton*, 1 Pet. 299; *Porter v. B'k of Rutland*, 19 Vt.

(a) See *Lowell*, Transfer of § 323 *et seq.*; 1 *Ames on Trusts* Stock, §§ 151, 242; 1 *Cook on* (2d ed.), 414. *Stock and Stockholders* (3d ed.),

corporation negligently enter the names of the parties upon its books, in such manner that the stock is improperly transferred, it will be liable as a constructive trustee.¹ Accordingly a corporation has a right to require from all fiduciary holders of stock evidence of their authority to make the transfer.² It has been held that the mere addition of the word "trustee," without any reference to the terms of the trust or the persons of the *cestuis que trust*, is not sufficient notice to a bank to render it liable in case the stock is wrongfully transferred by the holder;³ and it is said that, as a guardian has a right to sell the personal property of his ward, a corporation is not liable if he wrongfully transfers the stock on its books.⁴ If purchasers of stock in a corporation have notice that their vendors are trustees, they will be held as constructive trustees; and if the certificates are passed over to the purchaser with the word "trustee" added to the name of the seller, the purchaser is bound to inquire into the particulars of the trust, and he has such notice as will bind him as a trustee if the sale was wrongfully made.⁵ But if the purchaser does not see the certificates of the stock in the seller's hands, as if the seller himself transfers the stock upon the books of the company, and brings to the purchaser new certificates that he is entitled to so many shares, the purchaser would not be affected with notice, and would not be held as a trustee.⁶

410; *Albert v. Savings B'k*, 1 Md. Ch. 407; 2 Md. 160; *Farmers' B'k v. Wayman*, 5 Gill, 356; *Atkinson v. Atkinson*, 8 Allen, 15; *Loring v. Salisbury Mills*, 125 Mass. 138; *Holden v. New York & Erie Bank*, 72 N.Y. 286.

¹ *Farmers' B'k v. Wayman*, 5 Gill, 356.

² *Bayard v. Farmers' & Mech. Nat. B'k*, 2 Leg. Int. 161.

³ *Albert v. Savings B'k*, 1 Md. Ch. 407; 2 Md. 160. But see to the contrary, *Walsh v. Stille*, 2 Pars. Eq. 17.

⁴ *B'k of Virginia v. Craig*, 6 Leigh, 339. But see *Atkinson v. Atkinson*, 8 Allen, 15. In the last case, however, the transfer was after the removal of the guardian and the appointment of another in his place.

⁵ *Walsh v. Stille*, 2 Pars. Eq. 17; *Reeder v. Barr*, 4 Ham. 446; *Simons v. S. W. Railway B'k*, 2 Am. Law Reg. 546; *Atkinson v. Atkinson*, 10 Allen, 15.

⁶ *Lowry v. Commercial B'k*, 3 Bankers' Mag. 2111; 10 Pa. Law Jour. 111; *Albert v. Savings B'k*, 2 Md. 160; *Atkinson v. Atkinson*, 10 Allen, 15.

§ 243. Again, if one receives a conveyance of lands or other property absolute in form, but really as security for a debt, he will hold the legal title in trust for the grantor after the payment of the debt, and before a reconveyance.¹ So, if one receives personal property, agreeing to hold it for another, or to sell it and pay the proceeds to the holder of a note, draft, or other debt, he becomes a trustee, and a bill in equity may be maintained against him and his pledges to enforce the trust.² But if such conveyance is fraudulent and void, the *bona fide* holder of the note or draft cannot enforce the trust.³ In England, upon the death of the mortgagee the mortgage debt goes to his personal representatives, but the fee in the mortgaged real estate descends to his heirs, if not otherwise disposed of; but his heirs hold it upon a constructive trust, as security for the debt, which has gone to his executors or administrators.⁴ (a) In nearly all the United States, both the debt and the mortgage security are chattel interests, and go to the executors or administrators, and not to the heirs,⁵ and payment of the mortgage debt discharges the mortgage; but while the mortgagee is in possession, he is a constructive trustee up to the time

¹ *Maverick, &c. Soc. v. Lovejoy*, 6 Allen, 163; *Baldwin v. Bannister*, 3 P. Wms. 251; *Poole v. Pass*, 1 Beav. 600; Cru. Dig. tit. 15; Mort. c. 3, § 5, tit. 15, c. 2, § 39; *Wilkinson v. Stewart*, 39 Ill. 48; *Smyth v. Carlisle*, 16 N. H. 464.

² *Michigan State Bank v. Gardner*, 15 Gray, 362; *Ulman v. Barnard*, 7 Gray, 554; *Martin v. Coles*, 1 M. & S. 140; *Graham v. Dyster*, 6 M. & S. 1; *Rodriguez v. Hefferman*, 5 Johns. Ch. 417; *De Wolf v. Gardner*, 12 Cush. 19; *Ellis v. Lamme*, 42 Mo. 153; *Petersham v. Tash*, 2 Stra. 1178; *Warner v. Martin*, 11 How. 224; *Evans v. Potter*, 2 Gall. 13; *Daubigny v. Duval*, 5 T. R. 604; *Guerreiro v. Peile*, 3 B. & Ald. 616; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Skinner v. Dodge*, 4 Hen. & M. 423; *Newson v. Thornton*, 6 East, 17; *McCombie v. Davies*, 7 East, 5; *Kinder v. Shaw*, 2 Mass. 398; *Van Amringe v. Peabody*, 1 Mason, 440.

³ *Potter v. McDowall*, 43 Mo. 93.

⁴ *Ellis v. Guavas*, 2 Ch. Cas. 60; *Chase v. Lockerman*, 11 G. & J. 185.

⁵ See *Greenleaf's Cruise*, Dig. tit. 15, c. 2, §§ 39, 40, and notes; 4 Kent, 160, 194.

(a) As to the equitable mortgage and notes; *Bullowa v. Orgo* (N. J. created by deposit of title-deeds, see Eq.), 41 Atl. 494.

4 Kent Com. (14th ed.), 150, 151,

that the mortgagor's equity of redemption expires, and he is bound to account for the rents and profits in due course of administration.¹ It has even been thought that he is liable for the rents and profits after he has transferred his mortgage;² but, as he has a right to assign his mortgage without notice to the mortgagor, it would seem that he would not be liable for anything after he had assigned his mortgage and the possession.³ If a mortgagee assigns the mortgage debt but not the mortgage, he holds the title to the mortgaged premises in trust for the owner of the debt.⁴ So one who takes a mortgagee's title holds it in trust for the owner of the debt which the mortgage was intended to secure.⁵

§ 244. At common law, if a testator appointed his debtor to be the executor of his will, the debt was extinguished, on the ground that, as the executor could not maintain an action against himself, the remedy was gone, and where the remedy is gone, the debt is gone.⁶ Equity, however, construes the debtor, although he is executor, to be a trustee, and the creditors, legatees, and next of kin of the testator can enforce the trust by compelling the executor to account for the amount of the debt due from him to the testator.⁷ In most of the United States this matter is regulated by statute, and the executor may be required by the probate court to put the amount of his debt to the testator into his inventory, or the court of probate may require the executor to charge

¹ *Coppring v. Cooke*, 1 Vern. 270; *Bentham v. Haincourt*, Pr. Ch. 30; *Parker v. Calcroft*, 6 Madd. 11; *Hughes v. Williams*, 12 Ves. 493; *Madocks v. Wren*, 2 Ch. R. 109.

² *Venables v. Foyle*, 1 Ch. Cas. 3.

³ *Ringham v. Lee*, 15 Sim. 400; *Re Radcliffe*, 22 Beav. 201.

⁴ *Torrey v. Morrill*, 53 Vt. 331.

⁵ *Jordan v. Cheney*, 74 Maine, 359.

⁶ 2 *Williams' Ex'rs*, 1129; 2 *Story's Eq. Jur.* § 1209.

⁷ *Berry v. Usher*, 11 Ves. 90; *Simmons v. Gutteridge*, 13 Ves. 264; *Carey v. Goodinge*, 3 Bro. Ch. 111; *Errington v. Evans*, 2 Dick. 456; *Flud v. Rumsey*, Yel. 160; *Phillips v. Phillips*, Freem. 11; 1 Ch. Cas. 292; *Brown v. Selwyn*, Cas. t. Talb. 203; 3 Bro. P. C. 607; 2 *Story's Eq. Jur.* § 1209.

himself with the amount of his debt in his account.¹ And so legatees and distributees may become constructive trustees for creditors of the estate, if the executor or administrator, by accident or mistake, pays over or distributes the estate before all debts are paid. The executor may be sued at law in such case by the creditor, and he may recover over against the persons to whom he has paid the estate. In equity, however, creditors can follow the fund liable for their debts into the hands of the persons to whom it has come, and treat them as constructive trustees, as they are not entitled to anything out of the estate till the debts are first satisfied.²

§ 245. A person may become a trustee by construction, by intermeddling with, and assuming the management of, property without authority. Such persons are trustees *de son tort*, as persons who assume to deal with a deceased person's estate without authority are administrators *de son tort*.(a)

¹ Pusey v. Clemson, 9 S. & R. 204; Griffith v. Chew, 8 S. & R. 32; Hill on Trustees, 172, notes (4th Am. ed.).

² 2 Story's Eq. Jur. §§ 1250, 1251; Russell v. Clark, 7 Cranch, 69; McCall v. Harrison, 1 Brock. 126; Buck v. Swazey, 35 Me. 52; Riddle v. Mandeville, 5 Cranch, 329; Anon. 1 Vern. 162; Newman v. Barton, 2 Vern. 205; Noel v. Robinson, 1 Vern. 94; White School House v. Post, 31 Conn. 240; Boddy v. Lefevre, 1 Hare, 602, n.

(a) Such a trustee is also styled a trustee *ex maleficio*. See Larmon v. Knight, 140 Ill. 232; Russell v. McCall, 141 N. Y. 437; Barry v. Hill, 166 Penn. St. 344; Cutler v. Babcock, 81 Wis. 195; Rollins v. Mitchell, 52 Minn. 41, 50; Luse v. Reed, 63 Minn. 5; Edwards v. Culbertson, 111 N. C. 342; Gruhn v. Richardson, 128 Ill. 178; Orth v. Orth, 145 Ind. 184; Ragsdale v. Ragsdale, 68 Miss. 92; Kincaid v. Thompson, 13 Wash. 377; Roggenkamp v. Roggenkamp, 68 F. R. 605; Leighton v. Leighton, 91 Maine, 593; Bailey v. Bailey, 67 Vt. 494; Brown v. Doane, 88 Ga. 32; Tennant v.

Tennant, 43 W. Va. 547. Thus, a wife who procures to herself the absolute legal title to her husband's property, which he intended to devise to his own heirs, but transferred to her on her promise to use it during her life and devise the part remaining to his heirs, will be charged with a trust *in invitum* in the property on a bill in equity by his heirs. Gilpatrick v. Glidden, 81 Maine, 137; Thompson v. Thompson, 107 Ala. 163. This form of trust properly depends only upon actual deceit. Davis v. Stambaugh, 163 Ill. 557. Such a trust does not arise from a mere refusal to perform

Thus an administrator has no right to interfere with the real estate of an intestate unless it is wanted to pay debts; and if he assume to act in relation to the real estate as a trustee, those interested may treat him as such, and he cannot demur to a bill charging him with neglect of duty, and praying for his removal.¹ If one enters upon an infant's lands, and takes the rents and profits, he may be charged as a guardian or trustee,² (a) and so if one takes personal property.³ If a deceased person holds money or other property in trust for another, and his heir, executor, administrator, or other person assume possession of such property, a constructive trust will be imposed upon them.⁴ During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees;⁵ and they cannot avoid their liability by showing that they were not in fact trustees,⁶ nor can they set up the statute of limitations.⁷ Of course, such unauthorized persons will always be liable to be deprived of the possession at the suit of those beneficially interested, and they will be liable for all the costs, expenses, and damages which their unauthorized intermeddling may have occasioned. Still there may be cases where an unauthorized person may interfere from necessity to preserve and protect the property. In

¹ *Le Fort v. Delafield*, 3 Edw. 31; *McCoy v. Scott*, 2 Rawle, 222; *Schwartz's Estate*, 14 Penn. St. 42; *People v. Houghtaling*, 7 Cal. 348.

² *Wyllie v. Ellice*, 1 Hare, 505; *Drury v. Connor*, 1 H. & G. 220; *Bloomfield v. Eyre*, 8 Beav. 250.

³ *Chaney v. Smallwood*, 1 Gill, 367; *Goodhue v. Barnwell*, Rice, Eq. 198; *Bennett v. Austin*, 81 N. Y. 308.

⁴ *White School House v. Post*, 31 Conn. 248; *People v. Houghtaling*, 7 Cal. 348.

⁵ *Wilson v. Moore*, 1 Myl. & K. 127.

⁶ *Rackham v. Siddall*, 1 Mac. & G. 607; 2 Hall & T. 41; 16 Sim. 297; *Hope v. Liddell*, 21 Beav. 183.

⁷ *Goodhue v. Barnwell*, Rice, Eq. 198.

an oral contract. *Barry v. Hill*, (a) *Thornton v. Gilman* (N. H.), 166 Penn. St. 344; *Dunn v. Zwilling*, 39 Atl. 900. *ling*, 94 Iowa, 233; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 318.

such cases courts of equity have power to do exact justice by decrees as to costs, compensation, and other similar matters. In all cases a person beneficially interested coming into equity must do equity, and join all who have interfered with the possession; and he cannot proceed against one alone as at law for a trespass, and compel one to bear the whole burden of the wrongful intrusion.¹

§ 246. If an agent is employed by a trustee and thus comes into possession of the property, he will be accountable to his employer, and will not be responsible as a constructive trustee.² But if such agent should act fraudulently or collusively he might be made a trustee by construction, and, as such, accountable to the *cestui que trust*.³ (a)

¹ *Wyllie v. Ellice*, 6 Hare, 515; *Phene v. Gillon*, 5 Hare, 5.

² *Keane v. Roberts*, 4 Madd. 332; *Nickolson v. Knowles*, 5 Madd. 47; *Myler v. Fitzpatrick*, 6 Madd. 360; *Davis v. Spurling*, 1 R. & M. 64; *Tam. 199*; *Crisp v. Spranger*, Nels. 109; *Saville v. Tancerd*, 3 Swanst. 141; *Fyler v. Fyler*, 3 Beav. 550; *Maw v. Pearson*, 28 Beav. 196; *Lockwood v. Abdy*, 14 Sim. 437; *Ex parte Burton*, 3 Mont., D. & De Gex, 361; *Re Bunting*, 2 Ad. & El. 467.

³ *Fyler v. Fyler*, 3 Beav. 550; *Att. Gen. v. Leicester*, 7 Beav. 171; *Hardy v. Caly*, 33 Beav. 365; *Bridgman v. Gill*, 24 Beav. 392; *Portlock v. Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont., D. & De G. 399; *Bodenham v. Hoskyns*, 2 De G., M. & G. 903; *Panell v. Hurley*, 2 Coll. 241; *Alleyne v. Darey*, 4 Ired. Ch. 199, 5 Ired. Ch. 56.

(a) *Pinney v. Newton*, 66 Conn. 141; *infra*, § 813. Strangers to the management of the trust, though agents of the trustees, are not constructive trustees because they follow the instructions of the trustees in matters within their legal powers, though the court may not approve of the trustees' action. Hence a solicitor to a trustee is under no greater liability to account as a constructive trustee than any other stranger to the trust. *Barnes v. Addy*, L. R. 9 Ch. 244; *In re Blundell*, 40 Ch. D. 370; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Roche-*

foucauld v. Boustead, [1897] 1 Ch. 196; *Friend v. Young*, 2 id. 421. An agent of the trustee who secures to himself a personal benefit from the trust estate is responsible as a trustee to the *cestui que trust*. *Lehmann v. Rothbarth*, 111 Ill. 185; *Shearman v. Morrison*, 149 Penn. St. 386. If such agent accepts a delegation of the trust, and fraudulently takes part in a breach of trust, he may be held liable to the *cestui que trust* as a trustee *de son tort*. *In re Barney*, [1892] 2 Ch. 265.

Trustees are liable personally for

§ 246 *a*. If a vendor undertakes to sell a good title to land for a valuable consideration, and his title is defective, but he afterwards obtains a perfect title, equity will compel him to hold it in trust for his vendee.¹ If, however, such vendor had conveyed the land with full covenants of warranty, the title which he afterwards obtains will enure for the benefit of his grantee, and the vendor will be estopped by his covenants from setting up his after-acquired title against his vendee.² And if a purchaser of land with notice of a prior mortgage afterwards sells the same to an innocent purchaser for its full value, equity will compel him to hold the proceeds in trust for the mortgagee.³ So, if one procures and puts on record a deed of land with notice of a prior deed and in fraud of a prior purchaser, equity will compel him to hold the legal title in trust for the first grantee.⁴ So, if a person sells stock, and it is conveyed in such a manner that the conveyance is void and the legal title is still in the vendor, he will hold it in trust for the actual vendee, and he may be compelled to take the title and assume the burdens.⁵

§ 247. Where a person has possession of title-deeds or other documents in relation to property, and other persons are interested in the same property, and claim title through or under the same papers, the person having the possession of the papers is a constructive trustee for the other persons

¹ *Clark v. Martin*, 49 Penn. St. 299; *Hope v. Stone*, 10 Minn. 14; *Doyle v. Peerless*, 44 Barb. 239; *Kelley v. Jenness*, 50 Maine, 455; *Cobb v. Stewart*, 4 Met. (Ky.) 255; *Dalhegney v. Tabor*, 22 Cal. 279; *Wasby v. Foreman*, 30 Cal. 90; *Kane County v. Herrington*, 50 Ill. 232.

² *Somes v. Skinner*, 3 Pick. 51; *White v. Patten*, 24 Pick. 324; 2 *Smith, Lead. Cases* (4 Amer. ed.), 550; *Nash v. Spofford*, 8 Met. 192.

³ *Moshier v. Knox College*, 32 Ill. 155.

⁴ *Troy City Bank v. Wilcox*, 24 Wis. 671.

⁵ *Brown v. Black*, L. R. 15 Eq. 367.

their agents' torts in the management of the trust business, as their negligence or that of their servants does not bind the trust estate. *McRoberts v. Carneal* (Ky.), 44 S. W. 442; *Blewitt v. Olin*, 14 Daly, 351; *Norling v. Allee*, 13 N. Y. S. 791; *Low v. Gemley*, 18 Baker v. Tibbetts, 162 Mass. 468; *Can. Sup.* 685.

interested in the same property, and a court of equity will compel him to produce the deeds or papers at the suit of those claiming an interest in the common property.¹

§ 247 a. If a person becomes surety for the debt of another, and the creditor holds mortgages on other securities from the debtor for the same debt, the surety, if he pay the debt, has a right to claim that the creditor shall hold the securities in trust for him; in other words, the surety upon paying the debt is subrogated into the rights of the original creditor;² and if an assignor receives payment for a chose in action which he has assigned, he holds the proceeds in trust for the assignee.³ (a) So, if one sells the property of another and deposits the money in bank in his own name, upon notice to the bank, by the owner of the property, of the facts, and a demand for the money, the bank becomes a *quasi* or constructive trustee for the true owner.⁴

¹ Lewin on Trusts, 156, 157 (5th Lond. ed.).

² Garnsey v. Gardner, 4 Maine, 167.

³ Post, § 438; Fortescue v. Barnett, 3 Myl. & K. 36.

⁴ Bank of Wellsborough v. Bache, 71 Penn. St. 213; Arnold v. Macungie Bank, id. 287; Twitchell v. Drury, 25 Mich. 393; Campan v. Campan, id. 127.

(a) See *supra*, § 60, n. (a). A banker also has a general lien upon securities in his possession; but such lien does not arise upon securities accidentally in his possession, or not in his possession in the course of his business as such, or where the securities are in his hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien. *Reynes v. Dumont*, 130 U. S. 354, 391.

CHAPTER VIII.

TRUSTS THAT ARISE BY CONSTRUCTION FROM POWERS.

- § 248. The nature of powers that imply a trust.
 § 249. Court will execute such powers as trusts.
 §§ 250, 251. Instances of powers which the court will execute as trusts.
 § 252. Instances of powers that are not trusts.
 § 253. Where the power is too uncertain.
 § 254. The power must be executed as given, or it will remain a trust to be executed by the court.
 §§ 255, 256. In what manner the court will execute a trust arising out of a power.
 § 257. Whether courts will distribute *per stirpes* or *per capita*.
 § 258. And whether to those living at the death of donor or of the donee.

§ 248. PROPERTY is sometimes given to a person with a power to dispose of it for a particular purpose, or to a particular class of persons, or to certain persons to be selected or designated by the donee from a particular class. If the donee executes the power and disposes of the property, or designates or selects the persons who are to take under the gift, it goes as directed, and there is no great room for doubt or question; but if the donee refuses or neglects to execute the power, it becomes a grave inquiry whether the persons in whose favor the power might have been executed have any interest in the property, or any remedy for the non-exercise of the power by the first taker or donee. In dealing with the cases that have arisen upon these inquiries, courts have distributed powers into *mere powers*, and *powers coupled with a trust*, or *powers which imply a trust*.¹ *Mere powers* are purely discretionary with the donee: he may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the

¹ *Brown v. Higgs*, 8 Ves. 574; *White v. Wilson*, 1 Drew. 298.

powers unexecuted.¹ (a) If the donee executes the powers, but executes them in a defective manner, courts may aid the execution and supply the defects, but they cannot exercise or execute mere naked powers conferred upon a donee.² (b) It is different with powers coupled with a trust, or powers which imply a trust. In this class of cases the power is so given that it is considered *a trust* for the benefit of other

¹ *Greenough v. Welles*, 10 Cush. 576; *Eldredge v. Heard*, 106 Mass. 582.

² *Wilkinson v. Getty*, 13 Iowa, 157; *Arundell v. Philpot*, 2 Vern. 69; *Tompkyn v. Sandys*, 2 P. Wms. 228, n.; *Bull v. Vardy*, 1 Ves. Jr. 272. And even if a party intended to execute a power, but is prevented by sudden death, the court will not execute the power. *Pigott v. Penrice*, Com. 250; *Gilb. Eq.* 138; *Sugd. on Powers*, 392.

(a) A trust which is a personal confidence does not, on the trustee's death, pass to his administrator, but must be executed by a trustee specially appointed for the purpose. *Hayes v. Pratt*, 147 U. S. 557; *Kean v. Kean* (Ky.), 19 S. W. 184; *Thompson v. Ballard*, 70 Md. 10. Discretionary powers given in discharge of a trust are personal and terminate upon the donee's death. *Security Co. v. Snow*, 70 Conn. 288; *Gambell v. Trippe*, 75 Md. 252; *Sites v. Eldredge*, 45 N. J. Eq. 632. But a power to sell and convey a fee to any one is a general power, and not a personal trust, and such power may be executed by a successor or by an administrator. *Hinson v. Williamson*, 74 Ala. 180; *Watson v. Martin*, 75 Ala. 506; *Syracuse S. Bank v. Porter*, 36 Hun, 168; *Clay v. Selah V. Ir. Co.*, 14 Wash. 543.

Equity may limit even discretionary powers to a reasonable, honest, and just exercise thereof, such having been probably intended. *Read v. Patterson*, 44 N. J. Eq. 211; *Re Stanger*, 64 L. T. 693; *May v.*

May, 167 U. S. 310; *Jones v. Jones*, 30 N. Y. S. 177; *Clark v. Clark*, 50 id. 1041. When an absolute discretion is not clearly given, to be exercised at the will of the person empowered to make a sale or appropriation of principal, an exercise of a power, to be valid, must be founded upon a reasonable judgment as to existing facts and reasonable anticipations of the future, having due regard to the purposes for which the power was given, and to the rights of those whose interests are injuriously affected by its exercise. *Lovett v. Farnham*, 169 Mass. 1. One who is to execute a power of sale by which the interests of others will be affected, must exercise not only good faith, but reasonable care and diligence, and, if others are injured by the negligent exercise of the power, they may appeal to equity for redress. *Price v. Bassett*, 168 Mass. 598.

(b) See *In re Cunningham & Frayling*, [1891] 2 Ch. 567; *In re Bryant*, [1894] 1 Ch. 324.

parties; and when the form of the gift is such that it can be construed to be a *trust*, the power becomes *imperative*, and *must* be executed. Courts will not allow a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee; therefore, courts will not allow a trust to fail, or to be defeated by the refusal or neglect of the trustee to execute a power, if such power is so given that it is reasonably certain that the donor intended that it should be exercised. There are mere powers and mere trusts. There are also powers which the party to whom they are given is intrusted with and required to execute. Courts consider this last kind of power to partake so much of the character of a trust to be executed, that they will not allow it to fail by the failure of the donee to execute it, but will execute it in the place of the donee.¹(a) Lord

¹ Burgess v. Wheate, 1 Wm. Black. 162; Sugd. on Pow. 393-398; Lucas v. Lockhart, 10 Sm. & M. 466; Harrison v. Harrison, 2 Gratt. 1;

(a) Randolph v. East Birmingham Land Co., 104 Ala. 355; Spitzer v. Spitzer, 56 N. Y. S. 470; Towler v. Towler, 142 N. Y. 371. Executors may in New York execute a testamentary power in which a donee is not named. Lesser v. Lesser, 32 N. Y. S. 167.

The court will also enforce the proper and timely exercise of a power which is coupled with a trust or duty, but will not interfere with the trustee's discretion as to the particular time or manner of his *bona fide* exercise of it. Tempest v. Camoys, 21 Ch. D. 571; *In re Kirwan's Trusts*, 25 Ch. D. 373; *Re Burray*, 62 L. T. 752. See Mutual Life Ins. Co. v. Everett, 40 N. J. Eq. 345; Towler v. Towler, 142 N. Y. 371; Jones v. Jones, 30 N. Y. S. 177; Correll v. Lauterbach, 36 id. 615; McHan v. Ordway, 82 Ala. 463; Dillard v. Dillard (Va.), 21 S. E.

Rep. 669; Dick v. Harby, 48 S. C. 516. A trustee cannot delegate a discretion, but may delegate a mere ministerial duty. Bohlen's Estate, 75 Penn. St. 304; Gillespie v. Smith, 29 Ill. 473.

A power coupled with an interest or a trust survives on the donor's death. Benneson v. Savage, 130 Ill. 352; Wilkinson v. Buist, 124 Penn. St. 253; Sites v. Eldredge, 45 N. J. Eq. 632; Herriott v. Prime, 87 Hun, 95; Hilliard v. Beattie (N. H.), 39 Atl. 897; McNeill v. McNeill, 43 W. Va. 765. See upon such powers, *In re Hannan's Co.*, [1896] 2 Ch. 643; 12 Harv. L. Rev. 262; Hall v. Gambrill, 88 F. R. 709; Frink v. Roe, 70 Cal. 296; Lockart v. Forsythe, 49 Mo. App. 654; Roland v. Coleman, 76 Ga. 652; Reeves v. Tappan, 21 S. C. 1; Bredenburg v. Bardin, 36 S. C. 197. It may even continue after the trust is termi-

Hardwicke observed that such powers ought rather to be called trusts than powers.¹ In all cases these powers or

Greenough *v.* Welles, 10 Cush. 576; Erickson *v.* Willard, 1 N. H. 217; Harding *v.* Glyn, 1 Atk. 496; Cruwys *c.* Colman, 9 Ves. 319; Forbes *c.* Ball, 3 Mer. 437; Witts *c.* Boddington, 3 Bro. Ch. 95; Walsh *c.* Wallinger, 2 R. & My. 78; Grievesson *c.* Kersopp, 2 Keen, 654; Jones *c.* Torin, 6 Sim. 255; Martin *c.* Swannell, 2 Beav. 249; Fenwick *c.* Greenwell, 10 Beav. 412; Fordyce *c.* Brydges, 10 Beav. 90; 2 Phill. 497; Burrough *c.* Philcox, 5 My. & Cr. 73; Falkner *c.* Wynford, 15 L. J. Ch. 8; 9 Jur. 1006; Penny *c.* Turner, 15 Sim. 368; 2 Phill. 493; Alloway *c.* Alloway, 1 Dr. & War. 380; Salusbury *c.* Denton, 3 K. & J. 535; Joel *c.* Mills, *id.* 474; Reid *c.* Reid, 25 Beav. 469; Brown *c.* Higgs, 8 Ves. 574; Babbitt *c.* Babbitt, 26 N. J. Eq. 44. In this case Lord Eldon said, if the power be one which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts this principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interest of those for whose benefit he is called upon to execute it. In *Att. Gen. v. Downing*, Wilm. 23, Ld. Ch. J. Wilmot said, as to the objection that those powers are personal to the trustees, and by their death become unexecutable, they are not *powers* but *trusts*, and there is a very essential difference between them. *Powers* are never imperative: they leave the acts to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. The court supplies the *defective execution* of powers, but never the *non-execution* of them; for they are not meant to be *optional*. But a person who creates a trust means it shall be executed *at all events*. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, the court assumes the office. There is some personality in every choice of trustees, but this personality is *res unus ætatis*, and if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in his place. *Brook v. Brook*, 3 Sm. & Gif. 280; *Withers v. Yeadon*, 1 Rich. Ch. 324; *Miller v. Meetch*, 8 Barr, 417; *Gibbs v. Marsh*, 2 Met. 243; *Grimke v. Grimke*, 1 Des. Eq. 375 n.

¹ *Godolphin v. Godolphin*, 1 Ves. 23.

nated: *Taber v. Willetts*, 37 N. Y. S. tion. *In re Sudeley*, [1894] 1 Ch. 233; or after the fee has vested 334.
absolutely, if such was the inten-

trusts must be construed according to the intention of the parties, to be gathered from the whole instrument.¹

§ 249. In all cases where parties have an *imperative power or discretion* given to them, and they die in the testator's lifetime,² or decline the trust or office,³ or disagree as to the execution of it,⁴ or do not execute it before their death,⁵ or if from any other circumstance⁶ the exercise of the power by the party intrusted with it becomes impossible, the court will imply a trust, and will put itself in the place of the trustee, and will exercise the power by the most equitable rule. And the court will act retrospectively in executing these powers as *quasi* trusts;⁷ and although there may be great difficulties and impracticabilities in the way, yet the court will exercise the power and enforce the trust:⁸ for, if the trust or power can by *any possibility* be exercised by the court, the non-execution by the party intrusted shall not prejudice the party beneficially interested, or the *cestui que trust*.⁹ Thus a power to sell given to tenant for life as *cestui que trust* may be executed after his death by trustees under a decree of a court of equity.¹⁰

¹ Kerr v. Verner, 66 Penn. St. 326; Guion v. Pickett, 42 Miss. 77.

² Maberly v. Turton, 14 Ves. 499; Att. Gen. v. Downing, Wilm. 7; Amb. 550; Att. Gen. v. Hickman, 2 Eq. Cas. Ab. 193.

³ Izod v. Izod, 32 Beav. 242; Doyley v. Att. Gen., 2 Eq. Cas. Ab. 194; Gude v. Worthington, 3 De G. & Sm. 389.

⁴ Wainwright v. Waterman, 1 Ves. Jr. 311; Moseley v. Moseley, t. Finch, 53.

⁵ Harding v. Glyn, 1 Atk. 469; Croft v. Adam, 12 Sim. 639; Hewett v. Hewett, 2 Eden, 332; Flanders v. Clark, 1 Ves. 10; Grieveson v. Kirsopp, 2 Keen, 653.

⁶ Att. Gen. v. Stephens, 3 M. & K. 347.

⁷ Maberly v. Turton, 14 Ves. 499; Edwards v. Grove, 2 De G., F. & J. 222.

⁸ Pierson v. Garnet, 1 Bro. Ch. 46.

⁹ Brown v. Higgs, 5 Ves. 505.

¹⁰ Faulkner v. Davis, 18 Grat. 651. Where the discretionary power is such as would not belong to the court by virtue of its jurisdiction over the subject-matter, independent of the will, as, for instance, a power of selecting the beneficiaries of testator's bounty, the court will not execute it, and under the rules cannot confer it upon an appointee. In such

§ 250. In some cases the donor makes a direct gift to one party, but subjects the gift to the discretion or power of some previous taker or other party; as if a donor limit a fund "upon trust for the children of A. as B. shall appoint." In such case the children of A. take a vested interest in the subject of the gift, liable to be divested by the exercise of the power by B. Therefore, on the failure of the power, the children of A. become as absolutely entitled as if the discretion or power had never been given to B.¹ But while the exercise of the power is possible, the donee of it may exercise his discretion in favor of any that he may select; he may select those who are living at the donor's death, or those living at his own death.² In other cases an estate is vested in a donee "upon trust to dispose of it among the children of A." Here the children of A. take nothing directly by way of the gift, but their interest must come to them through the medium of the power.³ If the trust is to dispose of it equally among the children of A., the bequest, though in form a power, is equivalent to a simple gift.⁴ If the donee may distribute or dispose of it *unequally* among the children of A., and no distribution or disposition is made by him, the court will execute the power and distribute the fund *equally* among the objects of it.⁵ In other cases the property

cases it is executed equitably by distributing equally among the distributees. But where the discretion applies to some ministerial act, as leasing or selling land, felling timber, and the like, the court will exercise control. *Druid Park Heights Co. v. Oettinger*, 53 Md. 63.

¹ *Davy v. Hooper*, 2 Vern. 665; *Jones v. Torin*, 6 Sim. 255; *Fenwick v. Greenwell*, 10 Beav. 412; *Hockley v. Mawbey*, 1 Ves. Jr. 143, 149, 150; *Madoc v. Jackson*, 2 Bro. Ch. 588; *Falkner v. Wynford*, 9 Jur. 1006; *Rhett v. Mason*, 18 Grat. 541; *Carson v. Carson*, Phill. (N. C.) Eq. 57.

² *Lambert v. Thwaites*, Law R. 2 Eq. 151; *Woodcock v. Renneck*, 4 Beav. 190; affirmed, 1 Phill. 72.

³ *Ward v. Morgan*, 5 Cold. 407.

⁴ *Rayner v. Mowbray*, 3 Bro. Ch. 234; *Phillips v. Garth*, id. 64.

⁵ *Hands v. Hands*, 1 T. R. 437, note; *Pope v. Whitcomb*, 3 Mer. 698; *Re White's Trust*, 1 Johns. 656; *Finch v. Hollingsworth*, 21 Beav. 112; *Brown v. Pocock*, 6 Sim. 257; *Grieveson v. Kirsopp*, 2 Keen, 656; *Walch v. Wallinger*, 2 R. & M. 78; Tam. 425; 1 Rev. Stat. N. Y. 734, § 100; *Dominick v. Sayre*, 3 Sandf. 555; *Hoag v. Kenney*, 25 Barb. 396.

is vested in a donee with a discretion as to the objects to which, and also as to the proportions in which, it is to be given over. Of course the first question to be determined in all such cases is, Did the donor intend to give a *mere power*, or did he create a trust, or will the court imply a trust? Lord Cottenham stated the general rule deduced from the cases as follows: "When there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises, as stated by Lord Eldon in *Brown v. Higgs*,¹ of the power being so given as to make it the duty of the donee to execute it; and, in such case, the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit."² (a)

§ 251. Thus, where a testator gave an estate "to A. upon trust (subject to certain charges), to employ the remainder of the rent for such children of B. as A. should think most deserving, and that will make the best use of it, or for the children of his nephew, C., if any there are, or shall be," and A. died in the testator's lifetime, it was held to be a trust in favor of all the children of B. and C.³ So where a testator directed certain property to remain until certain contingencies, and then gave life-estates in the property to two of his children, with remainder to their issue, and declared that in case his two children had no issue, the same

¹ 8 Ves. 574; 18 id. 192.

² *Burrough v. Philcox*, 5 My. & Cr. 72; *Witts v. Boddington*, 3 Bro. Ch. 95; 5 Ves. 503; *Harding v. Glyn*, 1 Atk. 469.

³ *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 574; 18 Ves. 192; 2 Sugd on Pow. 176; *Longmore v. Broom*, 7 Ves. 124; *Jones v. Torin*, 6 Sim. 255; *Prevost v. Clark*, 2 Madd. 458; *Penny v. Turner*, 2 Phill. 473; *Fordyce v. Bridges*, id. 497; *White in re*, John. 658.

(a) See 1 Ames on Trusts (2d ed.), 87, n.

should be disposed of by the survivor by will among his nephews and nieces or their children, or either of them, or to as many of them as his surviving child should think proper, it was held to be a trust in favor of the nephews and nieces and their children, subject to the power of selection and distribution by the surviving child.¹ So where a testator gave to B. in tail, and if she had no issue, she was to settle the estate upon such person as she thought fit by will, "confiding" in her not to transfer the estate from his nearest family, it was held to be a trust for the heir who was the nearest family or relation within the meaning of the will.² And where a testator gave his property to his son *in trust* to apply the income to the use of himself and family, and to give by deed or will all beyond what he should so apply, unto all or any child or children of his own in such proportions and in such manner as he should see fit, and his son died having devised the property to his wife with directions to his executors to act under the will of his father, it was held to be a trust coupled with a power to appoint at his discretion among his children, that the power could not be delegated, that the son's will was not an execution of the power, and that his children took equally under their grandfather's will.³ Where a man gave his property "wholly" to his wife to be disposed of by her and divided among his children at her discretion, the children took under the will and not as her heirs, in default of any distribution by her.⁴ And where a testator gave his estate to his wife during her life, and gave all the remainder to his two brothers A. and B. who were also his executors, "with full confidence that they will dispose of such residue among our brothers and sisters and their children, as they shall judge shall be most in need of the same, this to be done according to the best of their discretion;" it was held to be a trust for the brothers and sisters and their children, to the exclusion of A. and B. and

¹ *Burrough v. Philcox*, 5 My. & Cr. 73.

² *Griffiths v. Evans*, 5 Beav. 241.

³ *Withers v. Yeadon*, 1 Rich. Eq. 324.

⁴ *Collins v. Carlisle*, 7 B. Mon. 14; *Russell v. Kennedy*, 3 Brews. 438.

their children; and the court executed the trust, and exercised the powers.¹ Where a testator gave his wife certain property, and desired *her* "to give the same unto and among *such* of the testator's relations as she should think most deserving and approve of," after the death of the wife without appointing, the court decreed a trust, and divided the property equally among the relations.² Where a tenant for life "is desired to give it among his children as he should think fit,"³ or the "residue is to be disposed of among her children as she shall think proper,"⁴ or where after the death of testator's wife the gift "is to such of his grandchildren as she should appoint,"⁵ it was held to be a trust for selection or distribution, and in default of the exercise of the power the court enforced it as a trust and distributed it equally among all the objects named.⁶ In such cases the word "children" will embrace grandchildren if such appears to be the general intent of the donor.⁷ (*a*)

§ 252. But where a testator empowered his wife to give away £1000 of his estate at her death, £100 to A., £100 to B., and the rest by her will, and he died without having

¹ Bull *v.* Bull, 8 Conn. 47; see Gilbert *v.* Chapin, 19 Conn. 351; Harper *v.* Phelps, 21 Conn. 257.

² Harding *v.* Glyn, 1 Atk. 469.

³ 2 Sugd. on Pow. 181.

⁴ Kemp *v.* Kemp, 5 Ves. 849.

⁵ Witts *v.* Boddington, 3 Bro. Ch. 95.

⁶ Whitehurst *v.* Harker, 2 Ire. Ch. 292; Fowler *v.* Hunter, 2 Y. & J. 506; Longmore *v.* Brown, 7 Ves. 124; Salusbury *v.* Denton, 3 Kay & J. 529; Kennedy *v.* Kingston, 2 J. & W. 431; Davy *v.* Hooper, 2 Vern. 665; Maddison *v.* Andrew, 1 Ves. 57; Hockley *v.* Mawbey, 1 Ves. Jr. 143; Croft *v.* Adam, 12 Sim. 639; Brown *v.* Pocock, 6 Sim. 257; McNeilledge *v.* Galbrath, 8 Serg. & R. 43; Harrison *v.* Harrison, 2 Grat. 1; Frazier *v.* Frazier, 2 Leigh, 642; Cruse *v.* McKee, 2 Head, 1; Thompson *v.* Norris, 2 N. J. Eq. 489; Jecko *v.* Lansing, 45 Mo. 167.

⁷ Ingraham *v.* Meade, 3 Wall. Jr. 32.

(*a*) Such intention must, it seems, be clear, or this construction necessary to make the grant or devise effective. 91 Ky. 601; Bowker *v.* Bowker, 148 Mass. 198; Bragg *v.* Carter, 171 Mass. 324. Ormsby *v.* Dumesnil,

executed the power, it was held to be a mere power, and no trust, and the court refused to carry it into effect.¹(a) So where a testator gave £30,000 to his wife for life, to be distributed at her decease to and amongst such of his children and in such manner and proportion as she should appoint, it was held to be a mere power which the court could not execute in default of an appointment by her.²(b)

¹ Bull v. Vardy, 1 Ves. Jr. 279; *In re Eddowes*, 1 Dr. & Sm. 395.

² Marlborough v. Godolphin, 2 Ves. 61; 5 Ves. Jr. 506. In this case Lord Hardwicke drew a distinction between a gift "amongst my children as A. should appoint," which he considered a trust, and a gift "among such of my children as A. should appoint," which he considered a mere power. This distinction, however, is not now acted upon. *Crossling v. Crossling*, 2 Cox, 396, is to the same effect as *Marlborough v. Godolphin*. These cases have not been expressly overruled, but they have not been followed in the later cases, and if they were to come before the courts at the present day, it is probable that they would be held to be implied trusts, and not mere powers, as courts will, if possible, construe such be-

(a) A life estate, coupled with a power of sale, to the donor's widow, if the income is insufficient for support, is a personal power, which is not assignable, or liable for the life-tenant's debts. *Phillips v. Wood*, 16 R. I. 274; *Brown v. Phillips*, id. 612; *Ryan v. Mahan* (R. I.), 39 Atl. 893; *Welsh v. Woodbury*, 144 Mass. 542; *Hoxie v. Finney*, 147 Mass. 616; *Ladd v. Chase*, 155 Mass. 417; *Security Co. v. Snow*, 70 Conn. 288. Such a power so added does not raise the life-estate to a fee. *Ducker v. Burnham*, 146 Ill. 9. It does enable the widow to mortgage. *Kent v. Morrison*, 153 Mass. 137.

(b) See *Welch v. Henshaw*, 170 Mass. 409; *Carroll v. Shea*, 149 Mass. 317; *Burbank v. Sweeney*, 161 Mass. 490; *Peirsol v. Roop*, 56 N. J. Eq. 739; *Gulick v. Griswold*, 43 N. Y. S. 443. Rents and profits which, as

income, a widow is empowered to use in whole or in part, fall into the residue, if not used by her. *Brunson v. Martin* (Ind.), 52 N. E. 599.

The cited case of *Marlborough v. Godolphin* appears to be now overruled. Of it Lord St. Leonards (on Powers, p. 592) says: "As the right to exclude some does not prevent the class from taking in default of appointment, it should seem that if a case in the very terms of *Duke of Marlborough v. Godolphin* were now to occur, it would be decided that the children took as tenants in common in default of appointments, either by implication, which seems the true construction, or because the power was coupled with a trust." This is approved in *Salisbury v. Denton*, *supra*, in note, and in *Wilson v. Duguid*, 24 Ch. D. 244, the latter case fully reviewing the older authorities.

§ 253. If the power to be executed is so uncertain as to its objects, that a court of equity cannot say what particular person or persons or class of persons are to take an interest under it as a trust, it will be considered a mere power which cannot be carried into effect;¹ (a) or if the subject-matter to be affected by the power is too uncertain to be dealt with by the court, a trust will not be implied.² And where there is an express limitation of the property over in case the power is not executed, of course no trust can be implied.³

quests into gifts to the parties to be benefited. Hill on Trust. 69; 2 Sugd. on Powers, 181; Brown v. Pocock, 6 Sim. 257.

¹ Stubbs v. Sargon, 2 Keen, 255; Ommanny v. Butcher, 1 T. & R. 260; Wheeler v. Smith, 9 How. 79; Robinson v. Allen, 11 Grat. 785; Harper v. Phelps, 21 Conn. 257; Thompson v. McKissick, 3 Humph. 631; Ellis v. Ellis, 15 Ala. 296.

² Gibbs v. Marsh, 2 Met. 243.

³ Pritchard v. Juinchant, Amb. 126; 5 Ves. 596, n. ; 2 Sugd. on Pow. 183; Lines v. Durden, 5 Fla. 51.

(a) "If, considering all the circumstances, the intention be doubtful, the doubt will prevent the instrument from being deemed an execution of the power." Mason v. Wheeler, 19 R. I. 21; see Lee v. Simpson, 134 U. S. 572; Patterson v. Wilson, 64 Md. 193; Funk v. Eggleston, 92 Ill. 515; Farlow v. Farlow, 83 Md. 118; McMillan v. Deering, 139 Ind. 70. "If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the

power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power. I think it clear that an intention must be shown to revoke and undo what has been already done." Turner, L. J., in Pomfret v. Perring, 5 D. M. & G. 775, 781; see *In re Wells' Trusts*, 42 Ch. D. 646, 655; McGibbon v. Abbott, 10 A. C. 653.

An act evidently performed in execution of a power need not appear by written evidence to be done under the instrument creating it, and such act may be presumed to be in execution of the power. Walke v. Moore (Va.), 30 S. E. 374; Ridgely v. Cross, 83 Md. 161; Cooper v. Haines, 70 Md. 282; New England M. S. Co. v. Buice, 98 Ga. 795; Dick v. Harby, 48 S. C. 516;

§ 254. The general rule is, that the power given must be strictly executed as given, or it will remain as a trust for the person or class in whose favor it is given; thus, if the donee is to dispose of the property to such persons of a particular class as she shall select in a last will and testament, and the disposition is made by a deed, the power is not executed, and it will be construed into a trust for the whole class, or will go over, if there is a gift over in default of an appointment or execution of the power.¹(a) So if the power is attempted to be executed in favor of a person or a class, outside of the persons or classes in whose favor it is given, the execution will be bad, and it will remain as a trust for all those in whose favor it was given.² As if the power is to distribute among children, it cannot be executed by a distribution among grandchildren.³ Where the power is to distribute among a certain class, something must be given to each one or the execution of the power is bad.⁴(b) But the

¹ *Moore v. Dimond*, 5 R. I. 121; *Bentham v. Smith*, 1 Cheev. 33 (2d part); *Haslen v. Kean*, 2 Taylor. 279; *Christy v. Pulliam*, 17 Ill. 59; *Balteel v. Plumer*, L. R. 8 Eq. 585; *Garth v. Townsend*, L. R. 7 Eq. 220; *Thacker v. Kay*, L. R. 8 Eq. 408.

² *Jarnagin v. Conway*, 2 Humph. 50; *Horwitz v. Norris*, 49 Pa. St. 219; *Knight v. Garborough*, Gilmer, 27; *Little v. Bennett*, 5 Jones, Eq. 156; *Lippincott v. Ridgway*, 3 Stockt. 526; *Varrell v. Wendell*, 20 N. H. 431; *Wickesham v. Savage*, 58 Penn. St. 219; *In re Gratwick's Trust*, L. R. 1 Eq. 117; *Carson v. Carson*, Phill. Eq. (N. C.) 57.

³ *Horwitz v. Norris*, 49 Penn. St. 219; *Churchill v. Churchill*, L. R. 5 Eq. 44; *Moriarty v. Martin*, 3 Ir. Ch. 26.

⁴ *Ibid.*; *Lippincott v. Ridgway*, 2 Stockt. 164; 3 *id.* 526; *Booth v. Alington*, 39 Eng. L. & Eq. 250. It seems that this is not the rule in Pennsylvania. *Graeff v. De Turk*, 44 Penn. St. 527.

Cuniston v. Bartlett, 149 Mass. 243; *Sweeney v. Warren*, 127 N. Y. 426; *McCreary v. Bomberger*, 151 Penn. St. 323; *Hill v. Conrad* (Texas), 43 S. W. 789. A will which directs the division among children of "all my property of every kind," is not an execution of a special power of appointment by deed or will over

personalty, for the appointee's children. *In re Huddleston*, [1894] 3 Ch. 595. See *Harvard College v. Balch*, 171 Ill. 275.

(a) *Thrasher v. Ballard*, 33 W. Va. 285; *Sires v. Sires*, 43 S. C. 266.

(b) Under a direction in a will to the testator's widow to divide his realty between his children "to the

proportion is left to the trustee.¹ And the donee of the power cannot execute it in favor of himself or his family, unless the terms of the power specially authorize him so to do.² Nor can he delegate the power or the execution of it to others.³ It must be executed within the time named in the instrument,⁴ and if the appointment is to be made at a person's decease, it must be by will.⁵ It must also be executed for the precise purpose declared, and when the purpose becomes wholly unattainable the power ceases.⁶

§ 255. Generally, if the power is left unexecuted by the donee, the court will execute it as a trust, by dividing the fund equally among the objects or persons in favor of whom it was given, or from whom the selection might have been made, on the ground that *equality is equity*.⁷ But if the donor of the power lays down any rule by which the *donee* or trustee is to be governed in his selection and distribution of the fund, it is said the court will place itself in the position of the trustee. If the discretion of the trustee is to be founded upon, or measured by, a state of facts which the court can inquire into and apply as effectually as a private

¹ Portsmouth v. Shackford, 46 N. H. 423.

² Bostick v. Winton, 1 Sneed, 524; Cruse v. McKee, 2 Head, 1; Holt v. Hogan, 5 Jones, Eq. 82; Bull v. Bull, 8 Conn. 47; Cooper v. Cooper, L. R. 8 Eq. 312.

³ Singleton v. Scott, 11 Iowa, 589; Haslen v. Kean, 2 Taylor, 279; Withers v. Yeadon, 1 Rich. Eq. 324; Carr v. Atkinson, L. R. 14 Eq. 400; Webb v. Sadler, L. R. 14 Eq. 533.

⁴ Cooper v. Martin, L. R. 3 Eq. 47.

⁵ Freeland v. Pearson, L. R. 3 Eq. 658.

⁶ Hetzel v. Hetzel, 69 N. Y. 1; Brown v. Meigs, 11 Hun (N. Y.), 203.

⁷ Doyley v. Attorney General, 2 Eq. Cas. Ab. 195; Longmore v. Broom, 7 Ves. 124; Salusbury v. Denton, 3 K. & J. 403; Izod v. Izod, 32 Beav. 249; Gray v. Gray, 13 Ir. Ch. 404; Fordyce v. Brydges, 2 Phill. 497; Penny v. Turner, id. 493; Whithurst v. Harker, 2 Ir. Ch. 492; Kennedy v. Kingston, 2 J. & W. 431; Frazier v. Frazier, 2 Leigh, 642; Cruse v. McKee, 2 Head, 1; Davy v. Hooper, 2 Vern. 665.

best advantage, as she sees fit and 103 Ala. 556; Morffew v. San Francisco, &c. R. Co., 107 Cal. 587. See Faloon v. Flannery (Minn.), 76 McGibbon v. Abbott, 10 A. C. 653. N. W. 954; Hatchett v. Hatchett,

person could, it "can look with the eyes of the trustee," and can substitute its own judgment for that of the individual. Lord Hardwicke said in a case before him, "Here a rule is laid down; the trustees are to judge of the occasions and necessities of the family; the court can judge of such necessity; that is a judgment to be made from existing facts, so that the court can make the judgment as well as the trustee, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity;" and his Lordship referred the case to a master to report the facts, and decreed a distribution according to the necessities found.¹ This doctrine has been acted upon in similar cases.² In others, the courts have said that it was "impossible to distinguish between degrees of poverty," and that they would not attempt to apply the discretion given to the *donee* of the power, but would divide the fund equally.³ This conflict of authority leaves the question open for further discussion. It would seem that there is no impossibility in the nature of things "in distinguishing between degrees of poverty," or in deciding what class of persons or relations come within the description, and should take under the gift of the donor. Lord Hardwicke's observations are just, and can be acted upon by courts. It is not so much a question whether courts of equity can exercise the discretion given to the trustee, as whether it is consistent with the dignity of courts to inquire into the relative necessities of a testator's relations, or whether they have the time to enter into such inquiries. So far as the dignity of courts is concerned, they may well remember that they are created to administer justice and equity to the people, and that no inquiries or decrees that can be successfully made are inconsistent with their position or duties.⁴

¹ *Gower v. Mainwaring*, 2 Ves. 87. Mr. Belt's edition has a misprint, the court *cannot* judge.

² *Liley v. Hey*, 1 Hare, 581; *Hewett v. Hewett*, 2 Eden, 332; *Maberly v. Turton*, 14 Ves. 499; *Bull v. Bull*, 8 Conn. 48.

³ *McNeilledge v. Galbrath*, 8 Serg. & R. 43; *Harrison v. Harrison*, 2 Grat. 1; *Withers v. Yeadon*, 1 Rich. Ch. 324.

⁴ Upon the general subject of bequests to poor or necessitous relations,

§ 256. If the donee of the power or trustee is to *select* from the donor's *relations* those to whom he is to give the property, in the execution of the power he may select from the whole circle of relations, whether near or distant;¹ and he may exclude some;² but if the power is to *distribute* to the donor's relations, then the donee must confine himself to the relations that are so near that they would take under the statute of distributions.³ Courts have adopted the rule of the statute of distributions as a convenient rule in such cases, to prevent such gifts from being void for uncertainty. If the power devolves upon the court as a trust, whether it is one of *selection* or *distribution*, the court will act upon the rule of the statute of distributions,⁴ unless the donor has himself established some rule of *selection* or *distribution* which the court can act upon.⁵ And the same rule applies if the donor uses the word "family."⁶ A gift to *nearest relations* or next of kin must be administered in the same way.⁷ But it is said that a power of selection will be implied in the donee in the

see *Att. Gen. v. Buckland*, 1 Ves. 231; *Amb. 71*; *Anon. 1 P. Wms. 327*; *Widmore v. Woodroffe*, *Amb. 636*; *Brunsdon v. Woolredge*, *id. 507*; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Green v. Howard*, 1 Bro. Ch. 33.

¹ *Grant v. Lynham*, 4 Russ. 292; *Brown v. Higgs*, 5 Ves. 501; *Cruwys v. Colman*, 9 Ves. 324; *Swift v. Gregson*, 1 T. R. 435, note f; *Salisbury v. Denton*, 3 K. & J. 536; *Supple v. Lowson*, *Amb. 729*; *Harding v. Glyn*, 1 Atk. 469; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Huling v. Farrer*, 9 R. I. 410; *Brunsdon v. Woolredge*, *Amb. 507*, seems inconsistent with the other authorities.

² *Ingraham v. Meade*, 3 Wall. Jr. 32.

³ *Clapton v. Bulmer*, 10 Sim. 426; 5 My. & Cr. 108; *Att. Gen. v. Price*, 17 Ves. 373, note a; *Isaac v. Defriez*, *Amb. 595*; *Carr v. Bedford*, 2 Ch. R. 146; *Pope v. Whitcombe*, 3 Mer. 437; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Forbes v. Ball*, 3 Mer. 437. This case seems inconsistent, but the question was whether it was a *power* or a *trust*, and not whether the authority was exceeded.

⁴ *Bennett v. Honeywood*, *Amb. 708*; *Hutchinson v. Hutchinson*, 13 Ir. Eq. 332; *Gough v. Bult*, 16 Sim. 45; *Cowper v. Mantell*, 22 Beav. 231.

⁵ *Ibid.*; or unless the gift is in some sense a charity. *White v. White*, 7 Ves. 423; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Att. Gen. v. Price*, 17 Ves. 371; *Isaac v. Defriez*, *id. 373*, note a.

⁶ *Cruwys v. Colman*, 9 Ves. 319; *Grant v. Lynham*, 4 Russ. 297.

⁷ *Edge v. Salisbury*, *Amb. 70*; *Goodinge v. Goodinge*, 1 Ves. 231.

case of relations, where it would not have been implied in the case of children.¹ (a) A power to an unmarried woman to appoint to her family or next of kin may extend to any relative,² and such power may be executed after coverture.³

§ 257. Intimately connected with this subject is the inquiry whether courts will execute the power of distribution among the persons intended, by distributing *per capita* or *per stirpes*. Upon this matter it is to be observed that courts have adopted the statute of distributions as a convenient rule to point out the *relations* intended by a donor, when he uses that word in a gift. The only reason for adopting the rule was to prevent the gift from failing for uncertainty. The rule is used to point out the *persons* intended to take, but the terms of the gift are used to point out the *proportions*. If, therefore, there is no rule in the gift which can apply to determine the proportions, the court will make the distribution *per capita*, and everybody within the rule will take equally as tenants in common.⁴ But if the gift is to the *next of kin* of the donor, it will be confined to the *nearest relations*; and those who would take by representation under the statute of distributions will be excluded if there are relations a degree nearer.⁵ (b) If the gift is to "my surviving nephews and nieces" after paying certain legacies and the termination of

¹ *Spring v. Biles*, 1 T. R. 435, note f; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Salisbury v. Denton*, 3 K. & J. 536; *Pope v. Whitcombe*, 3 Mer. 689.

² *Snow v. Teed*, L. R. 9 Eq. 622.

³ *Wood v. Wood*, L. R. 10 Eq. 220.

⁴ *Walker v. Maunde*, 19 Ves. 427; *Thomas v. Hole*, Cas. t. Talb. 251; *Phillips v. Garth*, 3 Bro. Ch. 64; *Stamp v. Cooke*, 1 Cox, 326; *Hinckley v. Maclaerns*, 1 Myl. & K. 27; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215; *Green v. Howard*, 1 Bro. Ch. 33; *Pope v. Whitcombe*, 3 Mer. 689; *Rayner v. Mowbray*, 3 Bro. Ch. 231; *De Laurencel v. De Boom*, 67 Cal. 362.

⁵ *Elmsley v. Young*, 2 Myl. & K. 780; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215.

(a) See *In re Veale's Trusts*, 4 Ch. D. 61, 67; *Wilson v. Duguid*, L. J. Ch. 268. 24 Ch. D. 244, 251.

certain life estates, the representatives of a nephew who survived the testator, but died before the time for distribution, have no share.¹ If the fund is left for the "maintenance and education" of two children named, each will share equally without regard to their differing needs.² If the subject-matter of the gift is incapable of division, and is to be bestowed upon some one of a class to be selected by the donee, and no selection is made, the court will notwithstanding execute the power as a trust, if by any possibility it can be done.³

§ 258. Another difficult question which courts must decide when they are called upon to execute these powers or trusts, is, whether the fund shall be distributed to the parties in interest living at the donor's death, or to those living at the donee's death. Upon this matter it has been determined that when it appears that the donee is to have his whole life to make the selection or distribution, or if the donee is to have the use of the fund for his life, then the court will distribute it to the parties entitled living at the death of the donee.⁴ But if the donee is to make the distribution *immediately*, or as soon as may be, the court, on his death, without executing the power, will distribute the fund among those entitled at the death of the donor;⁵ and the same rule will be followed if the donee die before the donor.⁶ These rules,

¹ Denny v. Kettel, 135 Mass. 138.

² Jones v. Foote, 137 Mass. 543.

³ Moseley v. Moseley, R. t. Finch, 53; Clarke v. Turner, Freem. 199; Richardson v. Chapman, 7 Bro. P. C. 318; Brown v. Higgs, 5 Ves. 504.

⁴ Cruwys v. Colman, 9 Ves. 319; Brown v. Pocock, 6 Sim. 257; Bonser v. Kinnear, 2 Gif. 195; Birch v. Wade, 3 Ves. & B. 198; Walsh v. Wallinger, 2 R. & M. 78; Burrough v. Philcox, 5 My. & Cr. 72; Woodcock v. Renneck, 4 Beav. 190; 1 Phill. 72; Finch v. Hollingsworth, 21 Beav. 112; Doyley v. Att. Gen., 2 Eq. Cas. Ab. 194, pl. 15; Witts v. Boddington, 3 Bro. Ch. 95; Winn v. Fenwick, 11 Beav. 438; Tiffin v. Longman, 15 Beav. 275; Grieveson v. Kirsopp, 2 Keen, 653; Freeland v. Pearson, L. R. 3 Eq. 658.

⁵ Brown v. Higgs, 4 Ves. 708; Longmore v. Broom, 7 Ves. 124; Cole v. Wade, 16 Ves. 27.

⁶ Penny v. Turner, 2 Phill. 493; Hutchinson v. Hutchinson, 13 Ir. Eq. 332.

however, are applicable only when the final beneficiaries take *through the medium* of the power; for if they take directly by the form of the gift subject to be defeated by the execution of the power, they have a vested interest at the death of the donor, and of course those living at that time will take, if the power is not executed to defeat them.¹ Where the donee may execute the power by *deed* or *will* at any time during his life, and he dies leaving the power unexecuted, there is a conflict of the authorities upon the question to whom should the court give the funds: Mr. Lewin says that there is an equal conflict of principle.²

¹ *Lambert v. Thwaites*, L. R. 2 Eq. 151.

² *Doyley v. Att. Gen.*, 2 Eq. Cas. Ab. 195; *Harding v. Glyn*, 1 Atk. 469; *Pope v. Whitcombe*, 3 Mer. 689, are authorities that those living at the death of the donee should take. On the other hand, the cases of *Hands v. Hands*, 1 T. R. 437, note; *Grieverson v. Kirsopp*, 2 Keen, 653, are authorities that those living at the death of the donor should take. Mr. Lewin says, p. 600 (5th ed. Lond.): "Upon principle, too, as well as upon authority, this question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the court has to supply, is the non-exercise *just before his death*; and that default must, therefore, be supplied in favor of those who were objects at the date of the death of the donee. On the other hand, the donee of the power may exercise it in favor of the class existing at the time of exercise, to the exclusion of those who have died before, and also, where the power is one of selection, to the exclusion of those who may come into *esse* subsequently, but the court cannot act arbitrarily, and cannot show any favor, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it; that is, those living at the death of the testator, and those who come into being during the continuance of the life-estate; otherwise, should all the class predecease the tenant for life (an event not improbable where *children* or some limited class of relations are the objects), there would be a power imperative which is construed a trust, and no *cestui que trust*, — a result which, it is conceived, the court would be somewhat unwilling to adopt.

CHAPTER IX.

APPOINTMENT, ACCEPTANCE, DISCLAIMER, REMOVAL, RESIGNATION, SUBSTITUTION, AND NUMBER OF TRUSTEES, AND APPOINTMENT UNDER A POWER.

- § 259. Acceptance of the trust — how and when it should be accepted
- § 260. What is an acceptance, and its effect.
- § 261. How an acceptance may be shown.
- § 261 *a.* Trustee's bond.
- §§ 262, 263. Where an executor is also named as trustee.
- § 264. Of the executor of an executor, or the executor of a trustee
- § 265. Trustee *de son tort*.
- § 266. No such thing as a passive trustee.
- § 267. Disclaimer by trustee.
- § 268. Cannot disclaim after acceptance.
- § 269. Whether an heir can disclaim after the death of the trustee.
- §§ 270, 271. Parol disclaimer sufficient, but a writing more certain.
- § 272. Where a legacy or other benefit is given to the trustee or executor.
- § 273. Effect of a disclaimer.
- Removal or resignation.
- § 274. How a trustee may be removed or resign.
- § 275. For what causes may be removed.
- § 276. For what causes may be allowed to resign.
- § 276 *a.* A trust shall not fail for lack of a trustee. See § 731.
- §§ 277, 278. How the court proceeds in substituting trustees.
- § 279. Bankruptcy of trustee.
- § 280. The resignation of trustees.
- § 281. Where the same person is executor and trustee.
- § 282. The proceedings to remove and substitute trustees.
- § 283. Where all parties consent.
- § 284. Of the vesting of the property in the new trustees.
- § 285. Duty of trustee where all consent to his discharge.
- § 286. Of the number of trustees.
- Appointment of trustees under a power.
- § 287. Trustees cannot appoint their successors or new trustees unless power is given in the instrument of trust.
- § 288. Caution necessary in new appointments.
- § 289. Powers of appointment frequently matters of personal confidence.
- § 290. Occasions or events upon which new appointments may be made.
- § 291. An appointment may be made to fill a vacancy occurring before the death of the testator.
- § 292. Unfitness and incapacity.
- § 293. Power cannot be exercised if the trust is already in suit in court.

- § 294. By whom the power may be exercised.
§ 295. The power must be strictly followed.
§ 296. Who may be appointed to exercise the power.
§ 297. Who may be appointed under a power.

§ 259. WHEN a trust is created by implication, result, or construction of law from acts of parties, they will be held by the law to the performance of the trust whether they are willing or unwilling to accept the situation; that is, when a trust is raised by law and thrust upon the conscience of a party, as the result or construction to be put upon his acts, in order to do complete justice, the acceptance or refusal of the party to be charged with the trust cannot alter his legal or equitable liability to act as a trustee, and to do all that is required of him to execute the trust. Subject to this qualification, no one is *compellable* to undertake a trust.¹ If a conveyance is made by a private individual or corporation to public officers and their successors in office, the successors are not bound, unless they accept the trust.² In voluntary or express trusts, no title vests in the proposed trustee, by whatever instrument it is attempted to be transferred, unless he expressly or by implication accepts the office, or in some way assumes its duties and liabilities.³ And though a person may have promised or agreed beforehand to accept a trust, and his name is introduced into the will, conveyance, or settlement, yet he may decline to act, and it is proper for him to do so if he finds that his duties are different from what he conceived them to be when he entered into the agreement; or if for any reason he cannot attend to the proper discharge

¹ *Lowry v. Fulton*, 9 Sim. 123; *Robinson v. Pitt*, 3 P. Wms. 251; *Moyle v. Moyle*, 2 Russ. & M. 715. And he may renounce the trust, though such renunciation may deprive a beneficiary of all means of obtaining a benefit intended for him by a testator. *Beekman v. Bonsor*, 23 N. Y. 298; *Kennedy v. Winn*, 80 Ala. 166.

² *Delaplane v. Lewis*, 19 Wis. 476.

³ *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Bethune v. Dougherty*, 21 Ga. 257; *King v. Donnelly*, 5 Paige, 46; *Trask v. Donaghue*, 1 Aik. 370; *Burritt v. Silliman*, 13 N. Y. 93; *De Peyster v. Clendinning*, 8 Paige, 295; *Bulkley v. De Peyster*, 26 Wend. 21; *Judson v. Gibbons*, 5 Wend. 224; *Cooper v. McClun*, 16 Ill. 435; *Matter of Robinson*, 37 N. Y. 261; *Armstrong v. Morrill*, 14 Wall. 138.

of the office.¹ Such refusal does not invalidate the deed or will: it only relieves the trustees, and enables the court to appoint others.² The refusal to act should be affirmatively shown, either by an express disclaimer, or by such a tacit refusal to act as amounts to an express rejection;³ for every gift by will or deed is supposed, *prima facie*, to be beneficial to the donee, and therefore the law will presume that every gift, whether in trust or not, is accepted until the contrary is proved.⁴ Especially will this presumption prevail after a long lapse of time, as twenty years,⁵ or thirty-four years,⁶ if the trustee has notice, and has not disclaimed, though he may have done nothing in the execution of the trust. And even where a deed was only four years old, and the trustees knew of their appointment, and did not object, Lord St. Leonards held that they could not be allowed to say that they did not assent to the conveyance.⁷

§ 260. If the trust is created by deed, the most obvious, natural, and effectual mode of signifying an acceptance is by signing the deed;⁸ but such execution of the deed by the trustee is not necessary.⁹ Where trusts are by will vested

¹ Doyle v. Blake, 2 Sch. & Lef. 239; Evans v. John, 4 Beav. 35; Smith v. Knowles, 2 Grant Cas. 413; Crook v. Ingoldsby, 2 Ir. Eq. 375.

² Brownell v. Downs, 11 How. 62; Nicoll v. Miller, 37 Ill. 387; Nicoll v. Ogden, 29 Ill. 323; Elstner v. Fife, 32 Ohio St. 358; Thatcher v. St. Andrews Church, 37 Mich. 264; Johnson v. Roland, 58 Tenn. 203. Declining to act as executor is not a renunciation of the trust over a fund bequeathed in the will. Garner v. Dowling, 11 Heisk. (Tenn.) 48; Williams v. Cushing, 34 Maine, 370; Taintor v. Clark, 13 Met. 224.

³ Read v. Robinson, 6 Watts & S. 331.

⁴ Ibid.; Townson v. Tickell, 3 B. & Ald. 36; Thompson v. Leach, Ventr. 198; Wilt v. Franklin, 1 Binn. 502; Wise v. Wise, 2 Jon. & La. 412; Eyrick v. Hetrick, 13 Penn. St. 494; 4 Kent, 500; 4 Cru. Dig. 404-406; Goss v. Singleton, 2 Head, 67; Penny v. Davis, 3 B. Mon. 313; Furman v. Fisher, 4 Cold. 626.

⁵ *In re* Uniacke, 1 Jon. & La. 1; Eyrick v. Hetrick, 13 Penn. St. 493.

⁶ *In re* Needham, 1 Jon. & La. 34.

⁷ Wise v. Wise, 2 Jon. & La. 403-412; Penny v. Davis, 3 B. Mon. 314; Lewis v. Baird, 3 McLean, 65; Read v. Robinson, 6 Watts & S. 338.

⁸ Patterson v. Johnson, 113 Ill. 559, a good case on acceptance.

⁹ Flint v. Clinton Co., 12 N. H. 432; Cook v. Fryer, 1 Hare, 498;

in the executors as such, accepting and qualifying as executor accepts the trusts.¹ Acceptance may be presumed by acts of the trustee at or subsequent to the grant.² (a) If the trustee acts under the deed in the performance of the trust, he will be held to have accepted, though he has not executed, the deed, and he may be liable for a breach of the trust;³ but if the deed contains special covenants, the trustee cannot be sued upon them, if he has not executed it, though he may have accepted the deed.⁴ Nor will the execution of the deed amount to a covenant to execute the trust, if it does not contain words that can be construed into such a covenant at law.⁵ But the word "covenant" or "agree" is not neces-

Montfort v. Cadogan, 17 Ves. 488; 19 Ves. 638; Small v. Ayleswood, 9 B. & Cr. 300; Leffler v. Armstrong, 4 Iowa, 482; Buckridge v. Glasse, 1 Cr. & Ph. 131; Bixler v. Taylor, 3 B. Mon. 362; Field v. Arrowsmith, 3 Humph. 442; Smith v. Knowles, 2 Grant, Ca. 413; Roberts v. Moseley, 51 Mo. 284.

¹ Earle v. Earle, 93 N. Y. 104.

² Harvey v. Gardner, 41 Ohio St. 642.

³ Redenour v. Wherritt, 30 Ind. 485. See also cases in note 9, p. 346.

⁴ Richardson v. Jenkins, 1 Drew. 477; Vincent v. Godson, 1 Sm. & Gif. 384.

⁵ Wynch v. Grant, 2 Drew. 312; Courtney v. Taylor, 6 M. & Gr. 851;

(a) Apart from statute, the proposed trustee need not sign or expressly assent to the trust deed. Smith v. Davis, 90 Cal. 25; Garnsey v. Gothard, id. 603; Roberts v. Moseley, 51 Mo. 282; Daly v. Bernstein, 6 N. Mex. 380; Holland v. Alcock, 108 N. Y. 312; Wadd v. Hazleton, 62 Hun, 602; Ewing v. Buckner, 76 Iowa, 467; 1 Ames on Trusts (2d ed.), 229; *supra*, § 103, n. (a). If he knows of his appointment, and does not disclaim, he is estopped to deny the effect of his receipt of the trust property, or he will, after the lapse of time, be presumed to have accepted the trust, especially with respect to the effect upon third persons. See Lewin on

Trusts (10th ed.), 214; McBride v. McIntyre, 91 Mich. 406. When a resulting trust arises from a payment towards the purchase-money, the trustee's covenants in a declaration of trust made by him showing such payment, are his covenants only, and do not, under the statute of frauds, operate to limit or affect the beneficiaries' estates, without their signatures. Adams v. Carey, 53 N. J. Eq. 334. The grantee in a deed of trust, who accepts and takes possession, is estopped to deny the grantor's title. Guilfoil v. Arthur, 158 Ill. 600. As to what is a trust deed, see O'Rourke v. Beard, 151 Mass. 9; Dulaney v. Willis, 95 Va. 606; More v. Calkins, 95 Cal. 435.

sary for that purpose; the word "declare" will suffice.¹ If there is a breach of the trust, but no execution of the deed other than by an acceptance of it, a *simple contract debt* only is created against the trustee or his estate,² but a breach of covenants under the hand and seal of the trustee creates a *specialty debt*, which in some jurisdictions takes precedence of simple contract debts.³ This distinction is of no effect in the United States, as, in every State, probably the real estate of a deceased person is equally liable for his debts, however contracted or evidenced. If the trustee executes the deed, he should see to it that the recitals are all correct, otherwise he may be held liable to make them good.⁴ Acceptance of the trust estops the trustee from denying the title of the person for whom he holds.⁵ (a)

Newport v. Bryan, 5 Ir. Ch. 119; Adey v. Arnold, 2 De G., M. & G. 433; Marryatt v. Marryatt, 6 Jur. (N. S.) 572; Holland v. Holland, L. R. 4 Ch. 449.

¹ Richardson v. Jenkins, 1 Drew. 477; Saltoun v. Hanston, 1 Bing. N. C. 433; Cummins v. Cummins, 3 Jon. & La. 64; 8 Ir. Ch. 723; Jenkins v. Robertson, Law R. 1 Eq. 123.

² Jenkins v. Robertson, 1 Eq. R. 123; Lockhart v. Reilly, 1 De G. & J. 464; Vernon v. Vawdry, 2 Atk. 119; Barn. 280; Cox v. Bateman, 2 Ves. 19; Kearnan v. Fitzsimon, 3 Ridg. P. C. 18. If the trustee execute the deed, and it is a simple acceptance of the trust on his part, the breach of the trust is a simple contract debt, for there is no breach of any express covenant. Holland v. Holland, L. R. 4 Ch. 449.

³ Gifford v. Manley, For. 109; Mavor v. Davenport, 2 Sim. 227; Benson v. Benson, 1 P. Wms. 131; Deg v. Deg, 2 P. Wms. 414; Turner v. Wardle, 7 Sim. 80; Bailey v. Ekins, 2 Dick. 632; Cummins v. Cummins, 3 Jon. & La. 64; Primrose v. Bromley, 1 Atk. 89; Wood v. Hardisty, 2 Coll. 542, commented upon in L. R. 1 Eq. 125.

⁴ Gore v. Bowser, 3 Sm. & Gif. 6; Chaigneau v. Bryan, 1 Ir. Ch. 172; 8 Ir. Ch. 251; Story v. Gape, 2 Jur. (N. S.) 706; Bliss v. Bridgewater (cited Lewin on Trusts, 166, 5th ed.). But in Fenwick v. Greenwell, 10 Beav. 418, the Master of the Rolls refused to allow the recital of a representation to bind the trustees.

⁵ Smith v. Sutton, Adm'r, 74 Ga. 528.

(a) A trustee, who is in default, cannot claim, as against his *cestui que trust*, any beneficial interest in the trust estate until his default has been made good; this applies also to his assignee, even though the default was subsequent to the assignment; and the rule applies not

§ 261. Parol evidence of the conversations, acts, and admissions of a party are admissible to prove his acceptance of a trust.¹ Thus, if a person, with notice of his appointment to a trust, receives the income of the trust estate;² or executes a power of attorney;³ or signs a joint draft, order, or receipt, to enable some other person to act in administering the estate or the trust;⁴ or signs a receipt as trustee;⁵ or gives notice to a tenant of the estate to pay rent to him;⁶ or brings an action on the footing of the trust;⁷ or interferes generally by ordering the trust property to be sold, or by being present at the sale, or by giving any directions implying ownership, or by frequently making inquiries of the acting trustee as to the affairs of the trust,⁸ or by not objecting when the instrument of trust is read to him,⁹—all these acts may be shown by parol, as evidence tending to prove an acceptance, and the evidence will be more or less conclusive according to the circumstances of each case. The general rule is, that *every voluntary interference* with the trust property will stamp a person as an acting trustee,¹⁰ unless such

¹ *Urch v. Walker*, 3 My. & Cr. 703; *James v. Frearson*, 1 N. C. C. 375; 1 Y. & C. Ch. 370; *Doe v. Harris*, 16 M. & W. 517; *Redenour v. Wherritt*, 30 Ind. 485.

² *Conyngham v. Conyngham*, 1 Ves. 522.

³ *Harrison v. Graham*, 1 P. Wms. 241, n.; 1 Wms. Ex'rs, 151; *Hanbury v. Kirkland*, 3 Sim. 265; *Christian v. Yancey*, 2 P. & H. (Va.) 240.

⁴ *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Sadler v. Hobbs*, 2 Bro. Ch. 114; *Doyle v. Blake*, 2 Sch. & Lef. 231.

⁵ *Kennedy v. Winn*, 80 Ala. 166.

⁶ *Montfort v. Cadogan*, 17 Ves. 487.

⁷ *Ibid.*; *O'Neill v. Henderson*, 15 Ark. 235; *Pond v. Hine*, 21 Conn. 519; *Penny v. Davis*, 3 B. Mon. 314.

⁸ *James v. Frearson*, 1 Y. & C. Ch. 375; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Crocker v. Lowenthal*, 83 Ill. 579.

⁹ *James v. Frearson*, *supra*; *Chidgey v. Harris*, 16 M. & W. 517; *Butler v. Baker*, 3 Co. 26 a; *Hanson v. Worthington*, 12 Md. 418; *Roberts v. Moseley*, 64 Mo. 507.

¹⁰ *White v. Barton*, 18 Beav. 192; *Harrison v. Graham*, cited Churchill

only to shares taken by the trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate. *Doering v. Doering*, 42 Ch. D. 203.

interference can be *plainly* referred to some other ground of action than to an acceptance of the trust, as by showing that such a person acted, in interfering, as the mere agent of an acting trustee.¹ The mere fact that a person named as trustee in a deed takes the custody of the deed until another trustee can be appointed is not an acceptance, because his acts are plainly referable to another ground of action.² While parol evidence is competent to show whether a supposed trustee has or has not accepted the trust, it is not *competent*, in behalf of the trustee, to prove by such evidence the conversations or declarations of the settlor, in order to show what property was subject to the trust.³ A trustee should take care that his acts in relation to the trust fund are *plainly referable* to some certain ground of action; for if his acts are *ambiguous*, or it is doubtful whether he intended to accept, or to act in some other capacity, the doubt will be against him, and he will be construed to have accepted the trust and all its responsibilities.⁴

§ 261 a. Sometimes a bond is required by the instrument creating the trust, and sometimes the grantor expressly desires that the trustee shall not be required to give security. In the case of executors, statute law provides for the giving

v. Hobson, 1 P. Wms. 241 n. (y); *Cummins v. Cummins*, 8 Ir. Eq. 723; *Doyle v. Blake*, 2 Sch. & Lef. 231; *Malzy v. Edge*, 2 Jur. (N. S.) 80; *Lewis v. Baird*, 3 McLean, 56; *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Penny v. Davis*, 3 B. Mon. 313.

¹ *Stacy v. Elph*, 1 M. & K. 195; *Lowry v. Fulton*, 9 Sim. 115; *Dove v. Everard*, 1 R. & M. 281; *Taml.* 376; *Orr v. Newton*, 2 Cox, 274; *Balchen v. Scott*, 2 Ves. Jr. 678; *Carter v. Carter*, 10 B. Mon. 327; *Judson v. Gibbons*, 5 Wend. 224. And the onus is on the alleged trustee. *Kennedy v. Winn*, 80 Ala. 165.

² *Evans v. John*, 4 Beav. 35; *Smith v. Knowles*, 2 Grant Cas. 413.

³ *Doyle v. Blake*, 2 Sch. & Lef. 240.

⁴ *Read v. Truelove*, Amb. 417; *Chaplin v. Givens*, 1 Rice, Eq. 154; *Doe v. Harris*, 16 M. & W. 517; *Lowry v. Fulton*, 9 Sim. 115; *Conyngham v. Conyngham*, 1 Ves. 522; *Montgomery v. Johnson*, 11 Ir. Eq. 476.

of a bond,¹ and in relation to express trustees in general, similar provisions may exist.²

§ 262. At common law an executor was said to derive his authority from the will, and not from the appointment of the probate court.³ Therefore most of the acts of persons nominated to execute wills were valid before the probate of the will.⁴ Thus persons appointed by a testator in his will to administer his estate, and execute the trusts created by such will, might assume the trusts and proceed in the execution of them, without presenting the will for probate;⁵ and the same evidence might be used to show that a trustee under a will had accepted such trust, and had assumed its responsibilities, as was admissible to show that a trustee under a deed had accepted the office.⁶ But in nearly all the United States there are statutes upon the subject which require that wills shall be presented for probate, and that executors and trustees under them shall give bonds for the faithful discharge of their duties. Where such statutes are in force, executors or trustees have no power or authority to act without appointment by the probate court, and a refusal or neglect to qualify by giving bonds will be considered a refusal and disclaimer of the trust.⁷ In the absence of such

¹ See § 262.

² *Bates v. State*, 75 Ind. 463; *Hinds v. Hinds*, 85 Ind. 312; *Tucker v. State*, 72 Ind. 242; *Thiebaud v. Dufour*, 54 id. 620.

³ *Toller's Ex'rs*, 95.

⁴ *Easton v. Carter*, 5 Exch. 8; *Venables v. East Ind. Co.*, 2 Exch. 633; *Toller's Ex'rs*, 46, 47; *Mitchell v. Rice*, 6 J. J. Marsh. 625.

⁵ *Ibid.*; *Vanhorne v. Fonda*, 5 Johns. Ch. 403.

⁶ *Conyngham v. Conyngham*, 1 Ves. 522; *Doyle v. Blake*, 2 Sch. & Lef. 231; *James v. Frearson*, 1 Y. & C. Ch. 370; *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Godwin v. Yonge*, 22 Ala. 553; *Latimer v. Hanson*, 1 Bland, 51; *Flint v. Clinton Co.*, 12 N. H. 432; *Chaplin v. Givens*, 1 Rice, Eq. 133; *Baldwin v. Porter*, 12 Conn. 473.

⁷ *Luscomb v. Ballard*, 5 Gray, 403; *Monroe v. James*, 4 Munf. 195; *Trask v. Donahue*, 1 Aik. (Vt.) 373; *Carter v. Carter*, 10 B. Mon. 327; *Mitchell v. Rice*, 6 J. J. Marsh. 625; *Robertson v. Gaines*, 2 Humph. 381; *Johnson's App.*, 9 Barr, 416; *Simpson's App.*, id.; *Wood v. Sparks*, 1 Dev. & Bat. 396; *Miller v. Meetch*, 8 Barr, 417; *Roseboom v. Moshier*, 2 Denio, 61; *Williams v. Cushing*, 34 Maine, 370; *Deering v. Adams*, 37

statutes, if a person named as executor procures probate of the will, he will thereby constitute himself executor with all the liabilities attached to the office,¹ and if the same person is appointed executor and trustee, probate of the will by him will be an acceptance of the trusts.² (a) But the same person may be appointed both executor and trustee under a will in such a manner that he may accept one of the offices and decline the other. As if a man is appointed executor, and as executor is to act as a trustee, in such case the probate of the will, and qualification as executor, will be an acceptance of the trust.³ But if from the will it appears that the testator intended to give his trustees a distinct and independent character, probate of the will by the executors will not make them trustees, unless they also accept the trust

id. 265; Knight v. Loomis, 30 id. 208; Groton v. Ruggles, 17 id. 137; Hanson v. Worthington, 12 Md. 418; Sawyer's App., 16 N. H. 459; Gaskill v. Gaskill, 7 R. I. 478; Mahony v. Hunler, 30 Ind. 246; *infra*, § 264, n. In many of the States there are statutes that authorize the judges of probate to appoint executors or trustees under wills, without requiring bonds with sureties, if the testator request it in his will, or if all the parties in interest, being *sui juris*, request it in writing. In such cases the court proceeds with great caution, and it may at any time require security if the circumstances seem to require it. Gibbs v. Guignard, 1 S. C. 359. The omission to give the bond required does not divest the trustee of the legal title. Gardner v. Brown, 21 Wall. 36.

¹ Booth v. Booth, 1 Beav. 125; Ward v. Butler, 2 Moll. 533; Styles v. Guy, 1 Mac. & G. 431; Scully v. Delaney, 2 Ir. Eq. 165; and see Balchen v. Scott, 2 Ves. Jr. 678; Peeble's App., 15 Serg. & R. 39; Worth v. McAden, 1 Dev. & Bat. Eq. 209; Cummins v. Cummins, 3 Jon. & La. 64; Hanson v. Worthington, 12 Md. 418.

² Mucklow v. Fuller, Jac. 198; Williams v. Nixon, 2 Beav. 472; Clarke v. Parker, 19 Ves. 1; Cummins v. Cummins, 3 Jon. & La. 64; Hanson v. Worthington, 12 Md. 418; Baldwin v. Porter, 12 Conn. 473.

³ De Peyster v. Clendinning, 8 Paige, 295; Hanson v. Worthington, 12 Md. 418; Williams v. Conrad, 30 Barb. 524; Mucklow v. Fuller, Jac. 198; Booth v. Booth, 1 Beav. 125; Williams v. Nixon, 2 Beav. 472; Ward v. Butler, 2 Moll. 533; Wilson's Estate, 2 Penn. St. 325.

(a) In the case of money given trust, and pay the interest only to by will to one person for life, with the person entitled for life. Bul-remainder over, if no trustee is lard v. Chandler, 149 Mass. 532, specially named or appointed, the 537; White v. Mass. Inst. of Tech-executor is to hold the money in nology, 171 Mass. 84.

and qualify themselves according to law.¹ If the executor is not expressly appointed trustee, the court may determine from the whole will whether he is to act as trustee.² If the trust is given to one named, and the same person is afterwards appointed executor, the trust is not annexed to the office of executor.³ The conditions of bonds of administrators are to administer the estate according to law. Bonds of executors are conditioned to administer an estate according to the will, though a condition to administer according to law is the same thing, because by law they are to administer according to the will. If, therefore, by the terms of the will the executor, *as executor*, is to keep the estate, or any portion of it, in his hands, and is to deal with it as a trustee, his bond will be held as security for the faithful performance of his duties, though such duties are much larger and different from those of an ordinary executor.⁴ Where the income of property is given to one for life, and at his death the property is given over to another, and no trustee is named in the will, the executor is the trustee to hold the property during the life of the legatee for life.⁵ If, however, the will contemplates that the executor, *as such*, is to perform only the ordinary duties of an executor, and that when the estate is settled by him, another duty is to arise to

¹ *De Peyster v. Clendining*, 8 Paige, 295; *Worth v. McAden*, 1 Dev. & Bat. 209; *Judson v. Gibbons*, 5 Wend. 226; *Williams v. Cushing*, 31 Maine, 370; *Deering v. Adams*, 37 id. 265; *Knight v. Loomis*, 30 id. 204; *Hanson v. Worthington*, 12 Md. 418; *Wheatley v. Badger*, 7 Penn. St. 459. But see *Anderson v. Earle*, 9 S. C. 460.

² *Sawyer's App.*, 16 N. H. 459; *Carson v. Carson*, 6 Allen, 397; *Howard v. Amer. Peace Soc.*, 49 Maine, 288, 306. An executor must administer the trust created by will where there is no designation of the executor or any other person as trustee. *Pettingill v. Pettingill*, 60 Maine, 412; *Richardson v. Knight*, 69 id. 385.

³ *James's App.*, 3 Grant, 169.

⁴ *Saunderson v. Stearns*, 6 Mass. 37; *Prescott v. Pitts*, 9 Mass. 376; *Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 13 Pick. 328; *Towne v. Ammidown*, 20 Pick. 325; *Perkins v. Moore*, 16 Ala. 9; *State v. Nicols*, 10 Gill & J. 27; *Wilson's Estate*, 2 Penn. St. 325; *Sheet's Est.*, 52 id. 257; *Lansing v. Lansing*, 45 Barb. 182.

⁵ *Wheeler v. Perry*, 18 N. H. 307.

be performed, either by him or by another, then the bond of the executor is not security for those further duties; but the person who is to perform them must accept the office, and give a bond for their performance.¹ It may be further observed, that an executor will be considered as holding a legacy in his capacity as executor, unless the will clearly shows that the testator intended that he should hold it in the character of a trustee.² But after the lapse of twenty years the law will presume that an estate was fully administered, and that thereafter the executor held the funds as trustee.³ So, if it appears that the executor made an actual final settlement of the estate as executor, he will be presumed to hold subsequently as a trustee.⁴ As a general rule, executors' and trustees' bonds can be sued only by leave of court, upon good cause shown.⁵

§ 263. If the same person is both executor and trustee, it is sometimes difficult to determine whether, in a particular case, he is acting as executor or trustee. In England, the rule seems to be that if the executor assents to the legacy, if it is specific, or if part of the assets are clearly set apart and appropriated by him to answer a particular legacy, he will be considered to hold the fund as trustee for that trust, and not as executor.⁶ In jurisdictions where executors and trustees are required to qualify and give bonds, it has been held that an executor, who is also a trustee under the will, cannot be considered as holding any part of the assets as trustee, until he has settled his account at the probate office

¹ *Knight v. Loomis*, 30 Maine, 204; *Mastin v. Barnard*, 33 Ga. 520; *Perkins v. Lewis*, 41 Ala. 641; *Parsons v. Lyman*, 5 Blatch. C. C. 170; *Spark's Est.*, 1 Tuck. Sur. 443.

² *State v. Nicols*, 10 Gill & J. 27.

³ *Jennings v. Davis*, 5 Dana, 127.

⁴ *State v. Hearst*, 12 Miss. 365.

⁵ *Floyd v. Gilliam*, 6 Jones, Eq. 183.

⁶ *Dix v. Burford*, 19 Beav. 409; *Brougham v. Poulett*, id. 119; *Ex parte Dover*, 5 Sim. 500; *Phillipo v. Munnings*, 2 M. & Cr. 309; *Byrchall v. Bradford*, 6 Madd. 13; *Ex parte Wilkinson*, 3 Mont. & Ayr. 145; *Willmot v. Jenkins*, 1 Beav. 401.

as executor, and has been credited with the amount as executor with which he is afterwards to be charged as trustee.¹ In other cases it has been held that the change of property from the executor to the trustee, where they are the same persons, may be shown by some *authoritative and notorious act*;² but that the mere determination of the executor, in his own mind, to hold certain particular property thereafter in trust for a particular legatee under the will, is not such a setting apart as to discharge him from his liability as executor, and to charge him as trustee.³ (a) Where the executor may thus act in a double capacity, he must account in his capacity as executor, and the sureties on his bond as executor

¹ Hall v. Cushing, 9 Pick. 395; Prior v. Talbot, 10 Cush. 1; Perkins v. Moore, 16 Ala. 9; Elliott v. Sparrell, 114 Mass. 404; Muse v. Sawyer, T. R. 204.

² Newcomb v. Williams, 9 Met. 534; Conkey v. Dickinson, 13 Met. 53; Hubbard v. Lloyd, 6 Cush. 522; De Peyster v. Clendining, 8 Paige, 310; Byron v. Mood, 2 McMull. 288; Hitchcock v. Bank of U. S., 7 Ala. 386; Perkins v. Moore, 16 Ala. 9; State v. Brown, 68 N. C. 554; Tyler v. Deblois, 4 Mason, 131. A defaulting trustee who becomes entitled to a portion of the trust, being one of the next of kin to a deceased *cestui que trust*, will be held to have paid himself, and the share standing to his account on distribution will be paid to the other *cestui que trust*, to the extent of the defalcation. Jacobs v. Ryland, L. R. 15 Eq. 341. See Ruffin v. Harrison, 81 N. C. 208, in which the court, from an examination of the cases cited, deduced the following principles: 1. Where the simple relation of debtor and creditor exists, and the same person, representing both, is to pay and receive, the possession of assets which ought to be applied to the debts is in law an application. 2. Where one is clothed with a double fiduciary capacity, and the balance remaining upon a full execution of one trust belongs to the other, if the amount has been ascertained definitely and authoritatively, and the fund is then in the trustee's hands, the law makes the transfer. 3. If the first trust is not closed, although the trustee may have rendered an account, which has not been passed upon by a competent tribunal, the fund remains unchanged, and is held as before. 4. The trustee may, by an unequivocal act indicating the intent, elect to hold the fund in possession in another capacity, and it will be thereby transferred.

³ Miller v. Congdon, 14 Gray, 114. The question, in this case, was whether the estate or the legatee should suffer a certain loss; but it was not a question whether the executor should bear the loss in person.

(a) See *In re Smith*, 42 Ch. D. 302.

will be liable for the faithful discharge of his duties as such, until he has transferred his account to himself as trustee, and given a bond as trustee.¹ But, at the same time, it is held that if the executor, acting as trustee under such a will, acts with fidelity and due diligence, he and his sureties will not be responsible should any loss happen either to the principal or interest of the trust fund; that is, that his liability in such a case is rather that of a trustee than that of an executor;² and if he has acted in good faith in the investment of the legacy, any loss that may occur without his fault will fall upon the legatee or *cestui que trust*, and not upon him or the estate.³ Where a decree in chancery created a separate estate for a married woman, and the court appointed a trustee to receive it, and ordered him to give bond for the faithful administration of the trust, the property vested in him upon his giving bond, and continued during his life; and, at his death, it did not vest in the *cestui que trust*, but remained subject to the orders of the court.⁴

§ 264. The executor of an executor, by accepting the office from his immediate testator, becomes the executor and trustee of his testator's testator. This is the rule in England, where an executor comes into possession of all the assets in the hands of his testator, in whatever capacity such testator held them; and, by accepting the duty of administering the estate of his immediate testator, he accepts the duty of administering all the trusts with which the assets in his testator's hands were charged.⁵ An executor must administer

¹ *Prior v. Talbot*, 10 Cush. 1. A charge of the amount set apart in executor's account settled in probate court is conclusive against the executor. *Elliott v. Sparrell*, 114 Mass. 404.

² *Hubbard v. Lloyd*, 6 Cush. 522; *Brown v. Kelsey*, 2 Cush. 248; *Dorr v. Wainwright*, 13 Pick. 332; *Right v. Cathill*, 5 East, 491; *Denne v. Judge*, 11 East, 288.

³ *Ibid.*

⁴ *Witter v. Duley*, 36 Ala. 135.

⁵ In the *Goods of Perry*, 2 Curt. 655; *Goods of Beer*, 15 Jur. 160; *Shep. Touch. by Preston*, 464; *Wankford v. Wankford*, Freem. 520; *Hay-*

an account for all the assets that come to his hands. If his testator held goods of a previous testator unadministered, or if his testator held assets as a trustee, probate courts may appoint an administrator with the will annexed of the first testator, or a new trustee; and it will be the duty of the executor of the last testator to settle an account with the administrator with the will annexed, or with the new trustee, and to pay over to them the assets that came to his hands. Until such proceedings are had, he will hold such assets upon the same terms and trusts that his testator held them; and it will be his duty to administer them accordingly. The proposition may be briefly stated thus: An executor, in proving the will and in accepting the office from his immediate testator, accepts not only all the trusts imposed by the immediate will under which he acts, but also all the trusts in respect to the assets which come to his hands with which his immediate testator was charged; and he must execute those trusts until he is relieved by a new appointment in the probate court, and a settlement and payment over of the assets. He will not be allowed to accept the trusts created by his immediate testator, and to repudiate those with which his testator was himself charged.¹ And so, a trustee cannot limit his acceptance and liability to any particular portion of the trust. For if he acts at all, though he disclaim a part he will be held to have accepted the entire trust;² as if one is appointed trustee of real and personal estate, and he deals with the personal, he will be deemed to

tan v. Wolfe, Cro. Jac. 614; *Palm*, 156; *Hutt*, 30; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Maudlin v. Armisted*, 18 Ala. 702; *Nichols v. Campbell*, 10 Gratt. 561. See *Knight v. Loomis*, 30 Me. 204, where it is said that an administrator *de bonis non* under the will of a trustee is not constituted trustee by his appointment.

¹ *Worth v. McAden*, 1 Dev. & Bat. 199; *Mitchell v. Adams*, 1 Ired. (Law) 298; *King v. Lawrence*, 14 Wis. 238; *Schenck v. Schenck*, 1 Green, Ch. 174.

² *Urch v. Walker*, 3 M. & Cr. 702; *Read v. Truelove*, Amb. 417; *Doyle v. Blake*, 2 Sch. & Lef. 231; *Van Horn v. Fonda*, 5 Johns. Ch. 403; *Champlin v. Givens*, 1 Rice, Eq. 154; *Cummins v. Cummins*, 3 Jon. & La. 64; *Latimer v. Hanson*, 1 Bland, 51; *Flint v. Clinton Co.*, 12 N. H. 432.

have accepted the entire trust;¹ and so, if the same instrument appoints him to two distinct trusts, he cannot divide them.² (a)

§ 265. If a person wrongfully interferes with the assets of a deceased person, he may become an administrator or executor *de son tort*. So, if a person by mistake or otherwise assumes the character of trustee, and acts as such, when the office does not belong to him, he thereby becomes a trustee *de son tort*, and he may be called to account by the *cestui que trust* for the assets received under color of the trust.³ (b)

¹ Ward v. Butler, 2 Moll. 533.

² Urch v. Walker, 3 M. & Cr. 702; Judice v. Prevost, 18 La. An. 601.

³ Pearce v. Pearce, 22 Beav. 248; Life Ass'n v. Siddall, 3 De G., F. & J. 58; Hennessey v. Bray, 33 Beav. 96; Rackham v. Siddall, 16 Sim. 297; 1 Mac. & G. 607.

(a) When the same person is nominated by a will as both executor and trustee, one of these trusts may be accepted and the other disclaimed, if the testator has not directed otherwise; and, in general, the disclaimer of one of several trusts, when independent and created by the same instrument, does not prevent acceptance of the other trusts. *Re Cunard's Trusts*, 48 L. J. N. s. 192; *Daggett v. White*, 128 Mass. 398; *Carruth v. Carruth*, 148 Mass. 431. A trustee of both English and foreign property cannot make a partial disclaimer of the trusts of the English property and retain control of the foreign property. *In re Lord and Fullerton's Contract*, [1896] 1 Ch. 228.

A disclaimer should be executed without delay, but there is no absolute rule that it must be executed within any particular time. *Jago v.*

Jago, 68 L. T. 654. Yet non-action, if long continued, or other acts, may amount to a disclaimer by conduct. *Brandon v. Carter*, 119 Mo. 572; *Mutual Life Ins. Co. v. Woods*, 4 N. Y. S. 133. A person who by conduct disclaims the office of trustee under a will, disclaims the legal estate thereby devised to him. *In re Birchall*, 40 Ch. D. 436. Failure to qualify or to give bond is treated as a disclaimer, or else as cause for removal, under the statutes of the different States. *Supra*, § 262. See *Rothschild v. Frank*, 43 N. Y. S. 951; *Foss v. Sowles*, 62 Vt. 221; *Ex parte Kilgore*, 120 Ind. 94; *Sneer v. Stutz*, 102 Iowa, 462; *Lamar v. Walton*, 99 Ga. 356.

(b) Such a trustee must have actually intermeddled with or had control of the trust property. *In re Barney*, [1892] 2 Ch. 265; *supra*, § 245, n. (a).

§ 266. When trustees have accepted the office, they ought to bear in mind that the law knows no such person as a *passive trustee*, and that they cannot sleep upon their trust. If such trustee remains quiet for any reason, and suffers some other to do all the business, and yet executes formal papers, as a power of attorney for the sale of stock, or a release or discharge of mortgages on payment, he is answerable for the money as if he had conducted the business. And further, the trustee should make himself acquainted with the nature and circumstances of the property; for though he is not responsible for anything that happens before his acceptance of the trust,¹ yet if a loss occurs from any want of attention, care, or diligence in him after his acceptance, he may be held responsible for not taking such action as was called for.²

§ 267. It has been seen that a person named as trustee, either in a deed or will, may decline the office and disclaim the estate.³ If he does so, he ought to execute an effectual disclaimer without delay, for after a long interval of time it will be presumed that he accepted the office.⁴ If a person knows of his appointment, and lies by for a long time, it is for the court to say whether, under all the circumstances, such acquiescence was an assent to the trust.⁵ But if a trustee does no act in the office, there is no rule that requires him to disclaim within any particular time. Thus, he may disclaim after sixteen years if the delay can be so explained as to rebut the presumption of an acceptance.⁶ A disclaimer

¹ Greaves *v.* Strahan, 8 De G., M. & G. 291; Prindle *v.* Holcombe, 45 Conn. 111; Stevens *v.* Gaylord, 11 Mass. 269; Ips. Manuf. Co. *v.* Story, 5 Met. 310; Leland *v.* Felton, 1 Allen, 531; Kinney *v.* Ensign, 18 Pick. 236.

² England *v.* Downes, 6 Beav. 269, 279; Townley *v.* Bond, 2 Conn. & Laws. 405; James *v.* Frearson, 1 Y. & C. Ch. 270; Taylor *v.* Millington, 4 Jur. (N. S.) 204; *Ex parte* Greaves, 25 L. J. 53; 2 Jur. (N. S.) 253; Malzy *v.* Edge, 2 Jur. (N. S.) 8.

³ *Ante*, § 259.

⁴ *Ibid.*

⁵ Doe *v.* Harris, 16 M. & W. 517; Paddon *v.* Richardson, 7 De G., M. & G. 563; James *v.* Frearson, 1 Y. & C. Ch. 370.

⁶ Noble *v.* Meymott, 14 Beav. 471; Doe *v.* Harris, 16 M. & W. 517.

will take effect as of the time of the gift, and will prevent the estate from vesting in the trustee disclaiming; therefore, a disclaimer, whenever made, will relate back to the time of the gift, if the party disclaiming has done no act which may be construed into an acceptance. It is therefore immaterial when the mere formal instrument of disclaimer is executed, provided that nothing has intervened to vest the estate in the trustee.¹

§ 268. If a person has once accepted the office, either expressly or by implication, it is conclusive; and he cannot afterwards, by disclaimer or renunciation, avoid its duties and responsibilities.² And the reason is, that, if the estate has once vested in the trustee, it cannot be divested by a mere disclaimer, or renunciation, nor can he convey the estate against the consent of the *cestui que trust* without committing a breach of trust, unless the instrument creating the trust gives him that power, or unless there is the decree of a court to that effect. In such case the trustee may resign the trust, and convey the estate in the manner pointed out in the instrument creating the trust, if it speaks upon that subject; or the trustee may decline the office, and convey the estate to a new trustee, by the agreement of all the parties in interest, if they are competent to act, and consent to the arrangement. But if the parties do not consent, or if there are minor children, married women, insane persons, or others incompetent to act, a trustee, after he has once accepted the office, can only be discharged by decree of a court having jurisdiction, and upon proper proceedings had.³

¹ Stacy v. Elph, 1 M. & K. 195-199.

² Conyngham v. Conyngham, 1 Ves. 522; Read v. Truelove, Amb. 417; Doyle v. Blake, 2 Sch. & Lef. 231; Stacey v. Elph, 1 M. & K. 195; Cruger v. Halliday, 11 Paige. 314; Shepherd v. McEvers, 4 Johns. Ch. 136; Latimer v. Hanson, 1 Bland. 51; Jones v. Stockett, 2 Bland. 409; Chaplin v. Givens, 1 Rice, Eq. 133; Perkins v. McGavock, 3 Hay, 265; Drane v. Gunter, 19 Ala. 731; Strong v. Willis, 3 Fla. 124; Thatcher v. Corder, 2 Keyes, 157; Armstrong v. Merrill, 14 Wall. 138.

³ Courtenay v. Courtenay, Jo. & Lat. 519; Foreshow v. Higginson, 20 Beav. 485; Greenwood v. Wakeford, 1 Beav. 576; Coventry v. Coventry,

§ 269. If a person accepts a trust and dies, his heir cannot renounce or disclaim it. The acceptance vested the estate in the trustee, and the law at his death cast it upon the heir; and the heir cannot divest or repudiate the estate by a mere disclaimer.¹ But if the heir is so named in the original instrument of trust that he takes the estate *by purchase*, and not by inheritance or descent, or if he comes in under some arrangement, as a special occupant, he may use his own judgment in accepting or refusing the estate charged with the trust.² In most of the United States there are special provisions by statute regulating the resignation of trustees, and the proceedings to be had upon their death, for the preservation of the trust estates and the appointment of new trustees. If a person is appointed trustee and has neither accepted nor disclaimed during his life, it is an open question whether his heir or personal representative can disclaim after his death. The question was raised in *Goodson v. Ellison*,³ but was left undecided. Mr. Hill thinks that a disclaimer by the heir may be supported on principle.⁴ A later case seems strongly to imply that the heir cannot disclaim.⁵ If an acting trustee dies, a person named cotrustee with him may disclaim after his death, if the one disclaiming has done no act amounting to an acceptance.⁶

§ 270. It was the clear opinion of Lord Coke, that if a freehold vested in a person by feoffment, grant, or devise, it could not be divested except by matter of record; and this rule was established in order that a suitor might know, with more certainty, who was the tenant to the *præcipe*; ⁷ but, as

1 Keen, 758; *Cruger v. Halliday*, 11 Paige, 314; *Drane v. Gunter*, 19 Ala. 731; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Diefendorf v. Spraker*, 10 N. Y. 246; *Re Bernstein*, 3 Redf. (N. Y.) 20.

2 Co. Litt. 9 a; 3 Cru. Dig. 318; *Humphrey v. Morse*, 2 Atk. 408.

3 *Creagh v. Blood*, 3 Jon. & La. 170.

4 *Goodson v. Ellison*, 3 Russ. 583, 587.

5 Hill on Trustees, 222 (4th ed.).

6 *King v. Phillips*, 16 Jur. 1080.

7 *Stacey v. Elph*, 1 M. & K. 195.

8 *Butler & Baker's Case*, 3 Co. 26 a, 27 a; *Anon.* 4 Leon. 207; *Shep-*

a gift is not perfect in law until it is accepted by the assent of the donee, a disclaimer operates as evidence that the donee never assented, and consequently that the estate never vested in him. Accordingly, it is now established that a parol disclaimer is sufficient in all cases of a gift by deed or will of both real and personal estate.¹ And so a trust may be repudiated without an express disclaimer, as by evidence of the conduct of the party amounting to a refusal of the office,² or by any conduct inconsistent with an acceptance; and a disclaimer may be presumed after a long neglect to qualify or refusal to act.³ But the parol expressions of a refusal of the trust, or parol evidence of conduct inconsistent with an acceptance, must be unequivocal, and extend to a renunciation of all interest in the property; for if such refusal or conduct is coupled with a claim to the estate of another character, it will not amount to a disclaimer.⁴ But a person would act very imprudently who allowed so important a question, as whether he was a trustee or not, to be a matter of inference and construction from conversations or conduct.⁵

Touch. 285, 452; *Bonifant v. Greenfield*, Godb. 79; *Siggers v. Evans*, 5 El. & Bl. 380.

¹ *Townson v. Tickell*, 3 B. & Al. 31; *Stacey v. Elph*, 1 M. & K. 198; *Bonifant v. Greenfield*, Cro. Eliz. 80; *Smith v. Smith*, 6 B. & C. 112; *Begbie v. Crook*, 2 Bing. N. C. 70; 2 Scott, 128; *Shep. Touch.* 282, 452; *Smith v. Wheeler*, 1 Ventr. 128; *Thompson v. Leach*, 2 Ventr. 198; *Rex v. Wilson*, 5 Man. & R. 140; *Small v. Marwood*, 4 id. 190; *Foster v. Dawber*, 1 Dr. & Sm. 172; *Re Ellison's Trust*, 2 Jur. (N. S.) 62; *Doe v. Smith*, 9 D. & R. 136; *Bingham v. Clanmorris*, 2 Moll. 253; *Peppercorn v. Wayman*, 5 De G. & Sm. 230; *Doe v. Harris*, 16 M. & W. 517; *Thompson v. Meek*, 7 Leigh, 419; *Roseboom v. Moshier*, 2 Denio, 61; *Comm. v. Mateer*, 16 Serg. & R. 416; *Nicolson v. Wordsworth*, 2 Swanst. 369; *Adams v. Taunton*, 5 Madd. 435; *Miles v. Neave*, 1 Cox, 159; *Sherratt v. Bentley*, 1 Russ. & M. 655; *Norway v. Norway*, 2 M. & K. 278; *Bray v. West*, 9 Sim. 429.

² *Stacey v. Elph*, 1 M. & K. 195; *Ayres v. Weed*, 16 Conn. 291; *Thorn-ton v. Winston*, 4 Leigh, 152; *Wardwell v. McDonell*, 31 Ill. 364; *Williams v. King*, 43 Conn. 572 and cases cited.

³ *Marr v. Peay*, 2 Murph. 85.

⁴ *Doe v. Smith*, 6 B. & C. 112; *Judson v. Gibbons*, 5 Wend. 224.

⁵ *Stacey v. Elph*, 1 M. & K. 199; *In re Tryon*, 7 Beav. 496.

§ 271. A disclaimer should be by deed or other writing that admits of no ambiguity, and is certain evidence.¹ And the instrument should be a *disclaimer* and not a *conveyance*; for if the trustee attempts to convey the estate, he may be held to have accepted the trust by the same act which was intended to be a refusal of the office.² Although Lord Eldon expressed the opinion, which seems to be the common-sense view, that if the intention of the instrument is to disclaim, it ought to receive that construction, although it is in form a conveyance,³ yet this distinction has not been acted on. A trust may also be disclaimed at the bar of the court and by counsel, or by answer in chancery.⁴

§ 272. If a person is nominated as trustee in a will, and a benefit is also given to him independent of the office, he can claim the testator's bounty, and yet disclaim the burden of the trust,⁵ as an executor who is also a legatee may renounce the executorship and yet claim the legacy; but if the benefit is annexed to the office of trustee or executor, and is not a gift to the individual, the person named as executor or trustee cannot claim the benefit if he decline the office.⁶

¹ *Stacey v. Elph*, 1 M. & K. 199.

² *Crewe v. Dicken*, 4 Ves. 97; *Urch v. Walker*, 3 M. & C. 702.

³ *Nicolson v. Wordsworth*, 2 Swanst. 372; *Att. Gen. v. Doyley*, 2 Eq. Cas. Ab. 194; *Hussey v. Markham*, t. Finch, 258; *Sharp v. Sharp*, 2 B. & A. 405; *Richardson v. Hulbert*, 1 Anst. 65.

⁴ *Ladbroke v. Bleadon*, 16 Jur. 630; *Foster v. Dawber*, 1 Dr. & Sm. 172; *Re Ellison's Trust*, 2 Jur. (N. S.) 62; *Hickson v. Fitzgerald*, 1 Moll. 14; *Norway v. Norway*, 2 M. & K. 278; *Sherratt v. Bentley*, 1 R. & M. 655; *Legg v. Mackrell*, 1 Gif. 166; *Bray v. West*, 9 Sim. 429; *Clemens v. Clemens*, 60 Barb. 366.

⁵ *Pollexfen v. Moore*, 3 Atk. 272; *Andrew v. Trinity Hall*, 9 Ves. 525; *Talbot v. Radnor*, 3 M. & K. 524; *Warren v. Rudall*, 1 John. & H. 1; *Buel v. Yelverton*, L. R. 13 Eq. 131; *In re Isabella Denby*, 3 De G., F. & J. 350; *Burgess v. Burgess*, 1 Coll. 367.

⁶ It is an established rule that bequests to individuals are considered, *prima facie*, to be given to them in that character, — a presumption to be repelled by the nature of the legacies or other circumstances arising in the will. *Roper on Leg.* 780; *Slaney v. Watney*, L. R. 2 Eq. 418. It is so, even if the persons are described in the legacy as "my good friends." *Read v. Devaynes*, 3 Bro. Ch. 95. Or if the legacy is given in the will

And a trustee who has power, under certain circumstances, to appoint a colleague and successor to execute the trusts, may disclaim the trusts, except the power of nominating other persons to be trustees in place of those originally appointed, and an appointment by one who has never acted except to make the nomination will be held valid.^{1(a)}

§ 273. If a person appointed trustee effectually disclaims, it is as if he had never been named in the instrument. All parties are placed in the same situation in respect to the trust property as if his name had not been inserted in the deed or will.^{2(b)} Therefore, if one of the several trustees disclaims, the entire estate will vest in the remaining trustee or trustees;³ and if all the trustees or a sole trustee disclaim, the estate will vest in the heir subject to the trusts.⁴

among other legacies. *Calvert v. Sebhon*, 4 Beav. 222. Or if it is given in a codicil naming the person as an individual and not naming his office. *Stackpole v. Howell*, 13 Ves. 417; per Ch. J. Chapman in *Kirkland v. Narramore*, 105 Mass. 31. And see *Lewis v. Matthews*, L. R. 8 Eq. 277; *Abbott v. Massie*, 3 Ves. 148; *Harrison v. Rowley*, 4 Ves. 212; *Cockerell v. Barber*, 1 Sim. 23; 5 Russ. 585; *Barnes v. Kirkland*, 8 Gray, 512; *Rothmaler v. Myers*, 4 Des. 255; *Dix v. Read*, 1 S. & S. 237; *Piggott v. Green*, 6 Sim. 72; *Billingslea v. Moore*, 14 Ga. 370; *Hall v. Cushing*, 9 Pick. 395; *Newcomb v. Williams*, 9 Met. 525; *Dixon v. Homer*, id. 420; *Brydges v. Wotton*, 1 V. & B. 134; *Morris v. Kent*, 2 Ed. Ch. 175; *In re Hawken's Trust*, 33 Beav. 570; *Hanbury v. Spooner*, 5 Beav. 630; *Griffiths v. Pruett*, 11 Sim. 202; *King v. Woodhull*, 3 Edw. Ch. 79; *Brown v. Higgs*, 4 Ves. 708; *Thayer v. Wellington*, 9 Allen, 283, 295; *Granberry v. Granberry*, 1 Wash. 246.

¹ *In re Hadley*, 5 De G. & Sm. 67; 9 Eng. L. & Eq. 67.

² *Townson v. Tickell*, 3 B. & Al. 31; *Begbie v. Crook*, 2 Bing. N. C. 70; *Clemens v. Clemens*, 60 Barb. 366; *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Ventr. 128; *Legett v. Hunter*, 25 Barb. 81; 19 N. Y. 445; *Goss v. Singleton*, 2 Head, 67.

³ *Ibid.*; *Bonifant v. Greenfield*, Cro. Eliz. 80; *Denne v. Judge*, 11 East, 288; *Ellis v. Boston, Hartford, & Erie R. Co.*, 107 Mass. 13.

⁴ *Stacey v. Elph*, 1 M. & K. 195; *Austin v. Martin*, 29 Beav. 523;

(a) So a power may subsist after defeated. *In re Cotton's Trustees*, 19 Ch. D. 624, 628.

absolutely, if the object and intention (b) *Wheeler's Appeal*, 70 Conn. of its creation would otherwise be 511.

The settlor must be presumed to have known the effect of a disclaimer by the trustees named by him.¹ It will be seen from this, that a disclaimer operates retrospectively, and vests the estate, *ab initio*, in those trustees only who accept the trust, and, in the absence of an acceptance by any of the trustees, in the heir.² It follows, that all the powers and authority vested in the trustees, *as such*, which are incidental or requisite to the execution of the trusts, are vested in those trustees only who accept the office. They may, therefore, grant leases of the trust estate,³ and sell and convey the same,⁴ and give valid receipts for the purchase-money,⁵ and the disclaiming trustee need not join in the deeds, nor can his concurrence be required or enforced. But it must be known whether one of several trustees disclaims or accepts before it can be known whether the acts of the others are valid or not.⁶ And it is immaterial that a disclaiming trustee is expressly named as one of the persons by whom a power connected with the trust is to be exercised:⁷ a power given to the trustees, or the *survivor* of them, may be exercised by an *acting* trustee, although the disclaiming trustee is still alive.⁸ But if the power is given to the *person* and not to the *office*, a disclaimer by one will not vest the power in the other trustees, so as to enable them to exercise it. Powers that imply a personal confidence in the donee must be exercised by the persons in whom the confidence is placed,

Goss v. Singleton, 2 Head, 67. In New York it rests in the court by statute.

¹ *Browell v. Reed*, 1 Hare, 435.

² *Peppercorn v. Wayman*, 5 De G. & Sm. 230; *Stacey v. Elph*, 1 M. & K. 195; *Dunning v. Ocean Nat. Bk.*, 6 Laus. 296.

³ *Small v. Marwood*, 9 B. & Cr. 307; *Bayly v. Cumming*, 10 Ir. Eq. 410.

⁴ *Cooke v. Crawford*, 13 Sim. 91; *Adams v. Taunton*, 5 Madd. 435; *Crewe v. Dicken*, 4 Ves. 97; *Nicolson v. Wordsworth*, 2 Swanst. 378.

⁵ *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Ventr. 128; 2 Ven. & Pur. 850; *Vandever's App.*, 8 Watts & S. 405.

⁶ *Moir v. Brown*, 14 Barb. 39.

⁷ *Crewe v. Dicken*, 4 Ves. 100; *Adams v. Taunton*, 5 Madd. 435.

⁸ *Sharp v. Sharp*, 2 B. & Cr. 405; *Peppercorn v. Wayman*, 5 De G. & Sm. 230.

and to whom the power is given.¹ Such powers, therefore, will not vest by the disclaimer of one in his cotrustees, but will be absolutely gone.²

§ 274. If a trustee once accepts the office, he cannot by his sole action be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: first, he may be removed and discharged, and a new trustee substituted in his place, by proceedings before a court having jurisdiction over the trust; second, he may be discharged, and a new trustee appointed, by the agreement and concurrence of all the parties interested in the trust; (*a*) and, third, he may be discharged, and a new trustee appointed, in the manner pointed out in the instrument creating the trust, if it makes any provisions upon that subject.³ (*b*) Mere abandonment of the trust will not vest the trust property in the hands of his cotrustee, nor relieve a trustee from liability.⁴ If a trustee conveys away the trust estate to another, even his cotrustee, and appoints another to execute the trust, the conveyance may pass the naked legal title, but it will have no effect in relieving the original trustee from responsibility, if the transaction is not sanctioned by the decree of the court, or by the consent of all parties interested; and it will trans-

¹ *Cole v. Wade*, 16 Ves. 44; *Newman v. Warner*, 1 Sim. (n. s.) 457; *Eaton v. Smith*, 2 Beav. 236; *Att. Gen. v. Doyley*, 2 Eq. Cas. Ab. 194; *Walsh v. Gladstone*, 14 Sim. 2; *Wilson v. Pennock*, 27 Pa. St. 238.

² *Eaton v. Smith*, 2 Beav. 236; *Lancashire v. Lancashire*, 2 Phill. 657; *Robson v. Flight*, 33 Beav. 268.

³ *Craig v. Craig*, 3 Barb. Ch. 76; *Drane v. Gunter*, 19 Ala. 731; *Thatcher v. Candee*, 3 Keyes (N. Y.), 157; *Shepherd v. McEvers*, 4 Johns. Ch. 186; *Cruger v. Halliday*, 11 Paige, 319; *Ridgeley v. Johnson*, 11 Barb. 527; *Webster v. Vandeventer*, 6 Gray, 428; *Pearce v. Pearce*, 22 Beav. 248; *Sugden v. Crossland*, 3 Sm. & Gif. 192; *Jones v. Stockett*, 2 Bland, 409; *Perkins v. McGavock*, 3 Hay. 265.

⁴ *Webster v. Vandeventer*, 6 Gray, 428; *Cruger v. Halliday*, 11 Paige, 314; *Thatcher v. Candee*, 3 Keyes, 157.

(*a*) This applies to a trustee for (*b*) *Stearns v. Fraleigh*, 39 Fla. creditors. *Jenkins v. Hammerschlag*, 603, 610.
56 N. Y. S. 534.

fer no authority to the person thus appointed, except to make him a trustee *de son tort*, if he attempts to interfere with the trust estate.¹ (a)

§ 275. The *cestui que trust*, and all other persons, although contingently interested in the remainder or reversion of trust property,² are entitled to have the custody and the administration of it confided to *proper* persons, and to a *proper number* of persons. Thus if a trustee originally appointed by will die in the testator's lifetime, a new trustee may be appointed by the court to take the trust property; or if the original number of trustees is reduced by death, the *cestui que trust* may call upon the court to appoint new trustees in place of those deceased.³ So if a trustee disclaims, or refuses to act after having once accepted,⁴ or becomes so situated that he cannot effectually execute the office, as by becoming a permanent resident abroad,⁵ or by abscond-

¹ *Pearce v. Pearce*, 22 Beav. 248; *Sugden v. Crossland*, 3 Sm. & Gif. 192; *Braybrooke v. Inskip*, 8 Ves. 417; *Chalmers v. Bradley*, 1 J. & W. 68; *Williams v. Parry*, 4 Russ. 272; *Adams v. Paynter*, 1 Coll. 532; *Cruger v. Halliday*, 11 Paige, 314; *Ardill v. Savage*, 1 Ir. Eq. 79.

² *Finlay v. Howard*, 2 Dr. & W. 490; *Cooper v. Day*, 1 Rich. Eq. 26; *In re Sheppard's Trusts*, 4 De G., F. & J. 423; *Rennie v. Ritchie*, 12 Cl. & Fin. 204.

³ *Buchanan v. Hamilton*, 5 Ves. 722; *Hibbard v. Lamb*, Amb. 309; *Webb v. Shaftesbury*, 7 Ves. 487; *Millard v. Eyre*, 2 Ves. Jr. 94; *De Peyster v. Clendining*, 8 Paige, 296; *Dixon v. Homer*, 12 Cush. 41; *Mass. Gen. Hos. v. Amory*, 12 Pick. 445; *Greene v. Borland*, 4 Met. 339.

⁴ *Wood v. Stane*, 8 Price, 613; *Moggeridge v. Grey*, Nels. 42; *Anon.* 4 Ir. Eq. 700; *Travell v. Danvers*, Finch, 380; *Irvine v. Dunham*, 111 U. S. 327.

⁵ *O'Reilly v. Alderson*, 8 Hare, 101; *Re Ledwick*, 6 Ir. Eq. 561; *Com. &c. v. Archbold*, 11 Ir. Eq. 187; *Lill v. Neafie*, 31 Ill. 101; *In re Reynolds'*

(a) See 1 Ames on Trusts (2d empower the beneficiaries to remove a trustee for adequate cause, court in appointing a receiver and appoint a new one; but a court may amount to the removal of a trustee and the appointment of a new one. *Fatjo v. Swasey*, 111 Cal. 628. A will may properly

ing;¹ or if a *female* trustee marry;² or if the trustees of a church or chapel embrace opinions contrary to the founder's intentions;³ or if the trustee becomes bankrupt,⁴ or misconducts himself,⁵ or deals with the trust fund for his own personal profit and advancement,⁶ or commits a breach of trust,⁷ or refuses to apply and pay over the income as directed,⁸ or if

Settlement, L. R. 7 Ch. 224; *Maxwell v. Finnie*, 6 Cold. 434; *Curtis v. Smith*, 60 Barb. 9; *Meunard v. Wilford*, 1 Sm. & Gif. 426; *Re Stewart*, 8 W. R. 297; *Re Harrison's Trusts*, 22 L. J. Ch. 69; *Dorsey v. Thompson*, 37 Md. 25; *Ketchum v. Mobile & Ohio R. R.*, 2 Woods, 532. The voluntary removal to, and becoming a resident of, a foreign country by a trustee under a mortgage by a railroad company, incapacitates him and vacates the office; and if, after such removal, he attempts to prosecute suit in federal court the state court will enjoin him. *Farmers' Loan and Trust Co. v. Hughes*, 11 Hun (N. Y.), 130. And where the *cestui que trust* was prohibited by law from coming into the State, the court, on the trustee's petition, discharged him, and appointed one living in the same State with the *cestui que trust*. *Ex parte Tunno*, 1 Bailey, Ch. 395.

¹ *Millard v. Eyre*, 2 Ves. Jr. 94; *Gale's Peti. R. M. Charlt.* 109; *Re Mais*, 16 Jur. 608.

² *Lake v. De Lambert*, 4 Ves. 592; *Re Kaye*, L. R. 1 Ch. 387. By chap. 409 of the Acts of 1869, a married woman in Massachusetts may be appointed executrix, administratrix, guardian, or trustee, with the written assent of her husband; and the marriage of a single woman who holds such trusts shall not extinguish her authority, but her sureties on petition may be discharged, and she may be required to give new ones.

³ *Att. Gen. v. Pearson*, 7 Sim. 309; *Att. Gen. v. Shore*, id. 317; *Rose v. Crockett*, 14 La. An. 811. If individuals pay their own money, and take a deed to themselves in trust for a parish, the courts will not appoint a trustee to fill a vacancy; but if the parish paid the money, the court will appoint. *Draper v. Minor*, 36 Mo. 290.

⁴ *Bainbrigge v. Blair*, 1 Beav. 495; *In re Roche*, 1 Con. & Laws. 306; *Com., &c. v. Archbold*, 11 Ir. Eq. 187; *Harris v. Harris*, 29 Beav. 107; *Re Bridgman*, 1 Dr. & Sm. 164.

⁵ *Mayor of Coventry v. Att. Gen.*, 7 Bro. P. C. 235; *Buckeridge v. Glasse*, 1 Cr. & Ph. 122; *Thompson v. Thompson*, 2 B. Mon. 161; *Deen v. Cozzens*, 7 Rob. 178.

⁶ *Ex parte Phelps*, 9 Mod. 357; *Clemens v. Caldwell*, 7 B. Mon. 171; *Deen v. Cozzens*, 7 Rob. 178; *Kraft v. Lohman*, 79 Ala. 323.

⁷ *Thompson v. Thompson*, 2 B. Mon. 161; *Mayor of Coventry v. Att. Gen.*, 7 Bro. P. C. 235; *Att. Gen. v. Drummond*, 1 Dr. & W. 353; 3 Dr. & W. 162; *Att. Gen. v. Shore*, 7 Sim. 309, n.; *Ex parte Greenhouse*, 1 Madd. 92.

⁸ *Ex parte Potts*, 1 Ash. 340.

he fails to invest as directed,¹ or permits a cotrustee to commit a breach of trust,² or if he loans the trust funds on personal security, although the *cestui que trust* approves of it,³ or refuses to obey an order of court,⁴ or if trustees of a mortgage for the security of bond-holders of a railroad or other corporation refuse to foreclose or take other steps;⁵ or if a trustee make a grossly unreasonable claim upon the trust property adverse to the *cestui que trust*;⁶ or if a husband, trustee for his wife, abandons and deserts her or treats her with cruelty;⁷ or if a municipal corporation, holding property upon special trusts, is abolished;⁸ or if a trustee becomes an habitual drunkard;⁹ or a lunatic;¹⁰ or if a hostile feeling exists between a discretionary trustee and the *cestui*,¹¹ or the trustee is antagonized by litigation,¹² or the trustee acts adversely to the interests of the *cestui*,¹³ or if the trustee, appointed on an *ex parte* application of one of the *cestuis*, is his paid servant,¹⁴ or if there is any other good cause,¹⁵ as if the trust fund is in danger of being lost for want

¹ *Clemens v. Caldwell*, 7 B. Mon. 171; *Deen v. Cozzens*, 7 Rob. N. Y. 178; *Cavender v. Cavender*, 114 U. S. 464.

² *Ex parte Reynolds*, 5 Ves. 707.

³ *Johnson v. Simpson*, 9 Barr, 416.

⁴ *Ehlen v. Ehlen*, 63 Md. 267.

⁵ *Matter of Merchants' Bank*, 2 Barb. S. C. 446.

⁶ *Cooper v. Day*, 1 Rich. Ch. 26.

⁷ *Boaz v. Boaz*, 36 Ala. 334; *Fisk v. Stubbs*, 30 Ala. 355; *Smith v. Oliver*, 31 Ala. 139; *Abernathy v. Abernathy*, 8 Fla. 243. But if the wife deserts the husband without cause, though the husband may be at some fault, it is no cause for removing him as her trustee. *Abernathy v. Abernathy*, 8 Fla. 243.

⁸ *Montpelier v. East Montpelier*, 29 Vt. 12.

⁹ *Everett v. Prythergch*, 12 Sim. 367; *Bayles v. Staats*, 1 Halst. Ch. 513.

¹⁰ *Matter of Wadsworth*, 2 Barb. Ch. 387; *Re Fowler*, 2 Russ. 449; *Anon.*, 5 Sim. 322; *In re Holland*, 16 Ch. D. 672; *In re Nash*, 16 Ch. D. 503; *In re Watson*, 19 Ch. D. 384; *In re Martyn*, 26 Ch. D. 745.

¹¹ *Wilson v. Wilson*, 145 Mass. 490, 494.

¹² *Davidson v. Moore*, 14 S. C. 251.

¹³ *Dickerson v. Smith*, 17 S. C. 289.

¹⁴ *Mayfield v. Donovan*, 17 Mo. App. 684.

¹⁵ *Piper's App.*, 20 Penn. St. 67; *Franklin v. Hayes*, 2 Swanst. 521.

of care and attention by the trustee,¹ or if in any way the trustee has become incapable of performing the duties of the trust,² or his acts or omissions show a want of reasonable fidelity to the trust,³ — in all these and similar cases the old trustees may be removed, and new ones substituted in their room. (a) The matter rests in the sound discretion of the

¹ *Jones v. Dougherty*, 10 Ga. 273; *Harper v. Straws*, 14 B. Mon. 57; *Holcomb v. Coryell*, 1 Beas. 289; *Lasley v. Lasley*, 1 Duv. 117; and see *Commissioners v. Archibald*, 11 Ir. Eq. 195, where L. Ch. Brady ably discusses the removal of trustees. *In re Bernstein*, 3 Redf. (N. Y.) 20. Or if a trustee identifies himself with one of two contending parties in relation to the trust fund. *Scott v. Rand et al.*, 118 Mass. 215. Or is so hostile to his cotrustees as to endanger the execution of the trust. *Devasmer v. Dunham*, 22 Hun (N. Y.), 87. Or is guilty of gross misconduct in execution of a discretionary trust. *Babbitt v. Babbitt*, 26 N. J. Eq. 44; *Sparhawk v. Sparhawk*, 114 Mass. 356. ² *Austin v. Austin*, 18 Neb. 309.

³ *Cavender v. Cavender*, 114 U. S. 464.

(a) See *Jones v. Jones*, 30 N. Y. S. 177; *Elias v. Schwyer*, 40 id. 906; *In re Hoysradt*, 45 id. 841. Misconduct justifying a trustee's removal, also includes, *e. g.*, wasting of the estate in unnecessary litigation: *Re McGillivray*, 138 N. Y. 308; unreasonably or wilfully withholding income from a beneficiary: *Ibid.*, *Wilcox v. Quinby*, 16 N. Y. S. 699; refusing to convey, as directed by a valid decree of court: *Harrison v. Union Trust Co.*, 144 N. Y. 326; threatening to make injurious disclosures, if proceedings are taken against himself. *Grant v. Maclaren*, 23 Can. Sup. 310.

trustee and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are grossly exaggerated." *May v. May*, 167 U. S. 310, 320; *Wilson v. Wilson*, 145 Mass. 490, 493; *Marsden's Estate*, 166 Penn. St. 213; *Gartside v. Gartside*, 113 Mo. 348; *Letterstedt v. Broers*, 9 A. C. 371, 386.

If circumstances give rise to conflict of interests between the parts of trust property held on distinct trusts, the English courts, under the Trustee Act of 1850, § 32, would not necessarily deem it expedient to remove the trustees, but might appoint separate trustees. *In re Aston's Trusts*, 25 L. R. Ir. 96.

"The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be executed whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the

court.¹ And in a suit for the purpose, it will not be impertinent nor scandalous to charge the trustee with misconduct, or to impute to him a corrupt or improper motive, or to allege that his behavior is vindictive towards the *cestui que trust*; but it will be impertinent, and may be scandalous, to charge *general malice* or *general personal hostility*.² If the court have jurisdiction of the subject-matter, mere irregularity in the proceedings or in the appointment will not make it void in a collateral proceeding, nor can the regularity of the proceedings or of the appointment be inquired into in a collateral suit; such appointment must stand until it is reversed by a proceeding for the purpose in the same case.³ In case of a trust for creditors, the court will not at the instance of some of them remove the assignee, unless he is in default, or is shown to be unfit for his office.⁴ Equity will not exercise its power to take charge of and administer a trust when it is being properly administered by the trustee.⁵

§ 276. It may be stated generally, that if the conduct or circumstances of the trustees are such as to render it very inconvenient, improper, or inexpedient for them to continue in the trust, the court will exercise its discretion and relieve them, and appoint others in their place; as where the trustees were desirous of being discharged,⁶ or were incapable through age and infirmity of acting,⁷ or so disagreed among themselves that they could not act,⁸ or where cotrustees re-

¹ Ibid., citing many cases.

² Portsmouth v. Fellows, 5 Madd. 450; Parsons v. Jones, 26 Ga. 644.

³ Budd v. Hiler, 3 Dutch. 43; People v. Norton, 5 Selden, 176; Paules v. Dilley, 9 Gill, 222; Curtis v. Smith, 60 Barb. 9; Howard v. Waters, 19 How. 529; Hodgdon v. Shannon, 44 N. H. 572.

⁴ Jones v. McPhillips, 77 Ala. 314.

⁵ Meyers v. Trustees of Schools, 21 Ill. App. 223.

⁶ Bogle v. Bogle, 3 Allen, 158; Howard v. Rhodes, 1 Keen, 581; Coventry v. Coventry, id. 758; Greenwood v. Wakeford, 1 Beav. 576; Hamilton v. Frye, 2 Moll. 458.

⁷ Gardiner v. Downes, 22 Beav. 395; Bennett v. Honeywood, Amb. 710.

⁸ Bagot v. Bagot, 32 Beav. 509; Uvedale v. Patrick, 2 Ch. Cas. 20.

fuse to act with one of their number,¹ or where the trustees appointed were municipal officers for the time being and are changed yearly,² or where a corporation appointed trustee had become subject to a foreign power,³ — in these and the like cases the courts interposed and appointed other trustees. But if there is a controversy, the court will exercise a sound discretion. Mere disagreements between the trustee and *cestui que trust* will not justify a removal;⁴ nor the fact that the trustee forbids social intercourse between his family and the beneficiaries,⁵ and if a trustee fails in the discharge of his duties from an honest mistake, or mere misunderstanding of them, or from a misjudgment, it is no ground for removal;⁶ and if a trustee in good faith refuses to exercise a purely discretionary power in favor of the estate, as to vary the securities, he will not be removed;⁷ nor will he be removed for a mere constructive fraud, as for buying the trust property at his own sale;⁸ and where a trust was to take effect in the future upon the happening of a certain event, and in the meantime it was to remain passive, the court refused to interfere, and remove the trustee for an alleged misfeasance.⁹ In no case ought the trustee to be removed where there is no danger of a breach of trust, and some of the beneficiaries are satisfied with the management.¹⁰ Nor will a trustee be removed for every violation of duty, or even breach of the trust,

¹ Uvedale v. Patrick, 2 Ch. Cas. 20.

² *Ex parte* Blackburne, 1 J. & W. 297; Webb v. Neal, 5 Allen, 575.

³ Att. Gen. v. London, 3 Bro. Ch. 171.

⁴ Clemens v. Caldwell, 7 B. Mon. 171; Gibbes v. Smith, 2 Rich. Eq. 131; Foster v. Davies, 4 De G., F. & J. 133. Unless the duties of the trustee require an intimate personal intercourse, or the trustee has discretionary power over the *cestui que trust*. McPherson v. Cox, 96 W. S. 404.

⁵ Nickels v. Philips, 18 Fla. 732.

⁶ In the Matter of Durfee, 4 R. I. 401; Att. Gen. v. Coopers' Co., 19 Ves. 192; Att. Gen. v. Caius College, 2 Keen, 150; Lathrop v. Smalley, 23 N. J. Eq. 192.

⁷ Lee v. Young, 2 Y. & C. Ch. 532.

⁸ Webb v. Dietrich, 7 W. & S. 401.

⁹ Sloo v. Law, 1 Blatch. C. C. 512.

¹⁰ Berry v. Williamson, 11 B. Mon. 245.

if the fund is in no danger of being lost.¹ (a) The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or even breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy.²

§ 276 a. A trust will not be allowed to fail for want of a trustee; and if the nominee dies before qualifying or afterward, the court will appoint a trustee.³ So if no trustee is appointed by the grantor, or his appointment is void for uncertainty.⁴ But if the trustee of a power that is purely personal and discretionary refuses to qualify, the trust cannot be executed.⁵

§ 277. In removing and substituting trustees, the court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case. (b) Irregularities

¹ *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Corlies v. Corlies*, id.

² *Massy v. Stout*, 4 Del. Ch. 274.

³ *Schouler*, Petitioner, 134 Mass. 426; *Mendenhall v. Mower*, 16 S. C. 304.

⁴ *State v. Griffith*, 2 Del. Ch. 392.

⁵ *Jones v. Fulghum*, 3 Tenn. Ch. 193.

(a) Trustees, being personally liable for their negligence, will not necessarily be removed for this cause only, when the trust property is not endangered. 2 Story, Eq. Jur. § 1289; *Waterman v. Alden*, 144 Ill. 90; *Taylor v. Mahoney*, 94 Va. 508; *In re O'Hara*, 62 Hun, 531; *Dow v. Dow*, 18 N. Y. S. 222; *Lathrop v. Baubie*, 106 Mo. 470; *Williams v. Nichol*, 47 Ark. 254.

(b) This may be done upon the *ex parte* application of the beneficiary. *Sullivan v. Latimer*, 35 S. C. 422. See generally, *Dailey v. New*

Haven, 60 Conn. 314; *Tarrant v. Backus*, 63 Conn. 277; *Kane's Appeal*, 177 Penn. St. 638; *Anson, Petitioner*, 85 Maine, 79; *Willey v. Robinson*, 32 N. Y. S. 1618; *In re Carpenter*, 131 N. Y. 86; *Fisher v. Dickenson*, 84 Va. 318; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Gregg v. Gabbert*, 62 Ark. 602; *Brandon v. Carter*, 119 Mo. 572; *Hitch v. Stonebraker*, 125 Mo. 128; *White v. McKeon*, 92 Ga. 343; *Lowe v. Suggs*, 87 Ga. 577; *City Council v. Walton*, 77 Ga. 517; *Tuttle v. Merchants' Nat. Bank*, 19

in the proceedings of appointment not affecting the jurisdiction of the court will not avail in collateral suits.¹ (a) But an appointment where there is no vacancy, the former trustee not having relinquished the trust nor been deprived of it for abuse or mismanagement, is a nullity.² Where the trustees are required to give security, it will order such notice and to such persons as it sees fit.³ It always has regard to the wishes of the author of the trust, to be gathered from the instrument of trust; if he has expressed a disapprobation of an individual, the court would refrain from appointing him; and so the court will not appoint a new trustee with a view to the interest of some of the *cestuis que trust*, for the trustee ought to hold an even hand between all parties, and not favor a particular one. Further, the court has regard to the nature of the trust, and to those instrumentalities by which it can best be carried into execution.⁴ Accordingly, courts

¹ *McKim v. Doane*, 137 Mass. 195.

² *Augusta v. Walton*, 77 Ga. 525, 526.

³ *Matter of Robinson*, 37 N. Y. 271.

⁴ *In re Tempest*, L. R. 1 Ch. 487.

Mont. 11; *Dyer v. Leach*, 91 Cal. 191; *State v. Hunt*, 46 Mo. App. 616.

(a) See *Kenaday v. Edwards*, 134 U. S. 117; *Lahey v. Kortright*, 132 N. Y. 450; *Royce v. Adams*, 123 N. Y. 402; *Mulry v. Mulry*, 35 N. Y. S. 618; *Correll v. Lauterbach*, 42 id. 143; *Robinson v. Schmitt*, 45 id. 253; *Dexter v. Cotting*, 149 Mass. 92; *In re Stamford*, [1896] 1 Ch. 288; *Edgerly v. Barker* (N. H.), 32 Atl. 766; *Linton v. Shaw*, 95 Ga. 683; *Simmons v. McKinlock*, 98 Ga. 738; *Pettus v. Atlantic S. Ass'n*, 94 Va. 477; *Chapman v. Kimball*, 83 Maine, 389; *Avery v. Avery*, 90 Ky. 613; *Re Petranek*, 79 Iowa, 410; *Wall St. Meth. Church v. Johnson*, 140 Ind. 445; *Mazelin v. Rouyer*, 8 Ind. App. 27. A sub-

stituted trustee usually has the same rights and duties as, and is subject to the orders and conditions already imposed on, the first trustee. *Ibid.*, *Wemyss v. White*, 159 Mass. 484; *In re Appley*, 33 N. Y. S. 724; *Osborne v. Gordon*, 86 Wis. 92. A new trustee will not be appointed simply to distribute a trust fund in the possession of his predecessor's executor or administrator, but such representative will be ordered to make the payment. *Boyer v. Decker*, 40 N. Y. S. 469; *Tyler v. Mayre*, 95 Cal. 160; *Anderson v. Northrop*, 30 Fla. 612. In New York, the execution of a decree removing a testamentary trustee or executor is not stayed by an appeal. *Code Civ. Proc.*, § 2583; *Stout v. Betts*, 74 Hun, 266. A trustee's application

will not substitute trustees upon the mere *caprice* of the *cestui que trust*, and without a reasonable cause,¹ and although the instrument of trust or a statute gives the *cestui que trust* full power to remove and appoint other trustees, yet good cause must be shown or the court cannot be put in motion,² nor will they appoint a trustee out of the jurisdiction without security.³ There is no absolute rule of law that prevents a *cestui que trust* from being a trustee for himself and others, and the court is sometimes obliged to appoint him; but the arrangement is irregular and sometimes disastrous, and the court will not sanction it if it can be avoided.⁴ (a) So a husband may be trustee for a wife, and a wife for a husband,⁵ (b)

¹ O'Keeffe v. Calthorpe, 1 Atk. 18; Pepper v. Tuckey, 2 Jon. & La. 95; Ward v. Dorch, 69 N. C. 279; Bouldin v. Alexander, 15 Wall. 132.

² Stevenson's Appeal, 59 Penn. St. 101; 68 id. 101.

³ *Ex parte* Roberts, 2 Strob. 86; Gibson's Case, 1 Bland, 138.

⁴ Passingham v. Sherborne, 9 Beav. 424; Reid v. Reid, 30 Beav. 388; *Ex parte* Clutton, 17 Jur. 988; *Ex parte* Conybeare's Settlement, 1 W. R. 458; Wilding v. Bolder, 21 Beav. 222; Craig v. Hone, 2 Edw. Ch. 554.

⁵ Tweedy v. Urquhart, 30 Ga. 446; Livingston v. Livingston, 2 Johns. Ch. 541; Bennett v. Davis, 2 P. Wms. 316; Shirley v. Shirley, 9 Paige, 363; Jamison v. Brady, 6 S. & R. 467; Boykin v. Cipples, 2 Hill, Ch. 200;

to resign and to have a new trustee appointed is there a special proceeding. *In re* Holden, 126 N. Y. 589.

"Independently of statute, a court of equity cannot appoint a person to execute a transfer of the property of another." Field, J., in *McCann v. Randall*, 147 Mass. 81. See 1 Ames on Trusts (2d ed.), 249.

Where a will provided for the appointment of new trustees by the court on the application of the surviving trustee and the beneficiary, it was held that the appointment might be made by the court, under its general chancery jurisdiction, without the consent of the surviving trustee, who was also a bene-

ficiary. *Griswold v. Sackett* (R. I.), 42 Atl. 868.

(a) *Story v. Palmer*, 46 N. J. Eq. 1; *Curran v. Green*, 18 R. I. 329; *People v. Donohoe*, 70 Hun, 317.

(b) See *Gaskill v. Green*, 152 Mass. 526; *Grundy v. Drye* (Ky.), 48 S. W. 155; *Stearns v. Fraleigh*, 39 Fla. 603; 1 Ames on Trusts (2d ed.), 220, n. In England the Married Women's Property Act, 1882, does not enable a woman, married after that Act became law, when a trustee of realty for sale, to convey to the purchaser without her husband's concurrence, and by deed acknowledged by her. *In re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

but difficulties frequently grow out of the relation, and the courts have sometimes said that they would not make such appointments.¹ In no case will the court remove old trustees and substitute new ones, unless satisfied of the necessity of the removal, and of the fitness of the new trustee proposed. Nor will the court authorize the new trustees to nominate their successors. There was some doubt and difference of practice at first;² but it is now settled, except in charities,³ that the court will not delegate this part of its jurisdiction to new appointees.⁴

§ 278. If the instrument of trust requires the trustees of a charity to have a particular residence, it is irregular to appoint others not answering that description, provided there are those proper to be trustees.⁵ But if it is the custom to appoint such non-residents, the court will not remove them, but will see that vacancies when they occur are properly filled.⁶ And, generally, if an irregular appointment has been acquiesced in for a long time, the court will not remove.⁷ In making the selection, the inquiry is whether the proposed appointment is proper, not whether it is the most proper.⁸

Picquet v. Swann, 4 Mason, 455; *Griffith v. Griffith*, 5 B. Mon. 113; *Gibson's Case*, 1 Bland, 138; *Watkins v. Jones*, 28 Ind. 12; *Gardner v. Weeks*, 32 Ga. 696.

¹ *Dean v. Sanford*, 9 Rich. Eq. 423. But the court will not appoint the husband trustee, under a trust for the separate use of his wife. *Ely v. Burgess*, 11 R. I. 115; *Ex parte Hunter*, Rice, Ch. (S. C.) 294.

² *Joyce v. Joyce*, 2 Moll. 276; *White v. White*, 5 Beav. 221.

³ *Lewin on Trusts*, 606 (5th ed.).

⁴ *Bayley v. Mansell*, 4 Madd. 226; *Brown v. Brown*, 3 Y. & C. 395; *Bowles v. Weeks*, 14 Sim. 591; *Oglander v. Oglander*, 2 De G. & Sm. 381; *Southwell v. Ward*, Tambl. 314; *Holder v. Durbin*, 11 Beav. 594; overruling *White v. White*, 5 Beav. 221.

⁵ *Att. Gen. v. Cowper*, 1 Bro. Ch. 439.

⁶ *Att. Gen. v. Daugars*, 33 Beav. 621; *Att. Gen. v. Clifton*, 32 Beav. 596; *Att. Gen. v. Stamford*, 1 Phill. 737.

⁷ *Att. Gen. v. Cuming*, 2 Y. & C. Ch. Ca. 150.

⁸ *Lancaster Charities*, 7 Jur. (N. S.) 96.

§ 279. It is laid down in several cases, that if a trustee becomes bankrupt he may be removed,¹ or if he becomes insolvent and compounds with his creditors; and this is on the ground that the *cestui que trust* has a right to have the trust administered by responsible trustees. (a) The English Bankrupt Act² provides, that, if a trustee becomes bankrupt, the chancellor, on petition and due notice, may order the trust estate to be conveyed by the bankrupt, the assignees, and all other persons interested, to such other persons as the chancellor shall think fit, upon the same trusts. Under this statute it has been determined that the court will exercise its discretion whether to remove the bankrupt or not,³ but that *prima facie* the bankrupt is to be removed,⁴ although he may have obtained his discharge.⁵ But the court will not interfere long after the bankruptcy to remove the trustee, if he has obtained his discharge.⁶ Generally the insolvency or bankruptcy of a trustee does not disqualify him for the trust,⁷ nor does his bankruptcy affect the trust estate in his hands; and his certificate does not discharge him from fiduciary obligations.⁸ In the United States, trustees are, or

¹ *Bainbrigge v. Blair*, 1 Beav. 495; *In re Roche*, 1 Conn. & Laws, 306; Com., &c. *v. Archbold*, 11 Ir. Eq. 187; *Harris v. Harris*, 29 Beav. 107.

² 12 & 13 Vict. c. 106, § 130.

³ *Re Roche*, 2 Dr. & W. 289; 2 H. L. Cas. 461

⁴ *Bainbrigge v. Blair*, 1 Beav. 495.

⁵ *Ibid.*

⁶ *Re Bridgman*, 1 Dr. & Sm. 164.

⁷ *Shryock v. Waggoner*, 28 Pa. St. 430; *Turner v. Maule*, 5 Eng. L. & Eq. 222; *Ex parte Watts*, 4 Eng. L. & Eq. 67.

⁸ *Belknap v. Belknap*, 5 Allen, 468.

(a) A trustee will not be removed merely because he has been in financial difficulties which have been surmounted. *Assets Realization Co. v. Trustees, &c., Ins. Corp.*, 65 L. J. Ch. 74; 44 W. R. 126. "An insolvent trustee is not a sufficient party to a suit, so that the *cestui que trust* may be bound." Per North, J., in *Aylward*

v. Lewis, [1891] 2 Ch. 81. A mortgagee who is a trustee and has become bankrupt, cannot, as defendant to a foreclosure suit by a prior mortgagee, properly represent his *cestui que trusts*, who are necessary parties, under the English practice. *Francis v. Harrison*, 43 Ch. D. 183.

may be, required, in the great majority of cases, to give bonds or security for the safety of the trust fund: in all such cases it would seem that the bankruptcy of the trustee would not *per se* render him removable, unless there was some misconduct that rendered it proper for the court to exercise a sound discretion. (a)

§ 280. In *Bogle v. Bogle*,¹ the court determined that one who, without compensation and for no definite time, undertook a trust for the benefit of another was entitled to a decree discharging him, when the further care of the property became inconvenient to him. Generally, trustees who have acted are not entitled, as against the trust estate, to refuse at pleasure to continue: they must have some good cause to entitle them to be relieved.² (b) If they have received a legacy or other benefit given to them *as trustees*, they cannot be allowed to retire except for good cause,³ at least without restoring the legacy. It is a good cause for relief if the *cestui que trust* incumber and complicate the estate, and embarrass the trustee in the performance of his duties.⁴ But where there is no cause for a discharge, except the wish of the trustee, or his convenience, he ought to pay the costs of the proceeding, and not impose the burden and expense upon the estate;⁵ and so if the old trustee is removed for

¹ 3 Allen, 158.

² *Greenwood v. Wakeford*, 1 Beav. 576; *Cruger v. Halliday*, 11 Paige, 314; *Jones v. Stockett*, 2 Bland, 409; *Re Meloney*, 2 Jon. & La. 391.

³ *Craig v. Craig*, 3 Barb. Ch. 76.

⁴ *Howard v. Rhodes*, 1 Keen, 481; *Coventry v. Coventry*, id. 758; *Greenwood v. Wakeford*, 1 Beav. 576; *Hamilton v. Frye*, 2 Moll. 458.

⁵ *Matter of Jones*, 4 Sandf. Ch. 615; *Howard v. Rhodes*, 1 Keen, 581; *Courtenay v. Courtenay*, 3 Jon. & La. 529.

(a) See *Moorman v. Crockett*, 90 Va. 185; *Deroy v. Richards*, 46 Pitts. L. J. 78; *New York Security Co. v. Saratoga Gas Co.*, 88 Hun, 569.

(b) A trustee will not be allowed to resign if a pending suit or other cause prevents a settlement of his accounts. *In re Olmstead*, 49 N. Y. S. 104. See *Conant v. Wright*, 48 id. 422. The court may impose conditions on accepting a resignation. *In re Curtiss*, 37 N. Y. S. 586.

misconduct on his part.¹ (a) But if the trustee has a good reason for his discharge, he will be entitled to his costs out of the estate as between solicitor and client.² Courts of equity, by virtue of their general chancery powers, have jurisdiction to accept the resignation of trustees, or to remove them for cause, and to appoint new trustees; and courts of probate in several States have power by statute to remove and appoint new trustees, whether they are created by will or deed.³ Proceedings are generally commenced directly for the removal and appointment of trustees; but when a bill or petition is already pending for the administration of the trust, the appointment or removal may be made upon motion in those proceedings.⁴ And, further, if the trusts created in an instrument are of such a nature that they can be severed without injury to the estate, courts may allow the trustee to resign a part, and will commit that part to other trustees under proper arrangements for security.⁵ But courts will

¹ *Ex parte* Greenhouse, 1 Madd. 92; *Howard v. Rhodes*, 1 Keen, 581.

² *Coventry v. Coventry*, 1 Keen, 758; *Taylor v. Glanville*, 3 Madd. 176; *Curteis v. Chandler*, 6 id. 123; *Greenwood v. Wakeford*, 1 Beav. 581.

³ *Bowditch v. Bannelos*, 1 Gray, 220; *King v. Donnelly*, 5 Paige, 46; *De Peyster v. Clendinning*, 8 Paige, 295; *Field v. Arrowsmith*, 3 Humph. 442; *McCosker v. Brady*, 1 Barb. Ch. 329; *In re Potts*, 1 Ash. 340; *Matter of Mechanics' Bank*, 2 Barb. S. C. 446; *Dawson v. Dawson*, Rice, Eq. 213; *Lee v. Randolph*, 2 Hen. & M. 12; *In re Eastern R. R. Co.*, 120 Mass. 412.

⁴ ——— *v. Osborne*, 6 Ves. 455; *Webb v. Shaftesbury*, 7 Ves. 487; ——— *v. Roberts*, 1 J. & W. 251; *Ex parte Potts*, 1 Ash. 340.

⁵ *Craig v. Craig*, 3 Barb. Ch. 76. But where there is a single power of appointment in the trust instrument, though the estates are of a different description, or are held under a different title, or upon different trusts, there is no authority for dividing the trusts, and appointing differ-

(a) A trustee or guardian is not to be charged personally for the expenses incurred in a successful resistance to proceedings for his removal. *Coggins v. Flythe*, 113 N. C. 102.

While proceedings by a creditor are pending to set aside a trust in-

strument on the ground of fraud on the part of the creator of the trust, a beneficiary thereunder cannot require payment of the income thereby provided for him. *Bissell v. Continental Trust Co.*, 55 N. Y. S. 570.

not remove trustees against their will from one part of the trust, and leave them burdened with the responsibility of the remainder.¹ If the *cestuis* request a trustee who has misappropriated funds, &c., to resign, and make a promise to him on consideration that he will do so, the promise is void; it was the trustee's duty under such circumstances to comply with the request.²

§ 281. If a testator in his will appoint his executor to be a trustee, it is as if different persons had been appointed to each office;³ a court of equity cannot remove him from the executorship, for courts of probate have exclusive jurisdiction over the appointment and removal of administrators and executors; but if the office of trustee is separate from and independent of the office of executor, a court of equity may remove him from the office of trustee, and leave him to act as executor; or if he has completed his duties as executor, and is holding and administering the estate simply as trustee, a court of equity may remove him.⁴ (a)

ent sets of trustees for the different estates or trusts. *Cole v. Wade*, 16 Ves. 27; *Re Anderson*, 1 Llo. & Goo. t. Sugd. 29; *Curtis v. Smith*, 6 Blatch. 537.

¹ *Sturges v. Knapp*, 31 Vt. 1.

² *Withers v. Ewing*, 40 Ohio St. 406, 407.

³ *Parsons v. Lyman*, 5 Blatch. C. C. 170; *Perkins v. Lewis*, 41 Ala. 649. The fact of qualification as executor by a person named in the will both as executor and trustee does not of itself prove his acceptance of the office of trustee. *Anderson v. Earle*, 9 S. C. 460.

⁴ *Wood v. Brown*, 34 N. Y. 339; *Leggett v. Hunter*, 25 Barb. 81; 19 N. Y. 445; *Craig v. Craig*, 3 Barb. Ch. 76; *Matter of Wordsworth*, 2 Barb. Ch. 381; *Ex parte Dover*, 5 Sim. 500; *Quackenboss v. Southwick*, 41 N. Y. 117.

(a) This applies to a trustee who resides within the jurisdiction, but who was created trustee by the will of a citizen of another State, never proved within the jurisdiction. *Jones v. Jones*, 30 N. Y. S. 177, 187. A trustee cannot escape accounting in equity on the ground that he is still an executor, nor can an executor so escape on the ground that he is now a trustee. *Cranson v. Wilsey*, 71 Mich. 356; *Wooden v. Kerr*, 91 Mich. 188; *McBride v. McIntyre*, id. 406; *Loveman v. Taylor*, 85 Tenn. 1; *Leonard v. Haworth*, 171 Mass. 496. Upon the question when an executor becomes a trustee, see 1 Ames on Trusts (2d ed.), 73;

§ 282. Courts of equity, having jurisdiction to remove and appoint trustees,¹ may be applied to either by bill or petition;² (a) or, if a bill is already pending for administration of the estate, application may be made in those proceedings, by motion.³ All persons interested in the trust may institute proceedings in their own names, but notice should be given to all other parties in interest.⁴ If the trustee must give

¹ *Bowditch v. Bannelos*, 1 Gray, 220, and cases cited last section; *Williamson v. Suydam*, 6 Wall. 723; *Livingston, Pet'r*, 34 N. Y. 555. In absence of statutory provision, the weight of authority requires that the proceedings should commence by bill.

² *Mitchell v. Pitner*, 15 Ga. 319; *Ex parte Knust*, 1 Bail. Eq. 489; *Ex parte Grenville Academies*, 7 Rich. 470; *Matter of Van Wyck*, 1 Barb. Ch. 565; *Ex parte Hussey*, 2 Whart. 330; *Ex parte Rees*, 3 V. & B. 11; *Miller v. Knight*, 1 Keen, 129; *Barker v. Peile*, 2 Dr. & Sm. 310. This matter is mostly regulated by the statutes of the several States. Although proceedings by statute may be originated by petition, yet the proceedings may be by bill. *Barker v. Peile*, *ut supra*; *Re Foster's Will*, 15 Hun (N. Y.), 387; *Re Ballou, Pet'r*, 11 R. I. 360. In some cases it is said that the right to proceed by petition is confined to cases where there is a breach of the trust. *In re Sanford Charity*, 2 Mer. 456; *Re Livingston*, 31 N. Y. 567.

³ ——— *v. Osborne*, 6 Ves. 455; ——— *v. Roberts*, 1 J. & W. 251; *Webb v. Shaftesbury*, 7 Ves. 487; *Ex parte Potts*, 1 Ash. 340.

⁴ *Abbott, Pet'r*, 55 Maine, 580; *Williamson v. Wickersham*, 2 Coll. 52; *Guion v. Melvin*, 69 N. C. 242; *Wardle v. Hargreaves*, 11 Law Jour. (N. S.) Ch. 126; *Henry v. Doctor*, 9 Ohio, 49. As to who are parties interested entitled to notice. *Bradstreet v. Butterfield*, 129 Mass. 339. In Pennsylvania, under an act which provides that proceedings shall be

Hodges' Estate, 63 Vt. 661; *Prince v. Ladd* (Texas), 15 S. W. 159.

The settlement of an executor's accounts in the probate court, and the transfer of a balance to his account as trustee, do not conclusively end the right to question his investments made as executor. *Mattocks v. Moulton*, 84 Maine, 545.

As actual payment cannot be made by a person to himself, it is held in Massachusetts that, when the same person is executor and

trustee, he must give bond as trustee before he can exonerate himself from his liability as executor. *White v. Ditson*, 140 Mass. 351; *Crocker v. Dillon*, 133 Mass. 91.

(a) The removal of trustees and the appointment of subsequent ones should be by bill in equity, and not by petition. *Zehnbar v. Spillman*, 25 Fla. 591, 594. See 1 Dan. Ch. Prac. 348; *Tuttle v. Merchants' Nat. Bank*, 19 Mont. 11.

security for the fund, notice is within the discretion of the court;¹ but if the trust instrument provides that notice of the proceedings for the appointment of new trustees shall be given to particular persons, the appointment will be irregular if the notice is not given.² The *cestui que trust* and those directly interested may of course originate the suit,³ and those interested in remainder or reversion may begin proceedings.⁴ The trustees may bring the suit against the *cestui que trust*;⁵ or one or more of several trustees may bring the suit against one or more of their cotrustees, joining the *cestui que trust* either as plaintiffs or defendants.⁶ In all public charities the Attorney General may begin proceedings by information or petition with or without a relator.⁷ But where a settlor had conveyed property to a trustee for himself for life, and at his decease to his issue according to the statute of distributions, and in case of his dying without issue to his nephews, it was held that the trust was only an

upon petition "by any person interested, whether such interest be immediate or remote," it was held that the interest for such a purpose must be such as will certainly fall into possession sometime; and a bare possibility, dependent on the death of the first taker without issue, is not such an interest as will authorize a citation. *Keene's App.*, 60 Penn. St. 506. But see *Hartman's App.*, 90 id. 206, under a subsequent statute.

¹ *Matter of Robinson*, 37 N. Y. 261.

² *Washington, &c. R. R. Co. v. Alexander, &c. R. R. Co.*, 19 Grat. 592.

³ *Bainbrige v. Blair*, 1 Beav. 495; *Bennett v. Honywood*, Amb. 708; *Buchanan v. Hamilton*, 5 Ves. 722; *Portsmouth v. Fellows*, 5 Madd. 450; *Howard v. Rhodes*, 1 Keen, 581; *Millard v. Eyre*, 2 Ves. Jour. 94; In *Matter of Smith's Settlement*, 2 De G. & Sm. 781; *Ex parte Tunno*, 1 Bail. Eq. 395.

⁴ *Finlay v. Howard*, 2 Dr. & W. 490; *Cooper v. Day*, 1 Rich. Eq. 26; *Re Livingston*, 34 N. Y. 567; *Joyce v. Gunnels*, 2 Rich. Eq. 260; *Re Sheppard*, 1 N. R. 76, overruling same case, 10 W. R. 704; s. c. 4 De G., F. & J. 423.

⁵ *Coventry v. Coventry*, 1 Keen, 758; *Greenwood v. Wakeford*, 1 Beav. 576.

⁶ *Lake v. De Lambert*, 4 Ves. 592.

⁷ *Att. Gen. v. London*, 3 Bro. Ch. 171; *Att. Gen. v. Stephens*, 3 M. & K. 347; *Att. Gen. v. Clack*, 1 Beav. 467; *Re Bedford Charity*, 2 Swanst. 520; *Wilson v. Wilson*, 2 Keen, 251; *Re Fowey's Charities*, 4 Beav. 225.

implied trust for the nephews; that they had no interest in the express trusts for the settlor for life; and that they could not maintain a petition for the removal of the trustee.¹ And where a *cestui que trust* drew an order on the trustees in favor of her children, it was held that this did not give the children such an interest in the funds that they were parties to proceedings for the appointment of new trustees.² If a trustee retires, allowing a new trustee to be appointed, without communication with the *cestui que trust*, and a suit is instituted complaining of such appointment, but seeking no relief against such retiring trustee, he is not a necessary party.³ And if a trustee transfers the property to a new trustee appointed by order of court, he will be bound by the proceedings, though they were irregular and without notice to him.⁴ If some of the *cestuis que trust* are minors, they ought to have a guardian *ad litem*, but a new trustee may be appointed.⁵ The proceedings ought to be in a court having jurisdiction of the original trust.⁶

§ 283. If all the parties are *sui juris*, and consent to the appointment of the new trustee, the court will at once make the appointment, and direct the conveyances to be made.⁷ But generally it will be referred to a master to report a proper person to be appointed.⁸ Upon the coming in of the master's report, exceptions may be taken to it in the usual manner; but the exceptions must be to the unfitness of the

¹ *In re Livingston*, 34 N. Y. 555; *Ex parte Brown*, Coop. 295.

² *Hawley v. Ross*, 7 Paige, 103.

³ *Marshall v. Sladden*, 7 Hare, 427.

⁴ *Thomas v. Higham*, 1 Bail. Eq. 222.

⁵ *Hunter v. Gibson*, 16 Sim. 158.

⁶ *Howard v. Gilbert*, 39 Ala. 72.

⁷ *O'Keeffe v. Calthorpe*, 1 Atk. 18; *Young v. Young*, 4 Cranch, C. C. 499.

⁸ *Howard v. Rhodes*, 1 Keen, 581; *Buchanan v. Hamilton*, 5 Ves. 722; *Att. Gen. v. Stephens*, 3 M. & K. 352; *Millard v. Eyre*, 2 Ves. Jr. 94; *Seton's Decrees*, 249; *Matter of Stuyvesant*, 3 Edw. Ch. 229; ——— *v. Roberts*, 1 J. & W. 251; *Att. Gen. v. Clack*, 1 Beav. 474; *Att. Gen. v. Arran*, 1 J. & W. 229.

person recommended,¹ and not that some other one is more fit.²

§ 284. The appointment of a new trustee is not complete until the property is vested in him; therefore the court usually embraces, in the decree appointing a new trustee, a direction for a proper conveyance to be executed to him alone, or to him jointly with the continuing or remaining trustees, by all the requisite parties, whether remaining trustees, or heirs or representatives of the last survivor, or trustees who have been removed from office.³ If the old trustee refuses to deliver the property to the new incumbent, the former and his bondsmen are liable.⁴ In some States it is provided by statute, that, upon qualification by the newly appointed trustee, the trust estate shall vest in him in like manner as it had or would have vested in the trustee in whose place he is substituted.⁵ It has been determined that no conveyance is necessary where such statutes are in force, but that the trust estate vests immediately upon the appointment, by virtue of the statute, with all the powers and duties essential to the purposes of the trust.⁶ And so if the instrument of trust provides for the vesting of the estate in the remaining, surviving, or new trustees, upon the removal, resignation, death, and appointment of others, the trust estate will vest according to the provisions of the instrument, as the creator of the trust may mould it at his pleasure.⁷ It has already been seen that, if one of the trustees disclaims with-

¹ *Att. Gen. v. Dyson*, 2 S. & S. 523.

² *Ibid.*

³ *O'Keeffe v. Calthorpe*, 1 Atk. 18.

⁴ *Bassett v. Granger*, 136 Mass. 174; *McKim v. Doane*, 137 Mass. 195.

⁵ Mass. Public Stat.; Trustees Act, 1850, 12 & 13 Vict. c. 74, §§ 33-36; *Stearly's App.*, 3 Grant, 270. See *Golder v. Bressler*, 105 Ill. 419.

⁶ *Parker v. Converse*, 5 Gray, 341; *Re Fisher's Will*, 1 W. R. 505; *Smith v. Smith*, 3 Dr. 72; *Woolridge v. Planters' Bank*, 1 Sneed, 297; *Goss v. Singleton*, 2 Head, 67; *Gibbs v. Marsh*, 2 Met. 243, 253; *Duffy v. Calvert*, 6 Gill, 487; *Burdick v. Goddard*, 11 R. I. 516.

⁷ *Ellis v. Boston, Hartford, & Erie R. R.*, 107 Mass. 13; *National Webster Bank v. Eldridge*, 115 Mass. 424.

out having acted or accepted the trust, the estate vests in the acting trustees; and if a sole trustee disclaims before acting, the estate vests in the heirs-at-law subject to the trust.¹ So where a vacancy results from the incapacity of the trustee, or upon his removal from the jurisdiction of the court, the want of power to compel a conveyance, *and the necessity of the case*, require the court to recognize the power of the remaining trustee to convey to his new cotrustee without a conveyance from the retiring or removed trustee.² In trusts, that do not come within the words or the spirit of the statute in relation to the vesting of trust estates in new appointees, and in cases where the trust instrument is silent concerning the vesting of the estate in new trustees, and *there is no necessity* for a departure from the ordinary rule of a conveyance, a conveyance must be made to the new trustee, in order to vest the estate in him.³ When the removed trustee fails to obey an order of court for the delivery of the trust property to the new trustee, the latter may sue on the bond of the former trustee for damages.⁴ The acceptance by the new trustee of a statement found among the papers of a deceased trustee showing his receipts and disbursements on account of the trust estate may amount to an accounting between the old and new trustees.⁵ (a)

¹ *Ante*, § 273.

² *Cape v. Bent*, 9 Jur. 653; *O'Reiley v. Alderson*, 8 Hare, 101; *Menard v. Wilford*, 1 Sm. & Gif. 426; *Eaton v. Smith*, 2 Beav. 236; *Cooke v. Crawford*, 13 Sim. 91; *In re Moravian Soc.*, 26 Beav. 101.

³ *Folley v. Woutner*, 2 Jac. & W. 24; *Owen v. Owen*, 1 Atk. 496; *Foster v. Goree*, 4 Ala. 440; *Crosby v. Huston*, 1 Tex. 203; *Miller v. Priddon*, 1 De G., M. & G. 339.

⁴ *Phillips v. Ross*, 36 Ohio St. 458.

⁵ *Gorsuch v. Briscoe*, 56 Md. 573.

(a) New trustees are not affected with notice of incumbrances on the trust estate not disclosed in the trust documents, or by the retiring trustee who knew thereof. Hallows v. Lloyd, 39 Ch. D. 686. In New York it seems that the appointment of a new trustee does not preclude an administrator from denying the existence of the trust as created by his decedent. *Re Carpenter*, 131 N. Y. 86.

§ 285. A trustee may be relieved from his office by the consent of all parties interested, without the decree of a court, even if the instrument of trust is silent upon that subject. But the transaction operates rather as an estoppel of the *cestui que trust* than as an affirmative transfer of power. Thus, no *cestui que trust* who concurs in a breach of trust can afterwards call the trustee to an account for the disastrous consequences;¹ therefore, if a trustee conveys the trust estate to another person, and appoints such other person trustee, and all the *cestuis que trust* execute the conveyances, or otherwise consent to the transaction, they would be forever precluded from holding the retiring trustee responsible for any delegation of his office, or for any loss that occurred afterwards.² But the trustee must see to it that all the *cestuis que trust* are parties to the transaction and concur; for, even in the case of a large number of creditors, each individual must act for himself, or he is not estopped, and the consent of a majority cannot affect the rights of one who did not concur.³ The trustee must also see to it that all the *cestuis que trust* are *sui juris*, and not married women, infants, or other persons incapable of acting, or of no legal capacity to consent. For if there are such *cestuis que trust*, there can be no discharge and substitution of trustees without the sanction of the court, in the absence of a power in the instrument of trust;⁴ or if there may be parties in interest not yet in existence, as if the trust is for children not yet born, there can be no change of trustees by consent. But a *married woman* is considered *sui juris* in respect to her sole and separate estate, where there is no restraint against anticipation or alienation.⁵

§ 286. If there are two or more trustees named in an instrument of trust with power to appoint successors, and they

¹ *Wilkinson v. Parry*, 4 Russ. 276.

² *Ibid.*

³ *Colebrook's Case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacy*, id. 628-630, n.

⁴ *Cruger v. Halliday*, 11 Paige, 314.

⁵ *Hulme v. Hulme*, 1 Bro. Ch. 20; *Lewin on Trusts*, 540, 541 (5th ed.).

all retire at the same time, they ought not to appoint a single trustee *only* in the place of two or more.¹ In such case the settlor has fixed the number which he thinks necessary for the proper administration and safety of the trust fund; and if a single trustee is appointed and wishes to retire, he ought not to appoint a plurality of trustees, for in such a case he ought not to increase the machinery and expense of the trust contrary to the settlor's intention.² But the power may be so drawn that several may be put in place of one, or one in the place of several. Thus where a testator appointed two trustees, and the surviving or continuing trustee or trustees were authorized to appoint one or more persons to be trustee or trustees, in the room of the trustee or trustees so dying, &c., the surviving trustee appointed two new trustees, and the appointment was held by the court to be authorized.³ So, three trustees have been appointed in place of two,⁴ and three have been authorized in place of four,⁵ and two in place of one,⁶ and four in place of five.⁷ In another case, one trustee was appointed by the court in place of two.⁸ And if a successor cannot be found to a retiring trustee, the court may appoint the continuing trustees to

¹ *Hulme v. Hulme*, 2 M. & K. 682; *Mass. Gen. Hospital v. Amory*, 12 Pick. 445.

² *Rex v. Lexdale*, 1 Burr. 448; *Ex parte Davis*, 2 Y. & C. Ch. Ca. 468; 3 Mont. D. & De G. 304.

³ *D'Almaine v. Anderson*, *Lewin on Trusts*, 468 (5th ed.); *Hill on Trustees*, 182.

⁴ *Meinertzhagen v. Davis*, 1 Col. C. C. 335.

⁵ *Emmet v. Clarke*, 3 Gif. 32.

⁶ *Hillman v. Westwood*, 3 Eq. R. 142.

⁷ *Corrie v. Byrom*, *Lewin on Trusts*, 468 (5th ed.); *Hill on Trustees*, 181.

⁸ *Greene v. Borland*, 4 Met. 330. In this case the appointment was assented to by all parties, and great stress was laid upon that fact. The court might also have said that the proceedings were in a collateral matter, and that, as long as the appointment by a court having jurisdiction stood unreversed, its validity could not be tried in another and distinct proceeding. The case of *Greene v. Borland* is not necessarily inconsistent with *Mass. Gen. Hospital v. Amory*, 12 Pick. 445, decided by the same court. *Dixon v. Homer*, 12 Cush. 41; *Att. Gen. v. Barbour*, 121 Mass. 568; *Hammond v. Granger*, 128 Mass. 272.

be sole trustee or trustees.¹ Where real estate is given in trust to several persons and to the survivors or survivor if some decline to act, the others have the whole legal estate and all the powers of the trust.²

§ 287. The duties and powers of trustees cannot be delegated to others, unless there is express authority for that purpose given in the instrument creating the trust.³(a) It follows, that a power to appoint new trustees can seldom or never exist, except in express trusts created by deed or will. The person who creates the trust may mould it into whatever form he pleases: he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power; and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuance of the trust.⁴ And vacancies cannot be filled in any other way than that named by the grantor, unless in consequence of a statu-

¹ *In re Stokes Trusts*, L. R. 13 Eq. 333.

² *Long v. Long*, 62 Md. 33, see § 414, *Shockley v. Fisher*, 75 Mo. 498.

³ *Selden v. Vermilyea*, 3 Comst. 336; *Wilkinson v. Parry*, 4 Russ. 272; *Adams v. Paynter*, 1 Coll. 532; *Chalmers v. Bradley*, 1 J. & W. 68; *Swarez v. Pumpelly*, 2 Sandf. Ch. 336; *Wilson v. Towle*, 36 N. H. 129; *Bayley v. Mansell*, 4 Madd. 226; *Winthrop v. Att. Gen.*, 128 Mass. 258.

⁴ *Whelan v. Reilly*, 3 W. Va. 597. The testator may authorize the trustee appointed by him to appoint his successor by will. *Abbott, Pet'r*, 55 Me. 580. While the settlor may make such provisions as he may think best for filling vacancies, as a general proposition, yet it has been held that a power reserved to an assignor in a deed of trust for creditors, to appoint new trustees to fill vacancies occurring in the board, was void as interfering with the rights of creditors. *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Robins v. Embry*, 1 Sm. & M. Ch. 207.

(a) See *infra*, § 408. A power of appointment, see *In re Radcliffe*, [1892] 1 Ch. 227.

The question whether a power of appointment has been executed, is determined by the law of the donor's domicile. *Cotting v. De Sartiges*, 17 R. I. 668.

tory provision,¹ or of a failure on the part of the remaining trustees to perform the duty of filling the vacancy, in which case equity will interfere.¹ The power to appoint new trustees in place of the original ones can only be given by the author and creator of the trust. For, in cases where courts are called upon to appoint trustees, authority to appoint successors will not be given, but recourse must be had to the courts *toties quoties*.² (a) There is, however, an exception to this rule in case of charitable trusts; for, in such cases, to save costs, and for convenience, courts of equity will not only appoint new trustees to fill vacancies, but they will sanction a scheme for the administration of the charity, which provides for the appointment and succession of trustees without a continual recourse to legal proceedings.³

§ 288. Every well-drawn instrument, creating trusts intended to continue for any considerable time, should contain authority and power for any of the trustees to relinquish the trust, as well as provisions for filling vacancies occasioned by resignation, death, or incapacity. Such provisions save the cost and trouble of constant applications to courts. In framing these powers, great care should be taken to provide for every possible contingency in which a resignation or new appointment may become convenient or necessary. The power should clearly express the cases in which new trustees may be appointed, and embrace every event which can render

¹ *Golder v. Bressler*, 105 Ill. 419.

² *Wilson v. Towle*, 36 N. H. 129; *Oglander v. Oglander*, 2 De G. & Sm. 381; *Holder v. Durbin*, 11 Beav. 594; *Bowles v. Weeks*, 14 Sim. 591; *Bayley v. Mansell*, 4 Madd. 226; *Southwell v. Ward*, Taml. 314. A different practice was followed in *Joyce v. Joyce*, 2 Moll. 276; *Sampayo v. Gould*, 12 Sim. 426, and *White v. White*, 5 Beav. 221; but these cases are not authorities now. See *Brown v. Brown*, 3 Y. & C. 395.

³ *Att. Gen. v. Winchelsea*, 3 Bro. Ch. 373; *Att. Gen. v. Shore*, 1 M. & Cr. 394; 12 Sim. 426.

(a) By the New York statute, a trustee who dies or retires, Royce v. Adams, 123 N. Y. 402; 57 Hun, 415. A successor may be appointed by the court when one of several trustees

such an appointment necessary or desirable, as the death of all, any one, or more of the original or substituted trustees, their absence from the country or State, their wish to resign, their original refusal to accept, and their future incapacity or unfitness to discharge the duties; the instrument should also point out clearly and by whom and in what manner the new appointments are to be made. Such provisions are extremely convenient, and save much perplexity, expense, and trouble; and where a settlement is to be drawn up under articles, by the direction of the court, it will order such provisions to be inserted as are *just and reasonable*.¹ Where it

¹ *Lindow v. Fleetwood*, 6 Sim. 152; *Brewster v. Angell*, 1 J. & W. 628; *Sampayo v. Gould*, 12 Sim. 426; *Belmont v. O'Brien*, 2 Kern. 394. The following form is approved by both Mr. Lewin and Mr. Hill as a proper power for the appointment of new trustees:—

“ Provided always, and it is hereby further declared, that if the trustees hereby appointed, or any of them, or any future trustees or trustee hereof, shall die (either before or after their or his acceptance of the trusts thereof), go to reside abroad, desire to be discharged from, renounce, decline, or become incapable or unfit to act in the trusts of these presents, while the same trusts or any of them shall be subsisting, then, and in every or any such cases, and so often as the same shall happen, it shall be lawful for the said (*the cestuis que trust [if any] for life*), or the survivors of them, by any writing or writings, under their, his, or her hands or hand, attested by two or more witnesses, and after the decease of such survivor, then for the surviving or continuing trustees or trustee hereof, or the executors or administrators of the then last acting trustee (whether such surviving trustees or trustee, or executors or administrators, respectively, shall be willing to act in other respects or not), by any writing or writings, under their or his hands or hand, attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees hereof in the place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining, or becoming incapable or unfit to act as aforesaid. And that, so often as any new trustee or trustees hereof shall be appointed as aforesaid, all the hereditaments, &c., which shall, for the time being, be holden upon the trusts hereof, shall be thereupon conveyed, assigned, and transferred respectively, in such manner that the same may become legally and effectually vested in the acting trustees hereof for the time being, to and for the same uses, and upon the same trusts, and with and subject to the same powers and provisions as are herein declared, and contained of and concerning the same hereditaments and premises respectively, or such of the same uses, trusts,

is necessary to act under the powers thus given in the instrument of trust, it is of the utmost consequence that there should be an exact compliance with the power and authority as given. (a) For if the circumstances do not justify or demand a new appointment, as contemplated in the instrument of trust, or if there is any irregularity as to the persons by whom the new appointment is made, or as to the manner in which it is made, the retiring trustee will still be liable for any breaches of trust which may be committed, and the new trustee will be incapable of exercising any legal authority over the trust property, and will be a trustee only *de son tort*, if he interfere; and any purchaser of the trust property

powers, and provisions as shall then be subsisting or incapable of taking effect.

“ And that every new trustee, to be from time to time appointed as aforesaid, shall henceforth be competent in all things to act in the execution of the trusts hereof, as fully and effectually, and with all the same powers and authorities to all purposes whatsoever, as if he had hereby been originally appointed a trustee in the place of the trustee to whom he shall, whether immediately or otherwise, succeed.”

(a) In general, what is done under a power of appointment is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor. *Heath v. Withington*, 6 Cush. 497; *Osgood v. Bliss*, 141 Mass. 474; *Collins v. Wickwire*, 162 Mass. 143; *Dennis v. Holsapple*, 148 Ind. 297. In Massachusetts, when one has a general power of appointment and executes it by will, the property so appointed is regarded as assets of his estate, and his creditors are entitled to it in preference to his voluntary appointees; for the purposes of administration, the property should be administered by the executor of the will of the party exercising the power. *Olney v.*

Balch, 154 Mass. 318; *Emmons v. Shaw*, 171 Mass. 410. An appointee by will has no rights until the will is proved; generally appointments by will are intended to speak from the death of the testator, and not to leave any intervening time during which the fund is simply to accumulate. *Loring v. Mass. Horticultural Society*, 171 Mass. 401.

When a debtor, having a general power to appoint property which he never owned, exercises that power in favor of volunteers, the property in their hands is burdened with his debts, if needed to satisfy them. *Freeman v. Butters*, 94 Va. 406. An equitable estoppel does not apply in favor of a volunteer. *Lovett v. Lovett*, [1898] 1 Ch. 82.

may find his title utterly worthless.¹ The retiring trustee should be careful not to part with the control of the fund before the new trustee has been actually appointed and qualified; for if he transfer it into the name of the intended trustee, and by some accident the appointment is not completed, the old trustee still remains answerable for the fund.²

§ 289. These powers of appointing successors are frequently matters of *personal* confidence reposed in the trustees appointed by the settlor, and they are always matters of general trust and confidence to be strictly executed. (a) The court will not prevent the exercise of discretion given for appointment, but will see that it is used to subserve the purposes of its creation.³ Being powers given to third persons over the property of others, they are construed with great strictness, and a great variety of decisions have been made upon the various forms in which the power has been expressed. Questions have arisen: (1) As to the time, occasion, or event when a new appointment may be made; (2) As to the person or persons by whom the appointment may be made; (3) As to the persons who may be appointed; (4) As to the number of persons who may be appointed; (5) As to the manner of making the new appointment.

§ 290. It should always be carefully considered whether the circumstances or events are such as the settlor intended for the retirement of one or more of the trustees appointed

¹ *Adams v. Paynter*, 1 Col. 532; *Walker v. Brungard*, 13 Sm. & M. 723.

² *Pearce v. Pearce*, 22 Beav. 248.

³ *Bailey v. Bailey*, 2 Del. Ch. 95.

(a) The power of appointing new trustees is fiduciary, and the donee of such power cannot appoint himself, either solely or jointly with others. *In re Skeats' Settlement*, 42 Ch. D. 522. *In re Newen*, [1894] 2 Ch. 297.

Under the Massachusetts statute, a discretion to pay income is a part of the trust, and may be exercised by a new trustee. *Wemyss v. White*, 159 Mass. 484.

by him, and the substitution of new trustees; thus in a case where the power provided that, "in case either of the trustees, the said A. and B., shall happen to die, or desire to be discharged from, or neglect or refuse or become incapable to act in the trust, it shall be lawful for the survivor or survivors of the trustees so acting, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee." *Both* the trustees declining to act, they executed a conveyance to two other persons, as an appointment of them as new trustees under the power; and it was held that the power was not well executed, that the word "survivor" referred to the trustee "continuing to act," that it was the intention of the testator that in case of the death, refusal, or incapacity of *one* of his trustees, the remaining one who had been named by him, and who was the object of his confidence, should have the power of associating with himself some other person, and that the *event* of both declining at the same time was not provided for.¹ (a) Where a settlement upon a chapel contained a power for the appointment of new trustees upon the desertion or removal of any existing trustee, Lord Eldon held that the case of a trustee, who left the trust on account of its being converted by the other trustees to purposes different and distinct from the intention of the settlor, was an event not provided for.² And

¹ *Sharp v. Sharp*, 2 B. & Ad. 404; *Guion v. Pickett*, 42 Miss. 77.

² *Att. Gen. v. Pearson*, 3 Mer. 412. In *Morris v. Preston*, 7 Ves. 517, power was given to a husband and wife, or the survivor, with the *consent* of the *cotrustees* or *trustees*, to appoint any new trustee or trustees, and upon such appointment the surviving cotrustees should convey the estate, so that the surviving trustee or trustees, and the new trustee or trustees, might be jointly concerned in the trusts in the same manner as such surviving trustee and the person so dying would have been in case he were living. No new appointment was made till after the death of both the original trustees. The new appointees having made a sale, the purchaser objected to the title on the ground of the invalidity of their appointment under the power; but the objection was waived without argument. Mr. Sugden regrets that the opinion of the court was not taken. 2 Sugd. on Powers, 529. He has, however, never since acted on the doctrine. As

(a) See *In re Wheeler*, [1896] 1 Ch. 315; *In re Stamford*, id. 288.

so where *cestuis que trust* were to appoint a trustee upon the refusal or neglect of the others to act, it was held that they could not appoint upon the death of one of them.¹ But generally where the power to appoint new trustees is given to the *survivor* of several trustees, it may be legally exercised by the *continuing* trustee upon the resignation or refusal of the others to act.² (a)

§ 291. In some earlier cases, it was held that where a power was given to the surviving trustee or trustees to appoint new trustees *in case of the death of either of their co-trustees*, it did not authorize an appointment to fill a vacancy caused by the death of trustees during the *lifetime* of the testator, upon the ground that persons dying in the lifetime of the testator had never *filled the character* of trustees so as to come within the terms of the power;³ but these are overruled by the later cases, and it may be considered as settled that the surviving trustee or trustees may fill vacancies caused by the death of persons nominated by the testator, whether they die in his lifetime or afterwards.⁴ (b) So if the continuing trustee or trustees are to appoint upon the *refusing* or *declining* of any of the original trustees, they may appoint upon

where a similar power was given, to a tenant for life, of appointing new trustees, one trustee died and the other became bankrupt, and it was objected that the power of appointment was gone, Sir Edward Sugden ruled to the contrary. *Re Roche*, 1 Conn. & Laws, 306 ; 2 Dr. & War. 287.

¹ *Guion v. Pickett*, 42 Miss. 77.

² *Sharp v. Sharp*, 2 B. & Ad. 405 ; *Eaton v. Smith*, 2 Beav. 236 ; *Travis v. Illingworth*, 2 Dr. & Sm. 344 ; *Cooke v. Crawford*, 13 Sim. 91 ; *Hawkins v. Kemp*, 3 East, 410.

³ *Walsh v. Gladstone*, 14 Sim. 5 ; *Winter v. Rudge*, 15 Sim. 576.

⁴ *Lonsdale v. Beckett*, 4 De G. & Sm. 73 ; *In re Hadley's Trust*, 5 De G. & Sm. 67 ; 9 Eng. L. & Eq. 67 ; *Noble v. Meymott*, 14 Beav. 477.

(a) Under § 31 of the English Conveyancing Act of 1881, the sole surviving trustee of a will cannot by will continue the trust by appointing new trustees of the original will. *In re Parker's Trusts*, [1894] 1 Ch. 707 ; *Nicholson v. Field*, [1893] 2 Ch. 511.

(b) See *In re Scott*, [1891] 1 Ch. 298, 303.

the *disclaimer* of any one or more;¹ and so a payment of the trust fund into court, under an order or permission to that effect, is a *refusing* or *declining* by the trustee that authorizes the exercise of the power.²

§ 292. If the settlement provides that a new appointment may be made on either of the trustees becoming *unfit*, the power may be exercised if one of them becomes *bankrupt*;³ but if the word is "incapable" without the word "unfit," a new appointment cannot be made, for the word "incapable" means personal incapacity and not pecuniary embarrassment,⁴ and a bankrupt who had some time before obtained a first-class certificate of discharge was not regarded as coming within the term "unfit."⁵ But where a trustee of property in London had been domiciled in New York for twenty years, he was declared *incapable* without the meaning of the word.⁶ Where a power declared that, "if the trustees were not deemed *suitable* and *sufficient* to act as trustees by the *cestui que trust*, he might remove them, it was held to be a matter of discretion in the beneficiary to remove the trustees or not."⁷

¹ *Re Roche*, 1 Conn. & Laws, 306; *Walsh v. Gladstone*, 14 Sim. 2; *Mitchell v. Nixon*, 1 Ir. Eq. 155; *Cook v. Ingoldsby*, 2 Ir. Eq. 375; *Travis v. Illingworth*, 2 Dr. & Sm. 344.

² *Re William's Settlement*, 4 K. & J. 87.

³ *In re Roche*, 1 Conn. & Laws. 308; 2 Dr. & War. 287.

⁴ *Re Watt's Settlement*, 9 Hare, 106; *Turner v. Maule*, 5 Eng. L. & Eq. 222; 15 Jur. 761. *In re Bignold's Settlement*, L. R. 7 Ch. 223; *Re Blanchard*, 3 De G., F. & J. 131. A statute in New York provides that administration, &c., shall not be granted to any person who shall be judged *incompetent* by the surrogate to execute the duties of the trust by reason of drunkenness, *improvidence*, or want of understanding. Under this statute it was held that mere *moral turpitude* does not *per se* disqualify, but that professional gambling was such evidence of *improvidence* as *prima facie* to disqualify. *Coope v. Lowerre*, 1 Barb. Ch. 45; *McMahon v. Harrison*, 2 Seld. 443.

⁵ *Re Bridgman*, 1 Dr. & Sm. 164.

⁶ *Mennard v. Welford*, 1 Sm. & Gif. 426. The opposite doctrine was previously held in *Withington v. Withington*, 16 Sim. 104; *O'Reilly v. Alderson*, 8 Hare, 101.

⁷ *Walker v. Brungard*, 13 Sm. & Mar. 758.

§ 293. Where a suit is already pending in court for the administration of the trust, the donees of the power to appoint cannot exercise it without first obtaining the court's approval of the person proposed.¹ When it is desired to change the trustees during the pendency of a suit, a motion must be made, and such motion is referred to a master to report upon the person proposed. The master is to regard the power of appointment; but he is not bound to approve the proposed person.² If an appointment is made, however, by the old trustees, it is not contempt, nor is it altogether void; but it puts the burden upon those making the appointment of proving, by the strictest evidence, that it was just and proper. If they fail in such proof, the act will be declared null and void.³ So if the trustee or other person having power to appoint a new trustee is a lunatic, the court must appoint.⁴

§ 294. It will at once be seen that the power of appointing other trustees can be exercised only by those to whom it is expressly given. Therefore, if the power is not given to any one, new trustees can be appointed only by the court,⁵ except where, as in England, statutory provisions may change this rule.⁶ So if the power be given to particular persons by name, without saying more, or adding words of survivorship, it must be exercised jointly, and upon the death of one of them the power will be gone.⁷ But if a power be given to a

¹ *Millard v. Eyre*, 2 Ves. Jr. 94; *Webb v. Shaftesbury*, 7 Ves. 480; *Peatfield v. Benn*, 17 Beav. 552; *Kennedy v. Turnley*, 6 Ir. Eq. 399; *Att. Gen. v. Clack*, 1 Beav. 467; *Middleton v. Reay*, 7 Hare, 106; ——— *v. Roberts*, 1 J. & W. 251.

² *Webb v. Shaftesbury*, 7 Ves. 487; *Middleton v. Reay*, 7 Hare, 106.

³ *Cape v. Bent*, 3 Hare, 249; *Att. Gen. v. Clack*, 1 Beav. 467; *Baker v. Lee*, 8 H. L. Ca. 495.

⁴ *In re Sparrow*, 1 L. R. 5 Ch. 662; *In re White*, L. R. 5 Ch. 698; *In re Cuming*, id. 72; *In re Heaphy*, 18 W. R. 1070; *In re Nicholl*, id. 416.

⁵ *Wilson v. Towle*, 36 N. H. 129; *Pierce v. Weaver*, 65 Tex. 44, citing the text.

⁶ Act 44 and 45 Vict. c. 41.

⁷ *Co. Litt.* 113 a; 1 Sugd. Pow. 141.

class consisting of several persons, as to "my trustees," "my sons," or "my brothers," and not to individuals by their proper names, the authority will exist in the class, so long as the plural number remains, although it may have been reduced in number by the death or resignation of some;¹ and where a power is given to "my executors" as a class, it may be exercised by a single surviving executor.² A power to be exercised by the survivor of two persons cannot be executed by the one dying first,³ nor even by the two acting together during the lives of both.⁴ So a power given to the surviving or continuing trustee to appoint a cotrustee, if *either* of the two decline to act, does not authorize an appointment if *both* decline.⁵ So the power of appointment cannot be executed by *heirs*, *personal representatives*, or *assigns* of any trustee, unless the authority is expressly given in the instrument of trust.⁶ In these, as in all other cases, the authority will be strictly confined to those persons who answer the precise description. Thus a power given to a trustee, his *heirs*, *executors*, or *administrators*, cannot be executed by a *devisee* or *assignee* of the trustee.⁷ It is, however, well established, that a power given to a *surviving* trustee may be executed by a *continuing* or *acting* trustee, although a cotrustee who disclaimed is still living.⁸

¹ *Gartland v. Mayott*, 2 Vern. 105; *Eq. Cas. Ab.* 202; 2 Freem. 105; *Dyer*, 177 a; *Co. Litt.* 112 b; *Byam v. Byam*, 10 Beav. 58; *Belmont v. O'Brien*, 2 Kern. 391; 1 Sugd. Pow. 144; *McKim v. Handy*, 4 Md. Ch. 230.

² 1 Sugd. Pow. 244; *Davoue v. Fanning*, 2 Johns. Ch. 252.

³ *Bishop of Oxford v. Leighton*, 2 Vern. 376.

⁴ *McAdam v. Logan*, 3 Bro. Ch. 320.

⁵ *Sharp v. Sharp*, 2 B. & Ad. 405.

⁶ *Bradford v. Belfield*, 2 Sim. 261; *Eaton v. Smith*, 2 Beav. 236; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Titley v. Wolstenholme*, 7 Beav. 421; *Granville v. McNeale*, 7 Hare, 156; *Hall v. May*, 3 Kay & J. 585; *Cooke v. Crawford*, 13 Sim. 91.

⁷ *Bradford v. Belfield*, 2 Sim. 261; *Cole v. Wade*, 16 Ves. 47; *Cape v. Bent*, 3 Hare, 245; *Ackleston v. Heap*, 1 De G. & Sm. 640; *McKim v. Handy*, 4 Md. Ch. 230; *Mortimer v. Ireland*, 6 Hare, 196.

⁸ *Lane v. Debenham*, 11 Hare, 188; *Eaton v. Smith*, 2 Beav. 236; *Sharp v. Sharp*, 2 B. & A. 405.

§ 295. The number of parties undertaking to execute a power must come within the exact description given of the number of those who are to execute it; thus, if a power is given to be exercised by a certain specified number, or when they are reduced to a certain number, it cannot be exercised by a less number, and is gone if not exercised before the number is reduced below the number which is named for its execution.¹(a) But the power may be executed before the trustees are reduced to the lowest number specified, as where a conveyance to twenty-five trustees for a chapel directed that when, by death or otherwise, the number should be reduced to fifteen, a majority of those remaining should make up the number to twenty-five. The number was reduced to seventeen; and twelve, the others dissenting, elected eight new trustees, and it was held a good appointment under the power.²

§ 296. A married woman may exercise the power of appointing new trustees, if such power is expressly given to her, as she may exercise any other power given to her in an instrument of trust;³(b) and she may appoint her husband trustee;⁴ but an infant cannot exercise such power unless it is simply collateral.⁵ The power may be given to a firm, their agents and assigns,⁶ but not to a *court* that has

¹ Att. Gen. v. Floyer, 2 Vern. 748; Att. Gen. v. Litchfield, 5 Ves. 825.

² Dupleix v. Roe, 1 Anst. 86.

³ Ante, § 49.

⁴ Tweedy v. Urquhart, 30 Ga. 446.

⁵ Ante, § 52.

⁶ Leggett v. Grimmett, 36 Ark. 498.

(a) See *In re Lees' Settlement Trusts*, [1896] 2 Ch. 508.

(b) Under a testamentary gift by a husband to his wife of property for life, with a power to appoint such property among a class, and also of the residue of his property to her, the residuary gift does not prevent the implication from the power of a gift to the class

to take effect even if the wife does not appoint, and in the particular case the wife's release of her life's interest was held not to entitle her absolutely to the property. *In re Brierley*, 43 Ch. D. 36. A complete power of disposal given by a man's will by his widow is not limited by his verbal directions. *McFadin v. Catron*, 120 Mo. 252.

no authority by law to act in the appointment of trustees. A grantor cannot confer new powers on a court though it may on the judge as an individual.¹ But if the court is one that by law may act in the appointment of trustees, the selection of the grantor will be effective.²

§ 297. The appointment may be by parol unless the power otherwise provides.³ Where the appointment of new trustees is given to the discretion of the acting trustees, courts of equity will not interfere to control the exercise of the discretion if the old trustees act in *good faith*,⁴ and if the administration of the trust is not already in the hands of or before the court by a pending suit.⁵ Thus the old trustees in a case for the exercise of their discretion may appoint any suitable person. The inquiry in such cases is not whether the person proposed is the *most* suitable, but whether he is suitable.⁶ It is generally the duty, however, of trus-

¹ *Leman v. Sherman*, 117 Ill. 657; 18 Brad. (Ill.) 368.

² *Morrison v. Kelly*, 22 Ill. 610.

³ *Leggett v. Grimmett*, 36 Ark. 498.

⁴ *Bowditch v. Bannelos*, 1 Gray, 220; *Hodgson's Settlement*, 9 Hare, 118. In *Bowditch v. Bannelos*, above cited, Ch. J. Shaw said: "But when we say that she (the *cestui que trust*) had power at her pleasure to appoint, we do not mean to say that this was an arbitrary power to appoint a person unfit or unsuitable to execute such a trust, as a minor, an idiot, a pauper, or person incapable of performing the duties. It must be a person of full age, sufficient mental and legal capacity, and in all respects capable of performing the required duties. In case of trust property of real and personal estate, we are not prepared to say whether an alien, not naturalized, and not capable by law to hold real estate, would or would not be a suitable or legal appointment. We think the power was not exhausted by the appointment of the first substitute, but that the same power existed, on every resignation, to appoint a new trustee, pursuant to the original trusts; but that this power, by necessary implication, was limited to the appointment of a person legally capable of executing it." Whether the nomination of her husband, on account of the conjugal relation, would have been incompatible with the scope of the whole instrument, and would be a valid objection, or whether the fact that another appointee was a foreigner having no domicile in the United States, an alien not naturalized, would be a valid objection, the court did not decide, because the nominations were withdrawn.

⁵ *Ante*, § 293.

⁶ *Ante*, § 278.

tees to appoint new trustees, who are agreeable to the *cestuis que trust*, and who would administer the fund for their interest; to this end it is generally the duty of the trustees to consult the *cestuis que trust* as to the appointment.¹ And a new appointee ought to consult the *cestuis que trust* before accepting the office.² An appointment for the mere purpose of having a particular solicitor employed in the management of the trust ought not to be allowed.³ Generally, the new trustees appointed under a power should be amenable to the jurisdiction of the court; but where the *cestui que trust* resides abroad, it may be proper to appoint trustees in the same jurisdiction with the beneficiary.⁴ Though if the court is called upon to exercise the power, it will not appoint trustees out of its jurisdiction.⁵ Nor is the appointment of one of the *cestuis que trust* proper, as each of the *cestuis que trust* has a right to a *disinterested* and *impartial* trustee.⁶ This rule probably only affects the parties to the trust; for if a *cestui que trust* should be appointed, and should sell the estate under a power of sale, the purchaser would be protected.⁷ *Cestuis que trust* are not absolutely incapacitated to take the trusts, and courts themselves sometimes appoint them;⁸ but it is not generally desirable. So, near relationship is not a disqualification; but it is almost always better to have a capable person not intimately connected with the *cestuis que trust*.⁹ Nor should the donee of a

¹ *O'Reilly v. Alderson*, 8 Hare, 101; *Marshall v. Sladden*, 7 Hare, 428; *Peatfield v. Benn*, 17 Beav. 522; *Nagle's Est.*, 52 Penn. St. 154.

² *Ibid.*

³ *Marshall v. Sladden*, 7 Hare, 428.

⁴ *Meinertzhagen v. Davis*, 1 Col. C. C. 335; *Ex parte Tunno*, 1 Bail. Eq. 395.

⁵ *Guibert's Trust*, 13 Eng. L. & Eq. 372. But see *Ex parte Tunno*, 1 Bail. Eq. 395.

⁶ *Passingham v. Sherborne*, 9 Beav. 424.

⁷ *Reid v. Reid*, 30 Beav. 388.

⁸ *Ex parte Clutton*, 17 Jur. 988; 21 Eng. L. & Eq. 186; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Make v. Norrie*, 21 Hun (N.Y.), 128.

⁹ *Wilding v. Bolder*, 21 Beav. 222, where the husband of a *cestui que trust* was appointed trustee, the court required him to undertake to apply

power to appoint nominate himself, for trustees cannot even pay over the assets to one of their own number.¹ It is said, however, that if a trust with power of appointment is committed to trustees and the survivor of them, his executors or administrators, and the trustees all die, the appointment is in the executor of the survivor; and, as the instrument of trust declares him to be a proper person to execute the trust, he may appoint himself under the power. Mr. Lewin, however, says that "the exercise of every power should be regulated by the circumstances as they stand at the time, and that the limitation to executors cannot dispense with the *discretion* to be applied afterwards."²

for the appointment of a new trustee in case he became sole trustee, 18 W. R. 416; 21 L. T. (N. S.), 781.

¹ ——— v. Walker, 5 Russ. 7; *Stickney v. Sewell*, 1 M. & C. 14; *Westover v. Chapman*, 1 Col. C. C. 177.

² Lewin on Trusts, 472 (5th Lond. ed.).

CHAPTER X.

NATURE, EXTENT, AND DURATION OF THE ESTATE TAKEN BY TRUSTEES.

- § 298. Where trustees take and hold no estate, although an express gift is made to them. Statute of uses.
- § 299. Effect of the statute of uses upon conveyancing in the several States.
- § 300. Effect of the statute in the rise of trusts.
- §§ 301, 302. Rules of construction which gave rise to trusts.
- § 303. The word "seized."
- § 304. The primary use must be in the trustee to raise a trust.
- §§ 305, 306. Personal property not within the statute.
- §§ 307, 308. Where the statute executes trusts as uses, and where it does not.
- § 309. Where a charge upon an estate will vest an estate in trustees, and where not.
- § 310. Where the trust is for the sole use of a married woman.
- § 311. Trusts of personalty are not executed by the statute.
- § 312. The statute only executes the exact estate given to the trustee; but the trustee may take an estate commensurate with the purposes of the trust where it is unexecuted by the statute. Rules.
- §§ 313, 314. Courts may imply an estate in the trustee where none is given.
- §§ 315, 316. May enlarge the estate of the trustee for the purposes of the trust.
- § 317. Illustrations, explanations, and modifications of the rule.
- §§ 318, 319. Rule in respect to personal estate.
- § 320. Distinctions between deeds and wills in England and the United States.

§ 298. It may happen that although words of express trust are used in the grant or bequest of an estate to a trustee, yet no estate vests or remains in the trustee. This may be because only a *power* is given and no estate, as where a testator simply directs his executor to sell certain property and apply the proceeds to certain purposes instead of granting the property to the executor or trustee to sell, &c., or because the statute of uses *executes* the legal estate at once in the *cestui que trust*.¹ Thus, if A. grants or bequeaths land to B. and his heirs, in trust for C. and his heirs, the trustee, B., will take nothing in the land, but the legal title, as well

¹ West v. Fitz, 109 Ill. 425.

as the beneficial use, will vest immediately in C.;¹ for the statute of uses,² so called, executes the possession and the legal title in the same person to whom the beneficial interest is given. As stated in previous sections,³ a large part of the land in England was at one time held to uses. The legal title was in one person, but upon the trust and confidence that such person would apply it to the use of some person named, or that such legal owner would permit some other person to have the possession, use, and income of the estate. This system, originating partly in fraud of the law, and partly in the necessities and convenience of the subject, became at last the source of great abuses. To remedy these abuses, the statute of uses was enacted.⁴ This statute exe-

¹ *Austin v. Taylor*, 1 Eden, 361; *Williams v. Waters*, 14 M. & W. 166; *Robinson v. Grey*, 9 East, 1; *Chapman v. Blissett*, Cas. t. Talbot, 150; *Broughton v. Langley*, 2 Salk. 150; 2 Ld. Raym. 873; *Thatcher v. Omans*, 3 Pick. 521; *Upham v. Varney*, 15 N. H. 466; *Kinch v. Ward*, 2 Sim. & St. 409, and see *Doe v. Biggs*, 2 Taunt. 109; *Shapland v. Smith*, 1 Bro. Ch. 75, and notes; *Boyer v. Cockerell*, 3 Kan. 282; *Witham v. Brooner*, 63 Ill. 344.

² 27 Henry VIII. c. 10, § 1.

³ *Ante*, §§ 3, 4.

⁴ *Ante*, §§ 5, 6, 7. And see the preamble of the statute. The first section of the statute was as follows: "That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means, whatsoever it be: that in every such case, all and every such person and persons, and bodies politic that have or hereafter shall have any such use, confidence, or trust in fee-simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seized, deemed, and adjudged, in lawful seizin, estate, and possession, of and in the same honors, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes, in the law of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and ad-

cutes the use by conveying the possession to the use, and transferring the use into possession, thereby making the *cestui que use* complete owner of the estate, as well at law as in equity. It does not abolish the conveyance to uses, but only annihilates the intervening estate, and turns the interest of the *cestui que use* into a *legal* instead of an *equitable* estate.¹ A *use*, a *trust*, and a *confidence* is one and the same thing, and if an estate is conveyed to one person for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used.² So absolute is the statute that it will operate upon all conveyances in the words above stated, although it was the plain intention of the settlor that the estate should vest and remain in the first donee; for the intention of the citizen cannot control express enactments of the legislature,³ or positive rules of property. (*a*)

judged to be in him or them, that have, or hereafter shall have, such use, confidence, or trust after such quality, manner, form, and condition as they had before, in, or to the use, confidence, or trust that was in them." Saund. on Uses, 70-82.

¹ *Eustace v. Seamen*, Cro. Jac. 696 ; 2 Black. Com. 333, 338 ; *Thatcher v. Omans*, 3 Pick. 529 ; *Hutchins v. Heywood*, 50 N. H. 495.

² *Terry v. Collier*, 11 East, 377 ; *Right v. Smith*, 12 East, 454 ; *Broughton v. Langley*, 2 Salk. 679 ; *Ease v. Howard*, Pr. Ch. 338, 345 ; *Hammerston's Case*, Dyer, 166 a, note ; *Ramsay v. Marsh*, 2 McCord, 252 ; *Moore v. Shultz*, 13 Penn. St. 98 ; *Jackson v. Fish*, 10 Johns. 456 ; *Parks v. Parks*, 9 Paige, 107.

³ *Carwardine v. Carwardine*, 1 Eden, 36 ; *Gregory v. Henderson*, 4 Taunt. 772. In this case the intent of the testator was loosely talked of, but it was an active trust, as pointed out by Heath, J. *Doe v. Collier*,

(*a*) Where it appeared by two deeds that all parties intended that the grantee in each deed should take the legal estate in fee and in trust, and not as feoffee or grantee to uses, it was held that, when the active duties of the trust ceased with the discharge of the mortgage, the statute of uses did not of its own force immediately vest the legal estate in the beneficiary and his heirs; and that when the trust so ceased, it became the trustee's duty to convey on request the legal estate to the beneficiary and his heirs, or to his assigns. *Dakin v. Savage*, 172 Mass. 23. See *infra*, § 520.

§ 299. The statute of uses is in force in most of the United States,¹ but where the statute is not in force either by adoption or by re-enactment, and even where it is expressly repealed and a form of deed is enacted, a knowledge of the law of uses is necessary in order to understand and apply the common forms of conveyance.² The statute of uses, and the doctrines it established, are so interwoven with the history of every American State, and with the growth of its jurisprudence in regard to real estate, that the law of tenures is necessarily interpreted in America by the precedents established under the statute;³ and in this branch of the law, as in all others, it is impossible to obtain a clear perception of its present state, without a full knowledge of the successive steps by which the latest development has been reached. The application of the statute has been very much modified in many of the States, but the general idea is still acted upon.⁴ (a) Mr. Washburn remarks, that it is not a fair in-

11 East, 377; *Shapland v. Smith*, 1 Bro. Ch. 75; 1 Sugd. Ven. 309, 314.

¹ 4 Kent, Com. 299; 1 Green. Cru. tit. 11, Use, c. 3, § 3, note.

² Walk. Am. Law, 311; *Helfensteine v. Garrard*, 7 Ohio, 275; 2 Washb. on Real Prop. 152.

³ 4 Kent, Com. 299-301.

⁴ In Maine, a person may convey land by deed acknowledged and recorded. Rev. Stat. 1857, c. 73, § 1. And a deed may be any species of conveyance, not plainly repugnant in terms, and necessary to give effect

(a) See *Morgan v. Rogers*, 79 F. R. 577; *Martin v. Fort*, 83 id. 19; *Speed v. St. Louis, &c. R. Co.*, 86 id. 235; *Carr v. Richardson*, 157 Mass. 576; *Cushing v. Spaulding*, 164 id. 287; *Sullivan v. Chambers*, 19 R. I., 799; *Bork v. Martin*, 132 N. Y. 280; *King v. Townshend*, 141 N. Y. 358; *Dyett v. Central Trust Co.*, 140 N. Y. 54; *Atkins v. Atkins*, 70 Vt. 565; *Silverman v. Kristufek*, 162 Ill. 222; *Hooper v. Felgner*, 80 Md. 262; *Numsen v. Lyon*, 87 Md. 31; *Foster v. Glover*, 46 S. C. 522; *Reeves v. Brayton*, 36 S. C. 384; *Mims v. Macklin* (S. C.), 30 S. E. 585; *Holmes v. Pickett*, 51 S. C. 271; *McKenzie v. Sumner*, 114 N. C. 425; *Thompson v. Conant*, 52 Minn. 208; *Woodward v. Stubbs*, 102 Ga. 187; *Myers v. Jackson*, 135 Ind. 136; *Henderson v. Adams*, 15 Utah. 30; *Stoup v. Stoup*, 140 Ind. 179; *Cornwell v. Orton*, 126 Mo. 355.

ference that the doctrine of uses would be inapplicable in any State where they are not declared not to exist, either because

to the intention of the parties. *Emery v. Chase*, 5 Maine, 235. And the statute of uses is in force. *Shapleigh v. Pillsbury*, 1 Maine, 271; *Emery v. Chase*, 5 id. 232; *Webster v. Cooper*, 14 How. 496; *Morden v. Chase*, 32 Maine, 329.

In New Hampshire, the form in which lands may be conveyed is fixed by statute. Rev. Stat. But this does not exclude other known forms of conveyance at common law, and the statute of uses is in full force. *Exeter v. Odiorne*, 1 N. H. 232; *Chamberlain v. Crane*, id. 64; *French v. French*, 3 id. 234; *Upham v. Varney*, 15 id. 462; *Hayes v. Tabor*, 41 id. 526; *Bell v. Scammon*, 15 id. 394; *Pritchard v. Brown*, 4 id. 397; *Dennett v. Dennett*, 40 id. 498; *Hutchins v. Heywood*, 50 id. 496.

In Vermont, there is a similar legislation as to the form of conveyances; but Chief-Justice Redfield held that the English statute of uses was not in force, for the reason that their court of equity could carry out the intention of parties without the help of the statute. *Gorham v. Daniels*, 23 Vt. 600; *Sherman v. Dodge*, 28 id. 26. Mr. Justice Thompson, of the United States court for the district, held the contrary. *Soc. &c. v. Hartland*, 2 Paine, C. C. 536.

In Massachusetts, a deed acknowledged and recorded conveys land without any other ceremony. Gen. Stat. 1860, c. 89, § 1. The form of deed in general use *gives, grants, bargains, sells, and conveys*, upon a consideration, limiting the estate to the grantee and his heirs *to their use*. These words prevent a resulting use in the grantor; and it is a conveyance at common law, since the *grantee* and the *cestui que use* is the same person. But if, for any reason, it is necessary, in order to give effect to the conveyance, to construe it as operating under the statute of uses, the court will do so. *Cox v. Edwards*, 14 Mass. 492; *Marshall v. Fish*, 6 Mass. 24; *Hunt v. Hunt*, 14 Pick. 374; *Wallis v. Wallis*, 4 Mass. 135; *Pray v. Pierce*, 7 Mass. 381; *Russell v. Coffin*, 8 Pick. 143; *Blood v. Blood*, id. 80; *Parker v. Nichols*, 7 id. 111; *Gale v. Coburn*, 18 id. 397; *Brewer v. Hardy*, 22 id. 376; *Thatcher v. Omans*, 3 id. 522; *Norton v. Leonard*, 12 id. 157; *Newhall v. Wheeler*, 7 Mass. 189; *Chapin v. Univer. Soc.*, 8 Gray, 580; *Baptist Soc. v. Hazen*, 100 Mass. 322; *Durant v. Ritchie*, 4 Mason, 45; *Northampton Bank v. Whiting*, 12 Mass. 104; *Johnson v. Johnson*, 7 Allen, 197.

In Rhode Island, deeds of bargain and sale, lease and release, and covenants to stand seized, are recognized by statute. Rev. Stat. (1857), p. 335. And the statute of uses would seem to be in partial force. 1 Lomax, Dig. 188; *Nightingale v. Hidden*, 7 R. I. 132.

In Connecticut, the act of acknowledging and recording a deed is held equivalent to livery of seizin. *Barrett v. French*, 1 Conn. 351. But the statute of uses is held to be part of its common law. *Bacon v. Taylor*,

no case has arisen in the courts of the State to test the question, or because a form of deed not known under the statute

Kirb. 368; *Barrett v. French*, 1 Conn. 354; *Bryan v. Bradley*, 16 Conn. 474.

In New York, previous to 1827, the English statute of uses was in full force. *Jackson v. Myers*, 3 Johns. 388; *Jackson v. Fish*, 10 id. 456; *Jackson v. Root*, 18 id. 79; *Jackson v. Cary*, 16 id. 302; *Jackson v. Dunsbath*, 1 Johns. Cas. 91; *Jackson v. Cadwell*, 1 Cow. 622. After that year, the rules of the common law were repealed; all uses and trusts were abolished, except such as were expressly authorized. Every interest in land is declared to be a legal right, and cognizable in a court of law except where it is otherwise provided. A conveyance by *grant, assignment*, or *devise* is substituted for a conveyance to uses, and future interests in lands may be conveyed by grant. 3 Rev. Stat. 15 (5th ed.); 4 Kent, 300. It has, however, been determined that if land is granted to one in fee in trust for another, the *cestui que trust* takes the estate absolutely, but subject, however, to such incumbrances as the trustee made upon the estate at the time of the conveyance, as if the trustee should give back a mortgage for the purchase-money, it would be held to be one transaction. *Rawson v. Lampman*, 1 Seld. 456. Nor have these statutes any application to securities by mortgage. *King v. Merchants' Exchange Co.*, 1 Seld. 517.

In New Jersey, the statute of uses is substantially re-enacted. *Den v. Crawford*, 3 Halst. 107; *Prince v. Sisson*, 13 N. J. 168.

In Pennsylvania, a statute declares all deeds in a prescribed form equivalent to a feoffment with livery of seizin at common law, and the statute of uses is also in full force. Opinion of the Judges, 3 Binn. 599; *Welt v. Franklin*, 1 Binn. 502; *Ashhurst v. Given*, 5 Wat. & S. 323; *Sprague v. Woods*, 4 id. 192; *O'Kinson v. Patterson*, 1 id. 395; *Hurst v. McNeil*, 1 Wash. C. C. 70; *Franciscus v. Reigart*, 4 Watts, 118. Indeed, at one time the Pennsylvania courts carried the application of the statute to an unusual extent, and held that *equitable* were converted into *legal* estates in all cases except active trusts, and even *then* if the purposes of the trust did not furnish a legitimate reason for not executing the trust in the beneficiary. *Kuhn v. Newman*, 26 Penn. St. 227; *Whicheote v. Lyle*, 28 id. 73; *Bush's App.*, 33 id. 85; *Kay v. Seates*, 37 id. 31. But these cases were overruled, and the law restored to its former condition, in *Barnett's App.*, 46 Penn. St. 392; *Shankland's App.*, 47 id. 113; *Earp's App.*, 75 id. 119; *Deibert's App.*, 78 id. 296.

In Delaware, the statute provides that lands may be transferred by deed without livery, and that the legal estate shall accompany the use, and pass with it. Rev. Code (1852), p. 266.

In Maryland, the English statute of uses is the foundation of their conveyances, and their rules of construction of it are nearly similar to the English rules. *Lewis v. Beall*, 4 Harr. & McH. 488; *Mason v. Small*

of uses may have been declared by the statute of a State sufficient to convey lands.¹ It is true that Lord Hardwicke is wood, id. 484; *Matthews v. Ward*, 10 Gill & J. 443; *Cheney v. Watkins*, 1 Harr. & J. 527; *West v. Biscoe*, 6 id. 465; *Calvert v. Eden*, 2 Harr. & McH. 331.

In Virginia, the statute of uses was a part of the colonial law; but it was repealed in 1792. Afterwards, in 1819, and in Rev. Code (1849), p. 502, a partial substitute was adopted, by which the possession was transferred to the use only in cases of deeds of bargain and sale, lease and release, and deeds operating by way of covenant to stand seized to uses. If uses or trusts are raised by any other form of conveyance, as by devise, they remain, as before the statute of Henry VIII., mere equitable estates, not cognizable by courts of law. *Bass v. Scott*, 2 Leigh, 359; 1 Lomax, Dig. 188; 2 Matt. Dig. 34; *Rowletts v. Daniel*, 4 Munf. 473; *Tabb v. Baird*, 3 Call, 475; *Duvall v. Bibb*, id. 362.

In North Carolina, the statute is similar to the statute of Virginia, and the statute of uses has nearly the same application. Rev. Code (1854), p. 270; *Den v. Hanks*, 5 Ired. 30; *Smith v. Lockabill*, 76 N. C. 465.

In South Carolina, the statute of uses was re-enacted in terms. 2 Stat. at Large, p. 467; *Ramsay v. Marsh*, 2 McCord, 252; *Redfern v. Middleton*, Rice, 464; *Kinsler v. Clark*, 1 Rich. 170; *Chancellor v. Windham*, id. 161; *Laurens v. Jenney*, 1 Spears, 356; *McNish v. Guerard*, 4 Strob. 74.

In Georgia, the form of deed in general use is that of bargain and sale, which operates under the statute of uses. *Adams v. Guerard*, 29 Ga. 676.

In Florida, there is a statute similar to the statute of Virginia, and the statute of uses is in partial force. Thompson's Dig., p. 178, § 4; 1 Lomax, Dig. 188.

In Alabama, the statute of uses is part of the law of the State. *Horton v. Sledge*, 29 Ala. 478; *You v. Flinn*, 34 Ala. 411.

In Mississippi, there is a statute similar to the statute of Virginia. How. & Hutch. Dig. p. 349.

In Louisiana, conveyances originated under the civil law, or the code of France.

In Texas, a statute recognizes deeds of bargain and sale, which operate under the statute of uses.

In Arkansas, the mode of conveyance is by deeds of bargain and sale, and of course the statute of uses must be a part of their law.

In Tennessee, the statute of uses is not in force, though deeds good at common law or under the statute of uses are valid to convey estates; but if uses are raised, they remain as before the statute of Henry VIII.

The statute of Kentucky is in nearly the same words as the statute of

¹ 2 Washburn on Real Property, 154.

reported to have said, that the statute of uses had no other effect than to add at most three words to a conveyance;¹ Mr. Kent thinks this rather too strongly expressed, and says that the doctrine of the statute has insinuated itself deeply and thoroughly into every branch of the jurisprudence of real property.² It seems to have been the intention of the statutes of the various States to supply the want of livery of seizin, and to make all deeds, or other writings executed with certain formalities, equivalent to the old feoffments; therefore, any old and well-established rule of conveyancing

Virginia, and the statute of uses has the same application. Rev. Stat. p. 279 (ed. 1860).

In Ohio, the statute of uses was never in force, and if trusts or uses are raised by the form of conveyance they remain unexecuted, and mere equitable estates, cognizable only in courts of equity. *Williams v. Presbyterian Church*, 1 Ohio St. 497; *Helfensteine v. Garrard*, 7 Ham. 276; *Foster v. Dennison*, 9 Ohio, 124; *Walker*, Am. Law, 124; *Thompson v. Gibson*, 2 Ohio, 439.

In Indiana, the statute of uses is enacted in substance. Rev. Stat. (1843) p. 447; *Linville v. Golding*, 11 Ind. 374; *Nelson v. Davis*, 35 Ind. 474.

In Illinois, the statute is very similar to the statute of Virginia. 2 Stat. (1858) p. 959; *Witham v. Brooner*, 63 Ill. 344.

In Michigan, the laws are similar to the statutes of New York, by which all uses and trusts are abolished. 2 Compt. Laws (1857), p. 824; *Ready v. Kearsley*, 14 Mich. 228.

In Missouri, the statute of uses is re-enacted in substance. Rev. Stat. (1845) p. 218; *Guest v. Farley*, 19 Miss. 147.

In Iowa, uses are recognized, and deeds may operate under the statute of uses. *Pierson v. Armstrong*, 1 Iowa, 282.

In Wisconsin, the statute is very similar to the statute of New York, and all uses and trusts are abolished except those specially provided for. Rev. Stat. (1858) p. 529.

In Minnesota, deeds may be in form of bargain and sale, which operate under the statute.

In California, conveyances originated under the old Spanish law, and probably the statute of uses has little or no influence upon the law of the State.

In Kansas, a conveyance to A. to the use of B. vests the estate at once in B., by force of the statute. *Bayer v. Cockerill*, 3 Kan. 292.

¹ *Hopkins v. Hopkins*, 1 Atk. 591.

² 4 Kent, Com. 301.

ought not to be considered as abolished, in the absence of express provisions to that effect.

§ 300. The statute of uses at the time when it was passed had an immense effect upon the tenures of the realm. Many interests in land which had been merely equitable, and cognizable only according to the rules of equity, became at once legal interests, cognizable in courts of common law. Many persons who were seized of estates to uses, and who only could sue or be sued at law in relation to the same, ceased at once to have any title either at law or equity. Although it is probable that it was the intent of the statute to convert all uses or trusts into legal estates,¹ yet the convenience to the subject of being able to keep the legal title to an estate in one person, while the beneficial interest should be in another, was too great to be given up altogether, and courts of equity were astute in finding reasons to withdraw a conveyance from the operation of the statute.² Three principal reasons or rules of construction were laid down, whereby conveyances were excepted from such operation: first, where a use was limited upon a use; second, where a copyhold or leasehold estate, or personal property, was limited to uses; third, where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform his duty or execute the power.³ In all of these three in-

¹ 1 Green. Cruise, tit. 12, c. 1, § 1.

² Mr. Cruise thought that the strict construction put upon the statute by the judges in a great measure defeated its effect. *Id.* Mr. Blackstone is of a similar opinion. 2 Black. Com. 336. And Lord Mansfield, in *Goodright v. Wells*, 2 Doug. 771, said that it was not the liberality of courts of equity, but the absurd narrowness of courts of law, resting on literal distinctions, which in a manner repealed the statute of uses, and drove *cestuis que trust* into equity.

³ *Hill on Trustees*, 230. See § 735, a; *Farr v. Gilreath*, 23 S. C. 511; *Preachers' Aid Society v. England*, 106 Ill. 129 (referring to the text). Where an estate is conveyed to A. for the use of B., and nothing more is said, the title is immediately vested in B. by the statute, even though express words of trust are used; but if certain duties are imposed on A., such as collection of rents, making investments, &c., which require that

stances, courts both of law and equity held that the statute did not execute the use, but that such use remained, as it was before the statute, a mere equitable interest to be administered in a court of equity. These uses, which the statute did not execute, were called trusts, and justify Mr. Cruise's language that "a trust is a use not executed by the statute of 27 Henry VIII." The statute may execute the use in regard to one party and not as to another in the same deed; for example, where land is conveyed to A. in trust for B. for life, contingent remainder to C., the statute may execute the life estate in B., and still leave the fee in A. for the preservation of the remainder.¹

§ 301. The first two of these rules originated in a strict construction of the technical words used in the statute, which are, "where any person is *seized* of any lands or to the use of another." If A. grants lands to B. for the use of C. for the use of D., B. was said to be "seized" of the lands to the use of C.; and the statute immediately executed the use in C. and gave him the legal title. But C. was said not to be "seized" of lands to the use of D., but only of a *use*; therefore the use in C. for D. remained, as it was before the statute, unexecuted.² It remained, therefore, a mere equitable estate or trust cognizable in a court of equity alone. Hence the maxim that a use could not be limited on a use; not that such second use was void, but the statute did not execute it, and it remained a mere equitable interest. Thus, if lands come to A. and his heirs by feoffment, grant, devise, or other assurance, to the use of B. and his heirs, to the use of C. and his heirs; or to the use of C. in fee or for life, with remainders over; or to B. and his heirs in trust to permit C. and D. to receive the rents, — in all these cases the statute executed, he should keep the estate, the trust will be an active one, and the statute will not execute it. *Kellogg v. Hale*, 108 Ill. 164; *Howard v. Henderson*, 18 S. C. 189; *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Henderson v. Hill*, 9 Lea (Tenn.), 25.

¹ *Howard v. Henderson*, 18 S. C. 192; *Williman v. Holmes*, 4 Rich. Eq. (S. C.) 476.

² *Tyrrell's Case*, Dyer, 155 a.

cutes the first use only in B. and his heirs, and the legal estate is vested in him, as trustee for the parties beneficially interested.¹

§ 302. So where lands are conveyed by covenant to stand seized, or by bargain and sale, or by appointment under a power, to A. and his heirs, to the use of B. and his heirs, the *legal* estate will vest in A., and B. will take only an equitable interest; for these conveyances do not operate to transfer the seizin to A.² They merely raise a use which the statute executes in him, and stops there. Thus, in a deed of bargain and sale, the operation is as follows: the consideration and the bargain raise a use in the bargainee which the statute executes; and thus, under a deed of bargain and sale, the bargainee obtains both the use and the legal title. But no use can be limited and executed on a use.

¹ *Durant v. Ritchie*, 4 Mason, 65; *Hurst v. McNeil*, 1 Wash. C. C. 70; *Hutchins v. Heywood*, 50 N. H. 496; *Croxall v. Sherard*, 5 Wall. 268; *Reed v. Gordon*, 35 Md. 183; *Cueman v. Broadnax*, 37 N. J. Eq. 523; *Matthews v. Ward*, 10 G. & J. 443; *Whetstone v. Bury*, 2 P. Wms. 146; *Wagstaff v. Wagstaff*, id. 258; *Att. Gen. v. Scott, Forrest*, 138; *Doe v. Passingham*, 6 B. & Cr. 305; *Jones v. Lord Saye & Sele*, 1 Eq. Cas. Ab. 383; *Marwood v. Darell*, Ca. t. Hard. 91; *Hopkins v. Hopkins*, 1 Atk. 581; *Jones v. Bush*, 4 Harr. 1; 1 Sand. Uses, 195; 2 Black. Com. 336; *Williams v. Waters*, 14 M. & W. 166; *Ramsay v. Marsh*, 2 McCord, 252; *Burgess v. Wheate*, 1 W. Black. 160; *Wilson v. Cheshire*, 1 McCord, 233. The statute of uses in some of the States, as Virginia, speaks of uses raised by deed. Consequently, it is said that uses raised by devise are not executed, but remain trusts. Judge Lomax, however, denies this construction. 1 Lomax, Dig. 188, 196. In New York, the uses named in the text would be executed in the *cestui que use* by the statute of uses and trusts, and he would have the entire legal title.

² *Johnson v. Cary*, 16 Johns. 304; 1 Cruise, Dig. tit. 12, c. 1, § 9; Gilb. on Uses, 67, 347. Mr. Blackstone condemned this rule. 2 Black. Com. 336. And Lord Mansfield said that the rule grew up from the absurd narrowness of courts of common law. *Goodright v. Wells*, 2 Doug. 771. And Mr. Greenleaf doubts if the rule that a use cannot be limited upon a use would be generally acted upon in the United States, especially in those States which have declared by statute what formalities shall alone be necessary to pass estates. Green. Cruise, Dig. tit. 12, c. 1, § 4, n. (vol. i. p. 380); and see *Davis v. Hayden*, 9 Mass. 514; *Flint v. Sheldon*, 13 Mass. 443; *Marshall v. Fisk*, 6 Mass. 24.

Hence, if A. conveys land to B., to the use of C., by a deed of bargain and sale, the statute will not execute the use in C., but the legal title will remain in B. subject to a trust for C., to be administered in equity; for the consideration and bargain only raise a use in B., which the statute executes, but the use in B. for C. is in the nature of a use limited upon a use, which the statute does not execute.¹

§ 303. Another technical construction of the word "seized" withdrew all uses or trusts created in copyhold or leasehold estates, and all chattel interests and personal property, from the operation of the statute. The judges resolved in the 22d of Elizabeth that the word "seized" was only applicable to freeholds; consequently no one could be said to be "seized" of a leasehold or other chattel interests in real estate, or of personal property. Therefore, if A. gave leaseholds or personal property to B. for the use of C., the statute did not execute the use, but B. took the *legal* title in trust for C., which trust was not recognized at law, but only in equity.² So tenants by curtesy or in dower cannot stand

¹ The question has been raised in Massachusetts whether land can be conveyed by deed of bargain and sale to one for the use of another, and create anything more than a trust for the last beneficiary. *Stearns v. Palmer*, 10 Met. 32; *Norton v. Leonard*, 12 Pick. 152. The general doctrine stated in the text is fully admitted, but it is claimed in answer that the deeds in general use, although in the general form of deeds of bargain and sale, are in fact, by force of the statutes, equivalent to grants or feoffments, and it is said that if deeds will not operate in the form in which they are drawn, they shall be construed to operate according to the intention of the parties. *Higbee v. Rice*, 5 Mass. 352; *Pray v. Peirce*, 7 Mass. 384; *Knox v. Jenks*, id. 494; *Russell v. Coffin*, 8 Pick. 143. The question was left undecided in *Norton v. Leonard* and *Stearns v. Palmer*, *ut supra*, but see the remarks of Chief Justice Dana, in *Thatcher v. Orams*, 3 Pick. 528. The same question may arise in other States, where their deeds are in form deeds of bargain and sale.

² *Ante*, § 6; *Dyer*, 369 a; *Doe v. Routledge*, 2 Cowp. 709; *Simpson v. Turner*, 1 Eq. Ab. 383; 2 Wooddes. Lect. pp. 295, 297; 1 Cruise, Dig. p. 354, and tit. 12, c. 1; *Gilb. Ten.* 182; *Gilb. Uses*, 67 n.; *Rice v. Burnett*, 1 Spear, Eq. 579; *Joor v. Hodges*, Spear, 593; *Pyrton v. Mood*, 2 McMullan, 293. In some States, the statutes use the word "possessed" instead of the word "seized," in which case both real and personal estate and

seized to a use, for they are in by act of law in consideration of marriage and not in privity of estate; but in equity they would be held to execute any trusts charged upon their interests or estates.¹

§ 304. From these instances, it will be seen that, in order to create a trust, it is necessary to prevent the legal estate from vesting in the *cestui que trust*, and it is necessary that not only the *legal* title, but the *primary use*, should vest in the trustee. Any form of conveyancing that will effect this, notwithstanding the statute, will create a trust; as if a grant or devise be made to a *trustee and his heirs*, to the *use of the trustee* and his heirs, or unto and to the use of the trustee and his heirs, the title and the primary use will both be vested in the trustee; and although there is a trust or use over to some other person, yet it will not be effected by the statute, it not being the primary use.²

§ 305. The third rule of construction is less technical, and relates to special or active trusts, which were never within the purview of the statute.³ Therefore if any agency, duty, or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents,⁴ or to convey the

chattel interests would be transferred to the uses raised. *Tabb v. Baird*, 3 Call, 482. But this construction is controverted by Judge Lomax. 1 Lomax, Dig. 196.

¹ 1 Saunders on Uses, 86; 2 Fonbl. Eq. book 2, c. 6, § 1, and notes, p. 140.

² *Rackham v. Siddall*, 1 Mac. & G. 607; *Doe v. Passingham*, 6 B. & C. 305; *Robinson v. Comyns*, t. Talb. 154; *Doe v. Field*, 6 B. & Ad. 564; *Att. Gen. v. Scott*, t. Talb. 138; *Hopkins v. Hopkins*, 1 Atk. 589; *Harris v. Pugh*, 12 Moore, 577; 4 Bingh. 335; *Prise v. Sisson*, 2 Beas. 168; *Eckels v. Stewart*, 33 Penn. St. 460; *Freyvogle v. Hughes*, 56 id. 228; *Dodson v. Ball*, 60 id. 492; *McMullin v. Beatty*, 56 id. 387; *Keyser's App.*, 57 id. 636; *Koenig's App.*, id. 352; *Bacon's App.*, id. 504; *Goodrich v. Milwaukee*, 24 Wis. 422.

³ *Chapin v. Universalist Soc.*, 8 Gray, 580; *Exeter v. Odiorne*, 1 N. H. 232; *Mott v. Buxton*, 7 Ves. 201; *Wright v. Pearson*, 1 Edw. 125; *Wheeler v. Newhall*, 7 Mass. 189; *Norton v. Leonard*, 12 Pick. 152; *Striker v. Mott*, 2 Paige, 387; *Wood v. Wood*, 5 id. 596.

⁴ *Robinson v. Grey*, 9 East, 1; *Jones v. Saye & Sele*, 1 Eq. Cas. Ab.

estate,¹ or if any control is to be exercised, or duty performed by the trustee in *applying* the rents to a person's maintenance,² or in making repairs,³ or to preserve contingent remainders,⁴ or to raise a sum of money,⁵ or to dispose of the estate by sale,⁶ — in all these, and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates. So if the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal, or in the application of the income;⁷ or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division,⁸ (a) or until a request for a con-

383; *Barker v. Greenwood*, 4 M. & W. 429; *Simpson v. Turner*, 1 Eq. Cas. Ab. 383; *Chapman v. Blissett*, Cas. t. Talb. 145; *Garth v. Baldwin*, 2 Ves. 616; *Sherwin v. Kenny*, 16 Ir. Ch. 138; *Anthony v. Rees*, 2 Cr. & Jer. 75; *Doe v. Hampray*, 6 Ad. & El. 206; *White v. Barker*, 1 Bing. N. C. 573; *Kenrick v. Beaucherk*, 3 Bos. & P. 178; *Neville v. Saunders*, 1 Vern. 415. See the elaborate case, *Leggett v. Perkins*, 2 Comst. 297; *Brewster v. Striker*, id. 19; *Morton v. Barrett*, 22 Maine. 261; *McCosker v. Brady*, 1 Barb. Ch. 329; *Doe v. Biggs*, 2 Taunt. 109; *Wickham v. Berry*, 53 Penn. St. 70; *Manice v. Manice*, 43 N. Y. 203; *Adams v. Perry*, id. 487; *Hutchins v. Hleywood*, 50 N. H. 500; *Barnett's App.*, 46 Penn. St. 392; *Shankland's App.*, 47 id. 113; *Ogden's App.*, 70 id. 501; *Deibert's App.*, 78 id. 296; *Meecham v. Steele*, 93 Ill. 135.

¹ *Ibid.*; *Doe v. Edlin*, 4 Ad. & El. 582; *Doe v. Scott*, 4 Bing. 505; *Mott v. Buxton*, 7 Ves. 201.

² *Sylvester v. Wilson*, 2 T. R. 444; *Doe v. Edlin*, 4 Ad. & El. 582; *Vail v. Vail*, 4 Paige, 317; *Porter v. Doby*, 2 Rich. Eq. 52; *Doe v. Ironmonger*, 3 East, 533; *Gerard Ins. Co. v. Chambers*, 46 Penn. St. 485.

³ *Shapland v. Smith*, 1 Bro. Ch. 75; *Brown v. Ramsden*, 3 Moore, 612; *Tierney v. Moody*, 3 Bing. 3.

⁴ *Biscoe v. Perkins*, 1 Ves. & B. 485; *Barker v. Greenwood*, 4 M. & W. 431; *Vanderheyden v. Crandall*, 2 Denio, 9.

⁵ *Wright v. Pearson*, 1 Eden, 119; *Stanley v. Lennard*, id. 87.

⁶ *Bagshaw v. Spencer*, 1 Ves. 142; *Wood v. Mather*, 38 Barb. 473.

⁷ *Exeter v. Odiorne*, 1 N. H. 232; *Ashhurst v. Given*, 5 W. & S. 323; *Vaux v. Parke*, 7 W. & S. 19; *Nickell v. Handly*, 10 Grat. 336.

⁸ *Posey v. Cook*, 1 Hill (S. C.), 413; *Morton v. Barrett*, 22 Me. 261; *Wood v. Mather*, 38 Barb. 473; *McCaw v. Galbraith*, 7 Rich. L. 74; *Wil-*

(a) See *Hart v. Bayliss*, 97 Tenn. 72. Title in the trustee is essential to the exercise of the discretionary power to withhold or give an estate.

veyance is made.¹ So if an estate is given upon a trust to sell or mortgage for the payment of debts, legacies, or annuities, or to purchase other lands to be settled to certain uses;² and this construction will not be affected by a power given to one of the *cestuis que trust* to control the sale of part of the estate,³ nor by the fact that the direction for the payment of debts and legacies, out of the proceeds of the sale of the land, is only in aid of the personal property.⁴

§ 306. If, however, the trust simply is to *permit and suffer* A. to occupy the estate, or to receive the rents, the legal estate is executed in A. by the statute.⁵ And a trust to hold for the use and benefit of, and to apply the rents to, the children of A., is executed in the children, notwithstanding the word "apply" is used.⁶ But where the trust is "*to pay unto*" or to permit and suffer a person to receive the rents, using both expressions, the construction will be governed by the intention of the donor; and in this view the position of

liams v. McConico, 36 Ala. 22; *Nelson v. Davis*, 35 Ind. 474; *McNish v. Guerard*, 4 Strob. Eq. 66, was to the contrary upon the facts of that particular case.

¹ *Walter v. Walter*, 48 Mo. 140.

² *Curtis v. Price*, 12 Ves. 89; *Doe v. Ewart*, 7 Ad. & El. 636, 668; *Ashurst v. Given*, 5 W. & S. 323; *Vaux v. Parke*, 7 W. & S. 19; *Keene v. Deardon*, 8 East, 248; *Bagshaw v. Spencer*, 1 Ves. 142; *Chamberlain v. Thompson*, 10 Conn. 244; *Sanford v. Irby*, 3 B. & Al. 654; *Creaton v. Creaton*, 3 Sm. & Gif. 386; *Spence v. Spence*, 12 C. B. (N. S.) 199; *Smith v. Smith*, 11 C. B. (N. S.) 121.

³ *Chapman v. Blissett*, Forr. 145; *Naylor v. Arnitt*, 1 R. & M. 501; *Wykham v. Wykham*, 18 Ves. 395.

⁴ *Ibid.*; *Murthwaite v. Jenkinson*, 2 B. & Cr. 257.

⁵ *Right v. Smith*, 12 East, 455; *Wagstaff v. Smith*, 9 Ves. 524; *Gregory v. Henderson*, 4 Taunt. 773; *Warter v. Hutchinson*, 5 Moore, 143; 1 B. & C. 721; *Barker v. Greenwood*, 4 M. & W. 429; *Boughton v. Langley*, 1 Eq. Cas. Ab. 383; 2 Salk. 679 (overruling *Burchett v. Durdant*, 2 Vent. 311); *Doe v. Biggs*, 2 Taunt. 109; *Ramsay v. Marsh*, 2 McCord, 252; *Parks v. Parks*, 9 Paige, 107; *Witham v. Brooner*, 63 Ill. 158.

⁶ *Laurens v. Jenney*, 1 Spears, 356.

Marshall's Estate, 147 Penn. St. 77; *v. Prior*, 16 R. I. 566; *In re Dolan, Kreb's Estate*, 184 id. 222; see *Fish* 79 Cal. 65.

the words in the sentence, and the priority of the words, and the consideration whether the instrument is a deed or will, will have a material bearing upon the decision.¹ Mr. Jarman and Mr. Lewin suggest that the repugnancy would be obviated in such a case by construing the instrument to give an election or discretion to the trustees.²

§ 307. Although the direction may be for the trustees to *permit and suffer* another person to receive the rents, yet if any duty is imposed upon the trustees expressly or by implication, the legal estate will remain in them unaffected by the statute. As if the direction is to *permit* A. to receive the *net*³ rents, or the *clear*⁴ rents, the trustees take the legal estate, the words *net* and *clear* implying that the trustees are to pay all charges, and pay over the balance. So if, in addition to a devise in trust to preserve contingent remainders, there is a direction to *permit* A. to receive the rents and profits;⁵ and so if trustees are to pay certain life annuities out of the rents, and subject to those annuities to *permit and suffer* certain persons to receive the rents and profits.⁶ So if the trustees are to exercise any control,⁷ as if there is a trust to *permit and suffer* a woman to receive the rents, and that her receipts with the approbation of one of the trustees should be good.⁸

§ 308. A mere *charge* of debts and legacies on real estate will not vest the estate in the trustees, unless there is some direction to them to raise the money and pay them, or unless

¹ Doe v. Biggs, 2 Taunt. 109; Pybus v. Smith, 3 Bro. Ch. 340.

² 1 Jarm. Pow. Dev. 222, n.; Lewin on Trusts, 174 (5th Lond. ed.).

³ Barker v. Greenwood, 4 M. & W. 421; Keene v. Deardon, 8 East, 248; Rife v. Geyer, 59 Penn. St. 395.

⁴ White v. Parker, 1 Bing. N. C. 573.

⁵ Biscoe v. Perkins, 1 Ves. & B. 485, 489; Webster v. Cooper, 14 How. 499; Vanderheyden v. Crandall, 2 Denio, 9.

⁶ Naylor v. Arnitt, 1 R. & M. 501.

⁷ Exeter v. Odiorne, 1 N. H. 232.

⁸ Gregory v. Henderson, 4 Taunt. 772; Barker v. Greenwood, 5 M. & W. 430.

there is some other implication that they are to exercise an *active trust* for the purpose.¹ (a) Nor does the legal estate vest in the trustees where the *charge* of the debts and legacies upon the real estate is contingent upon the insufficiency of any other fund, for in that case the trustees do not take an *immediate* vested interest;² but if the *charge* is made in aid of any other fund without contingency, the trustees will take immediately a legal estate.³ So if the trustees are to demise the estate for a term, at rack-rent or otherwise, the term must come out of their interest, and the legal estate must be in them.⁴ If, however, the instrument confers by construction upon the trustees a mere *power* of leasing, a good legal term may be created by the exercise of the power and without the legal estate in them.⁵ So if a testator give his trustees a simple power of disposing of his estates, as that his executors or trustees, or other persons, shall sell or let or mortgage, or otherwise dispose of his estate, to pay his debts or legacies or annuities, or other charges, or where he directs his executors to raise money, no estate vests in the trustees, executors, or other persons, but it descends to the heir or the person to whom it is directed to go in the will, until it is wanted for the purposes named, and then it is

¹ Doe v. Claridge, 6 Man. & Scott, 657; 1 Jarm. Pow. Dev. 224, n.; Kenrick v. Beaucherk, 3 B. & P. 178; Cadogan v. Ewart, 7 Ad. & El. 636, 668; Jones v. Saye & Sele, 8 Vin. 262; Creaton v. Creaton, 3 Sm. & Gif. 386; Collier v. McBean, 34 Beav. 426.

² Goodtitle v. Knott, Coop. 43; Hawker v. Hawker, 3 B. & Al. 537; Gibson v. Montfort, 1 Ves. 485.

³ Murthwaite v. Jenkinson, 2 B. & Cr. 357; Wykham v. Wykham, 18 Ves. 395; and see Popham v. Bamfield, 1 Vern. 79.

⁴ Doe v. Willan, 2 B. & Al. 84; Doe v. Walbank, id. 554; Osgood v. Franklin, 2 Johns. Ch. 20; Burr v. Sim, 1 Whart. 266; Riley v. Garnett, 3 De G. & Sm. 629; Brewster v. Striker, 2 Comst. 19; Doe v. Cafe, 7 Exch. 675.

⁵ Doe v. Willan, 2 B. & Al. 84; Doe v. Simpson, 5 East, 162.

(a) *In re Stephens*, 43 Ch. D. 39; not charge them upon the testator's real estate. *In re Head's Trustees*, authority given to executors and trustees by will to pay debts does

divested only to the extent necessary for the purposes named. So where an estate was to remain in the hands of executors, for the use of the widow and children, until the youngest child should become twenty-one years old, the executors or trustees took no interest in the estate but a simple power.¹ Such directions are simple *powers* of disposition, which may be executed without any legal title.²

§ 309. Where a testator gave his wife an annuity, and a certain sum to his children to be paid when they arrive at twenty-one years, and appointed three persons by name, "as trustees of inheritance for the execution thereof," it was held that the trustees took the legal estate.³ And if several trusts are created in the same instrument, some of which would be executed by the statute, and others would require the legal estate to remain in the trustees, they will take the legal estate; and this will be the case, though the trusts are limited to arise successively.⁴ In all cases where an estate is given to trustees to preserve contingent remainders, the statute does not execute the estate in the *cestui que trust*;⁵ and in every case where the words "to the use of the trustees" are used, the statute does not execute the estate, although it is

¹ *Burke v. Valentine*, 52 Barb. 412.

² *Reeve v. Att. Gen.*, 2 Atk. 223; *Hilton v. Kenworthy*, 3 East, 553; *Bateman v. Bateman*, 1 Atk. 421; *Fowler v. Jones*, 1 Ch. Cas. 262; *Lancaster v. Thornton*, 2 Burr. 1027; *Yates v. Compton*, 2 P. Wms. 308; *Fay v. Fay*, 1 Cush. 94; *Shelton v. Homer*, 5 Met. 462; *Bank of U. S. v. Beverly*, 10 Peters, 532; 1 How. 134; *Deering v. Adams*, 37 Maine, 264; *Jackson v. Schaubert*, 7 Cow. 187; 2 Wend. 12; *Burr v. Sim*, 1 Whart. 266; *Guyer v. Maynard*, 6 Gill. & J. 420; *Dabney v. Manning*, 3 Ohio, 321; *Jameson v. Smith*, 4 Bibb, 307; *Hope v. Johnson*, 2 Yerg. 123; *Bradshaw v. Ellis*, 2 Dev. & Bat. Eq. 20. In Pennsylvania, such powers conferred upon executors pass the estate by force of a statute. *Miller v. Meetch*, 8 Penn. St. 417; *Chew v. Chew*, 28 id. 17.

³ *Trent v. Harding*, 10 Ves. 495; 1 B. & P. N. C. 116; 7 East, 95; *Re Hough*, 4 De G. & Sm. 371; *Re Turner*, 2 De G., F. & J. 527.

⁴ *Hawkins v. Lascombe*, 2 Swanst. 375, 391; *Horton v. Horton*, 7 T. R. 652; *Blagrove v. Blagrove*, 4 Exch. 570; *Brown v. Whiteway*, 8 Hare, 156; *Stockbridge v. Stockbridge*, 99 Mass. 244. But see *Tucker v. Johnson*, 16 Sim. 341; *Leonard v. Diamond*, 31 Md. 536.

⁵ *Laurens v. Jenny*, 1 Spears, 365; Co. Litt. 265 a, n. 2; 337 a, n. 2.

to the use of the trustees in trust for another; for the statute only executes the first use.¹

§ 310. If an estate be given to trustees upon a trust for a married woman "for her sole and separate use," and "her receipts alone to be sufficient discharges," or if the trust be to "permit and suffer a *feme covert* to receive the rents to her separate use," the legal estate will vest in the trustees, and the statute will not execute it in the *cestui que trust*.² In all these cases the court will give this construction to the gift, if possible;³ for if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor.⁴ These are not the only words that will prevent the estate from vesting. Any words that show an intent to create an estate or a trust, for the sole and separate use of a married woman, will have the same effect.⁵ And a woman in contemplation of marriage may deed lands to another to stand seized to the sole use of the grantor, and the statute will not affect the transaction, but a trust will be created, as otherwise the intent of the parties would be defeated.⁶ But it is said that if an estate is "released by deed" to A. and his heirs "upon a

¹ *Ante*, § 304; Keene v. Deardon, 8 East, 248; Whetstone v. St. Bury, 2 P. Wms. 146; Pr. Ch. 591; Sympton v. Turner, 1 Eq. Cas. Ab. 383; Hopkins v. Hopkins, 1 Atk. 586; Hawkins v. Luscombe, 3 Swanst. 376, 388.

² Horton v. Horton, 7 T. R. 652; Neville v. Saunders, 1 Vern. 415; Jones v. Saye & Sele, 1 Eq. Cas. Ab. 383; Doe v. Claridge, 6 C. B. 641; Hawkins v. Luscombe, 2 Swanst. 391; South v. Alleyne, 5 Mod. 63, 101; Bush v. Allen, id. 63; Robinson v. Grey, 9 East, 1; Ayer v. Ayer, 16 Pick. 330; Williman v. Holmes, 4 Rich. Eq. 475; McNish v. Guerard, 4 Strob. Eq. 475; Franciscus v. Reigart, 4 Watts, 109; Escheator v. Smith, 4 McCord, 452; Bass v. Scott, 2 Leigh, 356; Rogers v. Ludlow, 3 Sandf. Ch. 104; Richardson v. Stodder, 100 Mass. 528.

³ Ware v. Richardson, 3 Md. 505; Moore v. Shultz, 13 Penn. St. 98.

⁴ Ibid.; Rice v. Burnett, 1 Spear, Eq. 580.

⁵ Ayer v. Ayer, 16 Pick. 331; Kirk v. Paulin, 7 Vin. Ab. 95; Tyrrel v. Hope, 2 Atk. 558; Darley v. Darley, 3 Atk. 399; Hartley v. Hurle, 5 Ves. 540.

⁶ Pittsfield Savings Bank v. Berry, 63 N. H. 109.

trust" for "the sole and separate use of the releasor," and no *active* duty is imposed upon the trustee in respect to the sole and separate estate, a common-law court will reject the sole and separate use as an estate unknown to the law; and it has been held in such case that the statute vested the estate in the *cestui que trust*.¹

§ 310 a. But in order that an estate given to the sole and separate use of a woman may vest and remain in the trustees, it is necessary that she should be married or in immediate contemplation of marriage. For if she is unmarried, or the estate is not given in the immediate contemplation of her marriage, it will vest in her at once by the statute of uses; or she will have the right to call for the execution of the trust at once, by a conveyance of the legal estate to her by the trustee, unless there are some other provisions in the will or purposes of the trust which render it an active trust, and the continuance of the legal estate in the trustees necessary for its purposes.² It is not necessary that the contemplation of her immediate marriage should appear upon the face of the will or settlement, if in fact an immediate marriage was contemplated, and such fact was probably known to the testator or settlor.³ In such cases the trust will continue during the coverture of the woman, and at the decease of her husband she will have the right to call for a conveyance of the property as upon a termination of the trust.⁴ A conveyance "in trust for B., wife of C., and her heirs and

¹ *Nash v. Allen*, 1 Hurl. & Colt. 167; *Williams v. Waters*, 14 M. & W. 166 (see remarks on this case in *Ware v. Richardson*, 3 Md. 505); *Roberts v. Moseley*, 51 Mo. 282; *Westcott v. Edmunds*, 68 Penn. St. 34; *Edmund's App.*, id. 24.

² *Lancaster v. Dolan*, 1 Rawle, 231; *Smith v. Starr*, 3 Wharton, 63; *Hammersley v. Smith*, 4 Wharton, 129; *McBride v. Smyth*, 54 Penn. St. 250; *Yarnall's App.*, 70 id. 339; *Ogden's App.*, id. 501; 29 Legal Int. (May, 1872) 165; *Wells v. McCall*, 64 Penn. St. 207; *Springer v. Arundel*, id. 218; 7 Phila. R. 224; *Credlant's Est.*, id. 58.

³ *Wells v. McCall*, 64 Penn. St. 207; *Springer v. Arundel*, id. 218.

⁴ *Megargee v. Naglee*, 64 Penn. St. 211; *Yarnall's App.*, 70 id. 339; *Freyvogel v. Hughes*, 56 id. 230.

assigns forever," creates a trust during B.'s coverture and a legal estate afterwards. If C. dies, the legal estate is in B. and her heirs, though B. subsequently marries again.¹

§ 311. As stated, chattel interests in land and personal property were never within the statute of uses, and the legal title to them will remain in the trustee, until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use.² But where the trust is at an end, the title is in the person entitled to the last use;³ and a mere delivery, without other formality, gives such person full and absolute control of the property.⁴ Until such delivery the law cannot recognize any equitable interests in the property.⁵ If the *cestui que trust* is an infant, it is said that the trust will not be executed by delivering the property to him, because he is incapable of assenting to such transfer.⁶

§ 312. In all cases where an estate is given to one for the use of another, in such manner that the statute of uses steps in and executes the estate in the *cestui que trust*, the statute executes in the *cestui que trust* only the estate that the first donee or trustee takes; that is, the statute executes or transfers the exact estate given to the trustee. Therefore, if A. give an estate to B. and his heirs for the use of C. and his heirs, the statute will execute the fee-simple in C. But if

¹ *Moore v. Stinson*, 144 Mass. 594.

² *Ante*, § 303; *Harley v. Platts*, 6 Rich. L. 315; *Rice v. Burnett*, 1 Spear, Eq. 590; *Schley v. Lyon*, 6 Ga. 530; *Doe v. Nichols*, 1 B. & Cr. 336; *Slevin v. Brown*, 3 Mo. 176.

³ *Westcott v. Edmunds*, 68 Penn. St. 34; *Bacon's App.*, 57 id. 500; *Dodson v. Ball*, 60 id. 492; *Barnett's App.*, 10 Wright, 392; *Rife v. Geyes*, 59 Penn. St. 395; *Freyvogle v. Hughes*, 56 id. 228; *Deibert's App.*, No. 1, 83 id. 462; *Schaffer v. Lauretta*, 57 Ala. 14.

⁴ *Ibid.*; *Bringinghurst v. Cuthbert*, 6 Binn. 398; *Lawrie v. Bankes*, 4 K. & J. 142.

⁵ *Ibid.*; *Iorr v. Hodges*, 1 Spear, Eq. 593.

⁶ *Harley v. Platts*, 6 Rich. L. 315. But see *Lawrie v. Bankes*, 4 K. & J. 142; *White v. Baylor*, 10 Ir. Eq. 53; *Bulstrode*, 184.

A. gives an estate to B. for the use of C. and his heirs, the statute will execute only an estate for the life of A. in C.; for that is the extent of the estate conveyed to B. by a deed in that form; that is, by a deed that has no words of inheritance in B.¹ While this is the rule in respect to estates which the statute executes, a very different rule applies to estates upon a trust or use not executed by the statute. In these cases, the extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore, the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given.² On this principle, two rules of construction have been adopted by courts: first, "Wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument,

¹ *Newhall v. Wheeler*, 7 Mass. 189; *Cro. Car.* 231; *Nelson v. Davis*, 35 Ind. 474; *Baptist Soc. v. Hazen*, 100 Mass. 322; *Idle v. Cooke*, 1 P. Wms. 77; *Doe v. Smeddle*, 2 B. & A. 126; *Chambers v. Taylor*, 2 M. & Cr. 376; *Vanhorn v. Harrison*, 1 Dall. 137; *Jackson v. Fish*, 10 Johns. 456. Where a gift is made by deed to individuals and their "successors," without the word "heirs," in trust for or to the use of a corporation or religious society, an inheritance or succession is not created; and if the statute of uses applies to the conveyance, only a life-estate is executed in the corporation or religious society. *Henderson v. Hunter*, 59 Penn. St. 325; *First Bap. Soc. in Andover v. Hazen*, 100 Mass. 322.

² *Cleveland v. Hallett*, 6 Cush. 407; *Gibson v. Montfort*, 1 Ves. 485; *Newhall v. Wheeler*, 7 Mass. 189, 198; *Oates v. Cooke*, 3 Burr. 1684; *Stearns v. Palmer*, 10 Met. 32; *Sears v. Russell*, 8 Gray, 86; *Gould v. Lamb*, 11 Met. 84; *Brooks v. Jones*, id. 191; *Fisher v. Fields*, 10 Johns. 495; *Doe v. Field*, 2 B. & Ad. 564; *Trent v. Hanning*, 7 East, 99; *Doe v. Willan*, 2 B. & A. 84; 8 Vin. Ab. 262, pl. 18; *Shaw v. Wright*, 1 Eq. Cas. Ab. 176, pl. 8; *Brewster v. Striker*, 1 E. D. Smith, 321; *Richardson v. Stodder*, 100 Mass. 528; *Fox v. Storrs*, 75 Ala. 267; *Gosson v. Ladd*, 77 id. 224; *West v. Fitz*, 109 Ill. 425; *Jourolmon v. Massengill*, 86 Tenn. 82. See *Henderson v. Hill*, 9 Lea (Tenn.), 25; *Young v. Bradley*, 101 U. S. 782.

whether to him and his heirs or not.”¹ (a) And, second, “Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires.”²

§ 313. Thus courts have by construction implied an estate in the trustees, although no estate was given them in words; but, in all such cases, the trustees were required to do something that required a legal estate of some kind in them; as,

¹ *Neilson v. Lagow*, 12 How. 98; *Sears v. Russell*, 8 Gray, 86; *Chamberlain v. Thompson*, 10 Conn. 244; *Cleveland v. Hallett*, 6 Cush. 407; *Payne v. Sale*, 2 Dev. & Bat. Eq. 460; *Nichol v. Walworth*, 4 Denio, 385; *Upham v. Varney*, 15 N. H. 462; *King v. Parker*, 9 Cush. 71; *Williams v. First Soc. in Cin.*, 1 Ohio St. 478; *Hawley v. James*, 5 Paige, 318; *Deering v. Adams*, 37 Maine, 265; *Webster v. Cooper*, 14 How. 499; *Combs v. McMichael*, 19 Ala. 751; *Gill v. Logan*, 11 B. Mon. 233; *Powell v. Glen*, 21 Ala. 468; *King v. Akerman*, 2 Black, 408; *Ward v. Amory*, 1 Curtis, C. C. 427; *White v. Baylor*, 10 Ir. Eq. 54; *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 240; *Nelson v. Davis*, 35 Ind. 474; *Kirkland v. Cox*, 94 Ill. 400; *Preachers' Aid Society v. England*, 106 Ill. 128.

² *Norton v. Norton*, 2 Sandf. 296; *Williman v. Holmes*, 4 Rich. Eq. 475; *Watson v. Pearson*, 2 Exch. 593; *Blagrove v. Blagrove*, 4 id. 569; *Brown v. Whiteway*, 8 Hare, 156; *Saye & Sele v. Jones*, 1 Eq. Cas. Ab. 383; 3 Bro. P. C. 113; *Shapland v. Smith*, 1 Bro. Ch. 75; *Heardson v. Williamson*, 1 Keen, 33; *Player v. Nicholls*, 1 B. & Cr. 142; *Warter v. Hutchinson*, 5 Moore, 153; 1 B. & Cr. 721; *Chapman v. Blissett*, Forr. 145; *Doe v. Hicks*, 7 T. R. 433; *Nash v. Coates*, 3 B. & A. 839; *Ex parte Gadsden*, 3 Rich. 468; *Adams v. Adams*, 6 Q. B. 866; *Barker v. Greenwood*, 4 M. & W. 429; *Doe v. Claridge*, 6 C. B. 641; *Ware v. Richardson*, 3 Md. 505; *Pearce v. McClenaghan*, 5 Rich. 178; *Ellis v. Fisher*, 3 Sneed, 231; *Gardenhire v. Hinds*, 1 Head, 402; *Smith v. Metcalf*, id. 64; *Slevin v. Brown*, 32 Mo. 176; *Greenwood v. Coleman*, 34 Ala. 150; *Bryan v. Weems*, 29 Ala. 423; *Koenig's App.*, 57 Penn. St. 552; *Ivory v. Burns*, 56 id. 300; *Wilcox v. Wilcox*, 47 N. H. 488; *McBride v. Smyth*, 59 id. 245; *West v. Fitz*, 109 Ill. 425; *Farmers' Nat'l Bank v. Moran*, 30 Minn. 167; *Davis v. Williams*, 85 Tenn. 646. But see *Watkins v. Specht*, 7 Cold. 585; *McElroy v. McElroy*, 113 Mass. 509.

(a) The trustee takes such an estate only as is adequate to the execution of the trust. *San Francisco, etc., R. Co.*, 107 Cal. 587; *Carney v. Kain*, 40 W. Va. 758. *Morffew v.*

where a testator gave to a married woman the rents and profits of certain lands to be paid her by his executors, it was held to be a devise of the land itself to the executors, although nothing was given them in terms, to enable them to carry out the purposes of the trust.¹ (a) So a power given to executors to rent, lease, repair, and insure, implies a legal title in them.²

§ 314. In the same manner, and for the same reasons, courts have enlarged or extended estates given to trustees. Thus, if A. gives an estate to B. without words of limitation, it is an estate for the life of A.; but if A. gives an estate to B. to pay certain annuities to persons named, for their lives, the trustee takes an estate for the lives of the several annuitants.³

§ 315. So, if land is devised to trustees without the word "heirs," and a trust is declared which cannot be fully executed but by the trustees taking an inheritance, the court will enlarge or extend their estate into a fee-simple, to enable them to carry out the intention of the donor.⁴ (b) Thus, if land is

¹ *Oates v. Cooke*, 3 Burr. 1684; *W. Black.* 543; *Bush v. Allen*, 5 Mod. 63; *Doe v. Woodhouse*, 4 T. R. 89; *Doe v. Homfray*, 6 Ad. & El. 206; *Doe v. Sampson*, 5 East, 162; *Feedey's App.*, 60 Penn. St. 349.

² *Kellam v. Allen*, 52 Barb. 605.

³ *Jenkins v. Jenkins*, Willes, 656; *Shaw v. Weigh*, 2 Str. 798; *Oates v. Cooke*, 3 Burr. 1684, and other cases cited, § 313, n. 2.

⁴ *Villiers v. Villiers*, 2 Atk. 72; *Cleveland v. Hallett*, 6 Cush. 407; *Fisher v. Fields*, 10 Johns. 505; *Ellis v. Fisher*, 3 Sneed, 231; *Rackham v. Siddall*, 1 Mac. & G. 607; 2 Hall & T. 44; *Deering v. Adams*, 37 Maine, 265; *Brown v. Brown*, 12 Md. 87; *Webster v. Cooper*, 14 How. 499; *Blagrove v. Blagrove*, 4 Exch. 569; *Hawkins v. Chapman*, 36 Md. 94;

(a) See *Davies to Jones*, 24 Ch. Mass. 9; *Dorr v. Clapp*, 160 Mass. 538; *Hopkins v. Grimshaw*, 165;

(b) This rule depends upon the intention, which is determined by the whole instrument; and, in general, the word "heirs" is not necessary when the scope of the powers granted requires a fee for their execution. *O'Rourke v. Beard*, 151 U. S. 342, 352; *Paine v. Forsaith*, 84 Maine, 66; *Phillips v. Swank*, 120 Penn. St. 76; *Kennedy v. Gramling*, 33 S. C. 367; *Crane v. Bolles*, 49 N. J. Eq. 373; *Carney v. Kain*, 40 W. Va. 758.

conveyed to trustees, without the word "heirs," in trust to *sell*, they must have the fee, otherwise they could not sell.¹ (a) The construction would be the same if the trust was to sell the whole or a part; for no purchasers would be safe unless they could have the fee;² and a trust to convey or to lease at discretion would be subject to the same rule.³ *A fortiori*, if an estate is limited to trustees and their heirs in trust to sell or mortgage or to lease at their discretion, or if they are to convey the property in fee, or divide it equally among certain persons; for to do any or all these acts requires a legal fee.⁴

§ 316. Where an estate is given to trustees in fee upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees conveying in fee-simple, the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and

Farquharson v. Eichelberger, 15 Md. 72; *Packard v. Marshall*, 138 Mass. 302.

¹ *Gibson v. Montford*, 1 Ves. 491; *Amb.* 95; *Shaw v. Weigh*, 1 Eq. Cas. Ab. 184; *Bagshaw v. Spencer*, 1 Ves. 144; *Glover v. Monckton*, 3 Bing. 113; 10 Moore, 453; *Hawker v. Hawker*, 3 B. & A. 537; *Warter v. Hutchinson*, 5 Moore, 143; 1 B. & C. 121; *Watson v. Pearson*, 2 Exch. 594; *Chamberlain v. Thompson*, 10 Conn. 244; *Doe v. Howland*, 7 Cow. 277; *Jackson v. Robins*, 16 Johns. 537; *Spessard v. Rohrer*, 9 Gill, 262.

² *Bagshaw v. Spencer*, 1 Ves. 144; *Kirkland v. Cox*, 94 Ill. 402.

³ *Booth v. Field*, 2 B. & Ad. 556; *Keen v. Walbank*, id. 554; *Brewster v. Striker*, 2 Comst. 19; *Deering v. Adams*, 37 Maine, 265. But see *Doe v. Cafe*, 7 Exch. 675.

⁴ *Bagshaw v. Spencer*, 1 Ves. 142; *Keane v. Deardon*, 8 East, 242; *Cadogan v. Ewart*, 7 Ad. & El. 636; *Tompkins v. Willan*, 2 B. & A. 84; *Keen v. Walbank*, id. 354; *Garth v. Baldwin*, 2 Ves. 646; *Booth v. Field*, 2 B. & Ad. 564; *Rees v. Williams*, 2 M. & W. 749; *Shelly v. Eldin*, 4 Ad. & El. 582; *Creaton v. Creaton*, 2 Sm. & Gif. 386; *Collier v. Walters*, L. R. 17 Eq. 265.

(a) A deed for church uses to a Catholic bishop and his successors in office, habendum to him "and his successors and assigns forever," gives the bishop power to sell. *Olcott v. Gabert*, 86 Texas, 121. In 1879, the word "heirs" was necessary to convey a fee, unless it was alleged and proved that it was omitted by mistake. *Fulbright v. Yoder*, 113 N. C. 456; *Allen v. Baskerville*, 123 id. 126.

North Carolina, prior to the statute

not by the mere power.¹ Where it is possible that the trustees may be under the necessity of exercising a power over the fee, as by mortgage, a gift to them of the fee will not be cut down;² and the rule is that all the trusts which trustees must execute are to be executed out of the estate given them.³ Lord Talbot said that it was wholly a matter of intention whether the trustee should take a fee or not;⁴ hence, in other cases, it has been said that if no intention appeared upon the face of the will that the trustees were to take anything beyond what was necessary for the execution of the trust, the estate, though limited to them and their heirs, would be cut down to the limit of the trust.⁵ So trustees may take only a *chattel* interest in real estate, although limited to them and their heirs, as where they are to hold it in trust only for a short time to pay debts and legacies, and convey it to the *cestui que trust* when he comes of age or at a certain time;⁶ and this construction will be much stronger if the fee is not limited to them.⁷ The same construction as to the estate of

¹ Fenwick v. Potts, 8 De G., M. & G. 506; Poad v. Watson, 37 Eng. L. & Eq. 112; Watkins v. Frederick, 11 H. L. Cas. 354; Haddelsey v. Adams, 22 Beav. 266. A power of appointment superadded to a life-estate will not enlarge it into a fee; and so a power of appointment added to an estate of inheritance will not cut down the fee. Yarnell's App., 70 Penn. St. 342; Burleigh v. Clough, 52 N. H. 267.

² Fenwick v. Potts, 8 De G., M. & G. 506; Horton v. Horton, 7 T. R. 652; Brown v. Whiteway, 8 Hare, 156.

³ Watson v. Pearson, 2 Exch. 593.

⁴ Chapman v. Blissett, Forr. Cas. t. Talb. 145; Hawkins v. Luscombe, 2 Swanst. 375; Curtis v. Price, 12 Ves. 89; Collier v. McBean, L. R. 1 Ch. 80.

⁵ Doe v. Hicks, 7 T. R. 433; Nash v. Coates, 3 B. & A. 839; Boteler v. Allington, 1 Bro. Ch. 72, is criticised in 7 T. R. 433, by Lord Kenyon; Webster v. Cooper, 14 How. 499; Beaumont v. Salisbury, 19 Beav. 198.

⁶ Goodtitle v. Whitby, 1 Burr. 228; Warter v. Hutchinson, 1 B. & Cr. 721; Stanley v. Stanley, 16 Ves. 491; Badder v. Harris, 2 Dowl. & Ry. 76; Wheedon v. Lea, 3 T. R. 41; Pratt v. Timins, 1 B. & Ald. 530; Brune v. Martin, 8 B. & Cr. 497; Tucker v. Johnson, 16 Sim. 341; Glover v. Monckton, 3 Bing. 13; Doe v. Davies, 1 Q. B. 430; Player v. Nicholls, 1 B. & Cr. 336; Cadogan v. Ewart, 7 Ad. & E. 136, 667.

⁷ Pearce v. Savage, 45 Maine, 90; Boraston's Case, 3 Co. 19; Player v. Nicholls, 1 B. & Cr. 336.

trustees will prevail where the limitation is to them and their heirs, to their use and behoof forever, whether it is contained in a deed or will.¹ Where a gift was made to one in trust for his wife for life, and to her heirs forever, subject to her husband's curtesy, the trustee took an estate for the life of his wife only, and at her death the trust ceased.²

§ 317. Where a testator gave all his real and personal estate to trustees, "their executors, administrators, and assigns," in trust to pay several annuities, sums, and legacies, on the deficiency of the personal estates out of the rents, issues, and profits arising from the real estate, and gave the residue over, Lord Hardwicke held that if the annual reception of the rents and profits would satisfy the purposes of the trust, the trustees would take only a chattel interest in the real estate; but, as the land must be sold for the payment of the legacies, the trustees took the fee.³ The court, however, is always reluctant to enlarge an estate in trustees beyond the terms of the gift; and it will not be done unless it is necessary for the execution of the trust.⁴ Where it is plain that the trustees are to pay all charges, debts, legacies, annuities, or other moneys out of the rents and profits of the estate, and no anticipation of the income is necessary or contemplated for that purpose, they will take a chattel interest, or a term for years necessary for the purpose, and not the legal inheritance;⁵ and if the testator use an inartificial word, as that the trustees are to lend the estate, they will not

¹ *Hawkins v. Luscombe*, 2 Swanst. 375; *Curtis v. Price*, 12 Ves. 89; *Venables v. Morris*, 7 T. R. 342; *Watkins v. Specht*, 7 Cold. 585. But see *Cooper v. Kynock*, L. R. 8 Ch. 402.

² *Noble v. Andrews*, 37 Conn. 346.

³ *Gibson v. Montfort*, 1 Ves. 485; *Amb. 93*; *Woodgate v. Flint*, 44 N. Y. 21, n.

⁴ *Heardson v. Williamson*, 1 Keen, 33; *White v. Simpson*, 5 East, 162; *Wykham v. Wykham*, 3 Taunt. 316; 11 East, 458; 18 Ves. 395, 416; *Ackland v. Lutley*, 9 Ad. & El. 879; *Doe v. Claridge*, 6 C. B. 641.

⁵ *Cordall's Case*, Cro. Eliz. 315; *Carter v. Bernadiston*, 1 P. Wms. 589; *Hitchens v. Hitchens*, 2 Vern. 404; *Wykham v. Wykham*, 18 Ves. 416; *Heardson v. Williamson*, 1 Keen, 33; *Co. Litt. 42 a.*

take a fee.¹ A trust to preserve contingent remainders, without limitation to heirs, will not be enlarged; for the trust does not require an estate of inheritance.²

§ 318. If, however, the subject-matter of the gift to trustees is personal estate, the whole legal interest will vest in them without words of limitation. They may generally dispose of personal estate absolutely, being compelled to account for it.³

§ 319. In England, a distinction is kept up between limitations to trustees in wills and deeds. Thus it is said that in wills there is more room for construction to ascertain and carry into effect the intention of testators, and that in deeds the rules of property are carried into effect with more strictness. So it is said, that if in a deed an estate is given to a trustee *and his heirs*, there is no power to abridge the estate on the ground that the purposes of the trust do not require a fee in the trustees; and that, on the other hand, when an estate is given by deed to a trustee in trust without words of inheritance, there is no authority to enlarge the estate in the trustee because the purposes of the trust seem to require a larger estate. There is a very respectable amount of authority, even in England, that an estate given to trustees and their heirs in trust, by a deed, may be restricted to an estate for the life of another, where the purposes of the trust can

¹ *Payne v. Sale*, 2 Dev. & Bat. Eq. 455.

² *Thong v. Bedford*, 1 Bro. Ch. 14; *Webster v. Cooper*, 14 How. 499; *Beaumont v. Salisbury*, 19 Beav. 198; Co. Litt. 290 b; Butl. n. viii.

³ *Dinsmore v. Biggert*, 9 Barr. 135; *Nicoll v. Walworth*, 4 Denio, 385; *Chamberlain v. Thompson*, 10 Conn. 244; *Combry v. McMichael*, 19 Ala. 751; *Elton v. Shepherd*, 1 Bro. Ch. 531; 2 Jarm. Pow. Dev. 631; *Doe v. Willan*, 2 B. & Ald. 84; *Smith v. Thompson*, 2 Swan, 386; *Foster v. Coe*, 4 Lans. 59; *Fellows v. Heermans*, id. 230; and *Aiken v. Smith*, 1 Sneed, 304, held that when personalty was limited to trustees, their heirs and executors, in trust for a married woman for life, and after her death to be equally divided among her children or to be conveyed to her children, the trustee took an estate for her life only, and that at her death the trust ceased. These cases, however, are not consistent with principle or authority, and probably would not be followed.

all be answered by such an estate in the trustee.¹ In the cases sustaining the power to abridge the legal operation of the words of inheritance in a deed, there were some further limitations of the estate, either to the trustees or to third persons, inconsistent with the idea of a fee in the trustees.² The authorities, however, greatly preponderate, that courts cannot look to the equitable interests given or created by a *deed*, in order to determine whether the trustee under it takes a fee or not, if there are plain words of inheritance in it. Lord Eldon said, that it appeared to him very difficult to apply the doctrine to a *deed*, and he refused thus to cut down an estate.³ While there is this conflict of authority upon the point, whether an estate given in fee by deed to trustees can be abridged to the extent of the trust, there is said to be no authority in England that an estate given by a deed to trustees without words of inheritance can be enlarged to suit the purposes of the trust;⁴ although there is one expression by Lord Hardwicke that such enlargement is within the power of the court when the circumstances require it.⁵

§ 320. In the United States, the distinction between deeds and wills, in respect to the trustees' estate, has not been kept up; and the general rule is, that, whether words of inheritance in the trustee are or are not in the *deed*, the trustee will take an estate adequate to the execution of the trust, and no more nor less.⁶ Courts will abridge the estate where

¹ *Curtis v. Price*, 12 Ves. 89; *Venables v. Morris*, 7 T. R. 342, 438; *Doe v. Hicks*, id. 437; *Brune v. Martyn*, 8 B. & Cr. 497; *Beaumont v. Salisbury*, 19 Beav. (198, where the authorities were commented on); *Lewis v. Rees*, 3 K. & J. 132; *Cooper v. Kynock*, L. R. 8 Ch. 403.

² *Ibid.*

³ *Wykham v. Wykham*, 18 Ves. 395; *Colomere v. Tyndall*, 2 Y. & J. 605; Co. Litt. 20 b; Butl. n. viii.; *Dinsmore v. Biggert*, 9 Barr, 123; *Lewis v. Rees*, 3 K. & J. 132, where the authorities are reviewed by Wood, V. C.

⁴ *Pottow v. Fricker*, 6 Exch. 570; *Hill on Trustees*, 251.

⁵ *Villiers v. Villiers*, 2 Atk. 72.

⁶ *King v. Parker*, 9 Cush. 71; *Stearns v. Parker*, 10 Met. 32; *Gould v.*

words of inheritance are used, if the execution of the trust does not require a fee; and so they will enlarge the estate if no words of inheritance are used in a deed.¹ In examining the cases, however, where a trust ceases upon the death of a tenant for life, or upon the death of a person for whom the property was held in trust, care must be taken that this principle is not confounded with another. Thus, where an estate is given to trustees and their heirs in trust to pay the income to A. during her life, and at her decease to hold the same for the use of her children or her heirs, or for the use of other persons named, the trust ceases upon the death of A. for the reason that it remains no longer an *active* trust; the statute of uses immediately executes the use in those who are limited to take it after the death of A., and the trustees cease to have anything in the estate, not because the court has abridged their estate to the extent of the trust, but because, having the fee or legal estate, the statute of uses has executed it in the *cestui que trust*.² But where the operation of the statute of uses does not put an end to the trust,

Lamb, 11 Met. 84; Cleveland v. Hallett, 6 Cush. 403; Att. Gen. v. Federal Street Meeting House, 3 Gray, 1; Wright v. Delafield, 23 Barb. 498; Fisher v. Fields, 10 Johns. 105; Welch v. Allen, 21 Wend. 147; Rutledge v. Smith, 1 Busb. Eq. 283; Liptrot v. Holmes, 1 Kelly (Ga.), 390; Cooper v. Kynock, L. R. 8 Ch. 402.

¹ Neilson v. Lagow, 12 How. 110; North v. Philbrook, 34 Maine, 537; Rutledge v. Smith, 1 Busb. Eq. 283; Cleveland v. Hallett, 6 Cush. 406. See to the contrary, Miles v. Fisher, 10 Ohio, 1.

² Parker v. Converse, 5 Gray, 336; Greenwood v. Coleman, 34 Ala. 150; Churchill v. Corker, 25 Ga. 479. See Vallette v. Bennett, 69 Ill. 336. And whenever the active duties required of the trustee have been performed and the purpose of the trust ceases, having no longer any proper object to serve, the legal estate is executed in the *cestui que trust*, without further action by the court or the trustee. Stoke's App., 80 Penn. St. 337; Dodson v. Ball, 60 id. 492; Wells v. McCall, 64 id. 207; Yarnell's App., 70 id. 335; Meacham v. Steele, 93 Ill. 135. And this is always so when an estate of inheritance or an absolute estate is put in trust for coverture. Megargue v. Naglee, 64 Penn. St. 216; Lynch v. Swayne, 83 Ill. 336. If the trust property is to be sold and proceeds distributed to the beneficiaries, there is still an active trust, and the estate is not executed in the *cestui*. Kirkland v. Cox, 94 Ill. 402; Read v. Power, 12 R. I. 16.

and where it is necessary to enlarge an estate although there are no words of inheritance, courts have been obliged to resort to different expedients to avoid the technical rules of law upon the subject of inheritances.¹ In those States where no technical or other words are necessary to convey a fee no difficulties arise.

¹ *Williams v. First Presby. Soc.*, 1 Ohio St. 498; *Rutledge v. Smith*, 1 Busb. Eq. 283; *Co. Litt.* 385, 386; 1 *Prest. Touchstone*, 182; *Rawle on Covenants*, 344; *Shaw v. Galbraith*, 7 Penn. St. 112.

CHAPTER XI.

PROPERTIES AND INCIDENTS OF THE LEGAL ESTATE IN THE
HANDS OF TRUSTEES.

- § 321. Common-law properties attach to estates in trustees.
- § 322. Dower and curtesy in trust estates.
- §§ 323, 324. Dower and curtesy in equitable estates of *cestui que trust*.
- § 325. Forfeiture and escheat of trust estates.
- § 326. Trustees must perform duties of legal owners.
- § 327. Forfeiture and escheat of the equitable estates of *cestui que trust*.
- § 328. Suits concerning legal title must be in name of trustee.
- § 329. Who has possession and control of trust estates.
- §§ 330, 331. Who has possession of personal estate. Rights and privileges of trustees.
- § 332. Who proves debt against bankrupt.
- § 333. Who has the right of voting.
- § 334. Trustee may sell the legal estate.
- § 335. May devise the legal estate. But see § 341.
- § 336. By what words in a devise the trust estate passes.
- § 337. Where a trust estate passes by a devise, and where not.
- § 338. The interest of a mortgagee in fee.
- § 339. Propriety of devising a trust estate.
- § 340. Whether a devisee can execute the trust.
- § 341. Rule in New York, &c.
- § 342. Where a testator has contracted to sell an estate.
- §§ 343, 344. Rights of the last surviving trustee, and his heirs or executors.
- § 345. Trust property does not pass to bankrupt trustee's assignee.
- § 346. A disseizor of a trust estate is not bound by the trust.
- §§ 347, 348. Merger of the equitable and legal titles.
- §§ 349, 350. Presumption of a conveyance or surrender by trustee to *cestui que trust*.
- §§ 351-353. Where the presumption will be made, and where not.
- § 354. Must be some evidence on which to found the presumption.
- § 355. Is made in favor of an equitable title, not against it.

§ 321. As a general rule, the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents, as if the trustee were the absolute beneficial owner. The legal title vests in him, together with all the appurtenances and all the covenants that run with the land.¹ The trustee may sell and devise it, or mort-

¹ Devin v. Henderchott, 32 Iowa, 192.

gage it, or it may be taken on execution. It may be forfeited, and it will escheat on failure of heirs, and so it will descend to heirs on the death of the trustee.¹ All these properties and incidents attach to the legal estate at common law, whether in the hands of a trustee or of an absolute owner; but these incidents do not generally interfere with the proper execution of the trust, for all conveyances and all incumbrances made or imposed upon the estate by the trustee, for other purposes than those of the trust, or in breach of the trust, are utterly disregarded by a court of equity, whatever may be the effect of such conveyances or incumbrances in a court of common law.² And as the trustee may in a court of law, as a general rule, deal with the legal estate in his hands, as if he was the absolute owner, so the *cestui que trust* in a court of equity may deal with the equitable estate in him: he is the beneficial and substantial owner, and in the absence of any disability, — that is, if he is *sui juris*, — he may sell and dispose of it; and any legal conveyance of it will have in equity the same operation upon the equitable estate as a similar conveyance of the legal estate would have at law upon the legal estate.³ (a) While a trust for the general benefit of one *sui juris*, not confined to maintenance, may create a transmissible interest, yet a trust for the maintenance of an imbecile son will not create a transmissible interest, although the will contains a limitation over to the issue of such son.⁴ In case of a trust for the use of a married woman as if she were sole, the husband has no control over the property, and cannot of himself lease or otherwise dispose of it.⁵

¹ *Zabriskie v. Morris & Essex R. Co.*, 33 N. J. Eq. 22.

² *Leake v. Leake*, 5 Ir. Eq. 366.

³ *Matthews v. Wardel*, 10 G. & J. 443; *Burgess v. Wheate*, 1 Eden, 226; *Croxall v. Sherard*, 5 Wall. 268; *Reid v. Gordon*, 35 Md. 184; *Boteler v. Allington*, 1 Bro. Ch. 72; *Campbell v. Prestons*, 22 Grat. 396.

⁴ *Gray v. Corbit*, 4 Del. Ch. 135.

⁵ *Panill v. Coles*, 81 Va. 380.

(a) See *Robinson v. Pierce* (Ala.), 24 So. 984.

§ 322. The legal estate in the hands of a trustee was subject at common law to dower and curtesy;¹ but, as those who take in dower or curtesy take by operation of law, they are subject to the same equities as the original trustee; therefore, if the widow of a trustee should take dower in a trust estate, she would take her dower subject to the same trusts that the estate was under in the hands of her husband. It would thus be of no benefit to her; and it is now understood to be the equitable rule, that a widow has no dower in the lands held by her husband as trustee, and the same observations apply to the right of curtesy in trust estates.² (a) If, however, the equitable estate meets the legal estate in the same holder, the equitable merges in the legal estate, and dower and curtesy will attach;³ and so they will attach so far as there is a beneficial interest in the trustee.⁴

§ 323. While speaking upon this subject, it may be said that, until lately, in England, the widow of a *cestui que trust* had no dower in his equitable estate, or his equitable fee in lands.⁵ A widow was not dowable of a use, and lands were frequently conveyed to uses to defeat the right of dower.⁶

¹ Bennett v. Davis, 2 P. Wms. 319; Noel v. Jevon, Freem. 43; Nash v. Preston, Cro. Car. 190; Casborne v. English, 2 Eq. Cas. Ab. 728; Hinton v. Hinton, 2 Ves. 631; 1 Sugd. V. & P. 358.

² King v. Bushnel, 121 Ill. 656; Derush v. Brown, 8 Ham. 412; Green v. Green, 1 id. 249; Cooper v. Whitney, 3 Hill, 97; Powell v. Monson, etc., 3 Mason, 364; Bartlett v. Gouge, 5 B. Mon. 152; Cowman v. Hall, 3 Gill & J. 398; Robison v. Codman, 1 Sumn. 129; Dean v. Mitchell, 4 J. J. Marsh. 451; Ray v. Pung, 5 B. & Ald. 561; Gomez v. Tradesmen's Bank, 4 Sandf. 102.

³ Hopkinson v. Dumas, 42 N. H. 303.

⁴ 4 Kent, 43, 46; Prescott v. Walker, 16 N. H. 343.

⁵ Dixon v. Saville, 1 Bro. Ch. 326; Maybury v. Brien, 15 Pet. 38; D'Arcy v. Blake, 2 Sch. & Lef. 387; 2 Eq. Cas. Ab. 384; 4 Kent, 43; 1 Rep. Hus. & Wife, 354; Banks v. Sutton, 2 P. Wms. 716, was overruled; Park on Dow. 138. In Pennsylvania, however, a wife can have dower in both legal and equitable estates. Dubs v. Dubs, 31 Penn. St. 154.

⁶ Wms. Real Prop. 134-136; Perkins, § 349.

(a) See Lewin on Trusts (10th ed.), 900; 1 Ames on Trusts (2d ed.), 374, 375, 383.

Thus, if a man before marriage conveyed his lands to trustees upon trust for himself and his heirs in fee, or if after marriage he purchased lands, and took the conveyance to a trustee upon a trust for himself and his heirs, his wife had no right of dower.¹ But if lands were settled on trustees upon a trust for a woman and her heirs in fee, her husband was entitled to his curtesy.² This anomaly grew up from an attempt to give to equitable estates the same incidents that belong to legal estates; but when it was proposed to assign dower to a widow out of her husband's equitable estate, it was found that it would disarrange so many titles and estates that the attempt was abandoned. The same inconvenience did not arise in allowing curtesy to a husband, for the reason that a wife could not convey her equitable interests without her husband joining in the act, and thus, to allow him curtesy would not affect titles to any considerable extent.³ But by a late statute a wife is now dowable in equity of all the lands in which her husband dies possessed of a beneficiary interest.⁴

§ 324. The general rule in the United States is, that a wife is dowable in equity in all lands to which the husband had a complete⁵ equitable title at the time of his death.⁶ (a) This

¹ Co. Litt. 208 a (n. 105).

² *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Chaplin v. Chaplin*, 3 P. Wms. 234; *Att. Gen. v. Scott*, t. Talb. 139; *Watt v. Ball*, 1 P. Wms. 108; *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 Bro. Ch. 405.

³ *Chaplin v. Chaplin*, 3 P. Wms. 234; *Att. Gen. v. Scott*, t. Talb. 139; *Burgess v. Wheat*, 1 Ed. 196; *Dixon v. Saville*, 1 Bro. Ch. 327; *Banks v. Sutton*, 2 P. Wms. 713; *Casburne v. Casburne*, 2 J. & W. 204; *Watt v. Ball*, 1 P. Wms. 109; *D'Arcy v. Blake*, 2 Sch. & Lef. 388.

⁴ 3 & 4 Wm. IV., c. 105; 1 Spence, Eq. Jur. 505.

⁵ It must be such a title as equity would enforce. *Efland v. Efland*, 96 N. C. 488.

⁶ *Shoemaker v. Walker*, 2 Serg. & R. 554; *Dubs v. Dubs*, 31 Penn. St. 154; *Reid v. Morrison*, 12 Serg. & R. 18; *Miller v. Beverly*, 1 Hen. & M.

(a) Land purchased by a husband another person by his direction to with his own money and conveyed to defeat dower is, under a statute by

rule, it is presumed, would apply in all the States where the common-law principles of dower prevail, except in Maine and Massachusetts, where a wife is not entitled to dower in her husband's equitable estates.¹ The husband also in most States has curtesy in the equitable estates of his wife.² But the wife must be actually in possession of her equitable interest: a mere right not in possession is not enough to entitle the husband to curtesy.³ But the husband's curtesy will not

365; *Clairborne v. Henderson*, 3 id. 322; *Lawson v. Morton*, 6 Dana, 471; *Bowie v. Berry*, 1 Md. Ch. 452; *Miller v. Stump*, 3 Gill, 304; *Hawley v. James*, 5 Paige, 318; *Thompson v. Thompson*, 1 Jones (N. C.), 430; *Gully v. Ray*, 18 Ky. 113; *Barnes v. Gay*, 7 Iowa, 26; *Lewis v. James*, 8 Humph. 537; *Rowton v. Rowton*, 1 Hen. & M. 92; *Gillespie v. Somerville*, 3 St. & P. 447; *Robinson v. Miller*, 1 B. Mon. 93; *Smiley v. Wright*, 2 Ohio, 512; *Davenport v. Farrar*, 1 Seam. 314; *Bowers v. Keesecker*, 14 Iowa, 301; *Peay v. Peay*, 2 Rich. Eq. 409; *Mershon v. Duer*, 40 N. J. Eq. 333, a resulting trust in husband.

¹ *Hamlin v. Hamlin*, 16 Maine, 141; *Reed v. Whitney*, 7 Gray, 533; *Lobdell v. Hayes*, 4 Allen, 187.

² *Tillinghast v. Coggeshall*, 7 R. I. 383; *Nightingale v. Hidden*, id. 115; *Dubs v. Dubs*, 31 Penn. St. 154; *Alexander v. Warrance*, 17 Mo. 228; *Robinson v. Codman*, 1 Sumn. 128; *Gardner v. Hooper*, 3 Gray, 404; *Houghton v. Hapgood*, 13 Pick. 154; *Rawlings v. Adams*, 7 Md. 54; and see *Fletcher v. Ashburner*, 1 Bro. Ch. 503, and Amer. notes; 1 Green. Cruise, 147, n; *Cushing v. Blake*, 30 N. J. Eq. 689.

³ *Parker v. Carter*, 4 Hare, 413; *Sartill v. Robeson*, 2 Jones, Eq. 510; *Pitt v. Jackson*, 2 Bro. Ch. 51; *Morgan v. Morgan*, 5 Madd. 408; 4 Kent, Com. 31.

which such a naked trust "is deemed a direct conveyance or devise to the beneficiary," subject to dower. *Stroup v. Stroup*, 140 Ind. 179, 185. *Contra*, under the New York statute. *Phelps v. Phelps*, 143 N. Y. 197. The widow of a *cestui que trust* is not entitled to dower when there is an equitable conversion of land bought by the trustee into personalty. *Hunter v. Anderson*, 152 Penn. St. 386. So when trust realty is so devised that

the *cestui que trust* cannot be seized thereof during the parties' married life. *Kenyon v. Kenyon*, 17 R. I. 539. An inchoate right of dower is not such an interest in land that, when the land is taken by the right of eminent domain, the wife can apply to a court of equity to obtain the benefit of such interest. *Flynn v. Flynn*, 171 Mass. 312; see *Wheeler v. Kirtland*, 27 N. J. Eq. 534.

be defeated by the negligence of the trustee, as where money is directed to be laid in land in such manner that the husband would have been entitled to his curtesy, and the trustee neglected to invest the money during the life of the wife, the husband was held to be entitled to his curtesy.¹ Nor will a trust for the separate use of the wife exclude the husband's curtesy, if at her decease the estate is to go to her heirs.²

§ 325. At common law if a person holding land committed treason or felony, he forfeited his land to the crown; and if he died without heirs, the land escheated to the crown or to his superior lord. Exactly the same incidents applied to land held in trust for another, if the trustee committed a treason or felony, or died without heirs.³ This rule of law has been changed in England by statute.⁴ At the present day the land either will not be forfeited or escheat, or the crown or superior lord will take it subject to the same equities under which the trustee held it. In the United States, either the land would not be forfeited or escheat, by reason of the failure or incapacity of the trustee or his heirs, or the State would hold it, subject to all the equities it was under in the hands of the trustee. It might not go to the State, for the reason that, if trustees are wanting, courts will appoint new trustees; and if, for any reason, the trust estate should vest in the State, care would be taken that all the rights of the *cestui que trust* should be protected. There are

¹ *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 Bro. Ch. 405; *Parker v. Carter*, 4 Hare, 413; *Casborne v. Scarfe*, 1 Atk. 609.

² *Roberts v. Dixwill*, 1 Atk. 609; *Hearle v. Greenbank*, 3 Atk. 715; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Bennett v. Davis*, 2 P. Wms. 316; *Tillinghast v. Coggeshall*, 7 R. I. 383.

³ *Burgess v. Wheat*, 1 Ed. 177; 1 Bro. Ch. 123; *Hovenden v. Annesley*, 2 Sch. & Lef. 617; *Eales v. England*, Pr. Ch. 200; *Pawlett v. Att. Gen.* Hard. 467; *Att. Gen. v. Leeds*, 2 M. & K. 243; *Penn v. Baltimore*, 1 Ves. 453; *Williams v. Lonsdale*, 3 Ves. Jr. 752; *Reeves v. Att. Gen.*, 2 Atk. 223; *Geary v. Bearcroft*, Cart. 67; *King v. Mildmay*, 5 B. & Ad. 254; *Wilks's Case*, Lane, 54; *Scounden v. Hawley*, Comst. 172.

⁴ 4 & 5 Wm. IV. c. 23; 39 & 40 Geo. III. c. 88; *Hughes v. Wells*, 9 Hare, 749; 14 Vic. c. 60.

statutes in most of the States determining the rights of the *cestui que trust* in such cases.

§ 326. The trustee is so far clothed with the legal title and all its incidents, that he must perform all the duties of the holder of the legal estate.¹

§ 327. Before the statute of uses, the estate of the *cestui que use* was not forfeited for crime, and did not escheat upon failure of heirs; but the feoffee to uses held the estate absolutely as his own.² And the same rule was afterwards followed in regard to trusts.³ Although it was enacted by statute that the *cestui que use* or *cestui que trust* should forfeit his equitable interest upon conviction for *treason*,⁴ yet the law never went further; and if the *cestui que trust* committed a *felony*, so that he could no longer claim his equitable rights, the trustee continued to hold the lands for his own use discharged of the trusts.⁵ And so it was held, after great debate in *Burgess v. Wheat*, that if the *cestui que trust* left no heirs, the trust estate of inheritance did not escheat, but that the trustee thenceforth held the estate discharged of the trust.⁶ This case has been doubted,⁷ but it has been followed as the law.⁸ (a) This is upon the principle, that there is no want of a tenant to the land, the trustee being clothed with all the rights of ownership against all the world

¹ *Wilson v. Hoare*, 2 B. & Ad. 350; *Trinity Coll. v. Brown*, 1 Vern. 441; 2 Ld. Raym. 994; *Bath v. Abney*, 1 Dick. 260; *Carr v. Ellison*, 3 Atk. 73; 1 Cru. Dig. 305.

² *Burgess v. Wheat*, 1 Ed. 199, per Sir Thomas Clarke, M. R.

³ *Att. Gen. v. Sands*, 1 Hale, P. C. 249.

⁴ 33 Hen. VIII. c. 20; 1 Hale, P. C. 248.

⁵ *Att. Gen. v. Sands*, 1 Hale, P. C. 249.

⁶ *Burgess v. Wheat*, 1 Ed. 177; 1 Black. 123; 1 Bro. Ch. 123.

⁷ *Middleton v. Spicer*, 1 Bro. Ch. 204; *Fawcett v. Lowther*, 2 Ves. 300; *Sweeting v. Sweeting*, 33 L. J. Ch. 211.

⁸ *Taylor v. Haygarth*, 14 Sim. 8; 8 Jur. 185; *Henchman v. Att. Gen.*, 3 Myl. & K. 485; *Onslow v. Wallis*, 1 Mac. & G. 506; 1 Hall & T. 513; *Rittson v. Stordy*, 3 Sm. & Gif. 230; *Barrow v. Wadkin*, 24 Beav. 1.

(a) See *In re Bacon's Will*, 31 Ch. D. 460.

except the *cestui que trust*, and those claiming under him. But this principle does not apply to chattels, where there can be no tenant, nor to leaseholds,¹ nor to an equity of redemption.² In the United States, trustees would hold personal property subject to the right of the State as *ultima hæres*, in case the *cestui que trust* died without heirs or next of kin; and it is conceived that they would hold real estate under the same rule.³

§ 328. It is the duty of the trustee to defend and protect the title to the trust estate; and, as the legal title is in him, he alone can sue and be sued in a court of law; the *cestui que trust*, the absolute owner of the estate in equity, is regarded in law as a stranger.⁴ The rule is carried to the extent that the grantee of the trustee can alone maintain an action upon the legal title, although the conveyance to him was a breach of the trust.⁵ To protect himself, the trustee must defend the

¹ Middleton v. Spicer, 1 Bro. Ch. 201; Walker v. Denne, 2 Ves. Jr. 170; Barclay v. Russell, 3 Ves. 424; Henchman v. Att. Gen., 3 Myl. & K. 485; Taylor v. Haygarth, 14 Sim. 8; Cradock v. Owen, 2 Sm. & Gif. 241; Bishop v. Curtis, 17 Jur. 23; Powell v. Merritt, 22 L. J. 208; 1 Sm. & Gif. 381.

² Down v. Morris, 3 Hare, 394.

³ McCaw v. Galbraith, 7 Rich. L. 75; Darrah v. McNair, 1 Ash. 236; Matthews v. Ward, 10 G. & J. 443; 4 Kent, 425; Crane v. Ruder, 21 Mich. 25.

⁴ May v. Taylor, 6 M. & Gr. 261; Gibson v. Winter, 5 B. & Ad. 96; Allen v. Imlett, Holt, 641; Goodtitle v. Jones, 7 T. R. 47; Baptist Soc. v. Hazen, 100 Mass. 322; Cox v. Walker, 26 Me. 504; Beach v. Beach, 14 Vt. 28; Moore v. Burnet, 11 Ohio, 334; Wright v. Douglass, 3 Barb. 59; Matthews v. Ward, 10 G. & J. 443; Mordecai v. Parker, 3 Dev. 425; Finn v. Hohn, 21 How. 481; Hooper v. Scheimer, 23 How. 235; Fitzpatrick v. Fitzgerald, 13 Gray, 400; Chapin v. Universalist Society, 8 Gray, 581; Crane v. Crane, 4 Gray, 323; Davis v. Charles River Railroad, 11 Cush. 506; Raymond v. Holden, 2 Cush. 268; Moody v. Farr, 33 Miss. 192; Adler v. Sewell, 20 Ind. 598; Western R. R. Co. v. Nolan, 48 N. Y. 517; Church v. Stewart, 27 Barb. 553; Ryan v. Bibb, 46 Ala. 323; Ponder v. McGruder, 42 Ga. 242; Kirkland v. Cox, 94 Ill. 402.

⁵ Reece v. Allen, 5 Gilm. 241; Taylor v. King, 6 Munf. 358; Canoy v. Troutman, 7 Ired. 155; Cary v. Whitney, 48 Maine, 516; Matthews v. McPherson, 65 N. C. 189; Phillips v. Ward, 51 Mo. 295.

title if he is sued. It is his duty to give the *cestui que trust* notice of a suit hostile to his interests, and to defend the action in good faith. To act otherwise would be a breach of trust.¹ A trustee may also maintain an action for any trespass upon the land;² but if the *cestui que trust* is in the actual possession of it, he may maintain an action for any injury done to his possession.³ If, however, the trust is terminated by operation of law or otherwise, and the property has vested in the *cestui que trust*, he may after that time maintain an action upon the title;⁴ and so if there has been a conveyance or surrender by the trustees to the *cestui que trust*,⁵ or a presumption of a surrender from the fact that the purposes of the trust are all accomplished.⁶ (a) If the trustee is in possession, he must sue for all injuries to the possession, and he is the proper person to maintain the claim for damages for flowing the land under the mill acts, or for taking it for railroad purposes, turnpikes, or public highways.⁷ (b) In Pennsylvania, however, the action of ejectment is an equitable action, and the *cestui que trust* may maintain the suit if he is entitled to possession, or it may be maintained by the trustee.⁸ (c) In a few States there are

¹ Mackay v. Coates, 70 Penn. St. 350; Warland v. Colwell, 10 R. I. 369.

² Walker v. Fawcett, 7 Ired. 44.

³ Cox v. Walker, 26 Maine, 504; Stearns v. Palmer, 10 Met. 32; Second Cong. Soc. North Bridgewater v. Waring, 24 Pick. 309.

⁴ Nicoll v. Walworth, 4 Denio, 385; Matthews v. McPherson, 65 N. C. 189; Lockhart v. Canfield, 49 Miss. 470.

⁵ Den ex d. Obert v. Bordine, 1 Spencer (N. J.), 394; Hopkins v. Ward, 6 Munf. 38; Doggett v. Hart, 5 Fla. 215.

⁶ Ibid.

⁷ Davis v. Charles River R. R. Co., 11 Cush. 506; Woodruff v. Orange, 32 N. J. 49.

⁸ School Dir. v. Dunkleberger, 6 Barr. 29; Presbyterian Cong. v.

(a) If a married woman assigns a mortgage to a trustee, and the extent of the trust cannot be definitely determined, the trust is presumed to continue only during her coverture. Bradford v. Burgess (R. I.), 38 Atl.

(b) See Lewin on Trusts (10th ed.), 828; 1 Ames on Trusts (2d ed.), 255.

(c) See Chamberlain v. Maynes, 180 Penn. St. 39; Simmons v. Richardson, 107 Ala. 697.

statutes or codes which enact that parties beneficially interested in the subject-matter of the suit shall be made the parties' plaintiffs; but the right or duty of trustees, or persons holding the legal title in a fiduciary capacity, to sue is generally provided for.¹ Merely nominal trustees, as officers of a town or parish, cannot sue in their own name.²

§ 329. Whether the trustees are entitled to the possession, control, and management of real estate, as against the *cestui que trust*, depends upon the whole scope of the settlement, and the nature of the duties which the trustees are required to perform. A fund in trust for the sole use of a person, with power to dispose of the fund by will, does not give the *cestui* a right to recover possession of the fund from the trustee.³ If the entire interest is vested in the trustees, and they are to manage the property, keep it insured, and pay taxes, premiums, annuities, and other charges out of the income, the court will imply that the trustees are to have the possession, and will not take it from them, unless there is some very clear intention expressed to control such directions.⁴ (a)

Johnston, 1 Watts & S. 56; Kennedy v. Fury, 1 Dall. 76; Hunt v. Crawford, 3 Pa. 426; Caldwell v. Lowden, 3 Brews. 63.

¹ See Codes of New York and Ohio, McGill v. Doe, 9 Ind. 306.

² Regina v. Shee, 4 Q. B. 2; Manchester v. Manchester, 17 Q. B. 859; Queen v. Commissioners, 15 Q. B. 1012; Connor v. New Albany, 1 Blackf. 88.

³ Barkley v. Dosser, 15 Lea (Tenn.) 529.

⁴ Tidd v. Lister, 3 Madd. 429; Naylor v. Arnitt, 1 R. & M. 501; Young v. Miles, 10 B. Mon. 290; Blake v. Bunbury, 1 Ves. Jr. 194, 514; 4 Bro. Ch. 21; Jenkins v. Milford, 1 J. & W. 629; Moseley v. Marshall, 22 N. Y. 200; Marshall v. Sladen, 4 De G. & Sm. 468; Matthews v. McPherson, 65 N. C. 189.

(a) Now, in England, the Settled Land Acts have granted such powers to and imposed such duties on tenants for life that, if the estate and trustees can be well protected by reasonable safeguards, an equitable tenant for life is to be let into possession and enabled personally to exercise these powers and discharge these duties when there is no urgent counter reason. See *In re Wythes*, [1893] 2 Ch. 369; *In re Bagot*, [1894] 1 Ch. 177; *In re Newen*, 2 id. 297; *In re Bentley*, 54 L. J. Ch. 782.

And the trustees may purchase whatever is necessary, and cultivate the land instead of renting it.¹ If the *cestui que trust*, or tenant for life, is a *female*, the court will continue the possession in the trustees for her protection in case of marriage.² So, if the trustees themselves have a beneficial interest, or a reversion or remainder after the death of the tenant for life, the court will continue the possession in them.³ (a) If, however, the plain intention of the settlement is that the *cestui que trust* is to have the possession, then all other considerations must give way; as, if it is plain that the settlor intended the estate to be a place of residence for the *cestui que trust*, the intention must be carried out.⁴ If the tenant for life takes a *legal* estate, subject to a charge, he will of course be entitled to the possession, so long as he discharges all incumbrances thus put upon the estate.⁵ But if the tenant for life allows the annuities or other charges to fall in arrears, the trustees must take possession for the security of the annuitants, and must continue the possession until ample security is made for the future.⁶ Security may be required in any case where the tenant for life is let into possession.⁷

§ 330. The trustee is entitled to the possession of all personal securities, such as bonds, notes, mortgages, and certifi-

¹ Mayfield v. Kegour, 21 Md. 241.

² Ibid.; Weekham v. Berry, 55 Penn. St. 70.

³ Ibid.

⁴ Tidd v. Lister, 5 Madd. 432; Campbell v. Prestons, 22 Grat. 396.

⁵ Denton v. Denton, 7 Beav. 388; Blake v. Bunbury, 1 Ves. Jr. 194; Tidd v. Lister, 5 Madd. 432.

⁶ Ibid.

⁷ Ibid.; Pugh v. Vaughn, 12 Beav. 517; Langston v. Ollivant, Coop. 33; Baylies v. Baylies, 1 Col. 137.

(a) A trustee may sue to protect a remainder in the trust property as well as the life estate therein. Leake v. Watson, 58 Conn. 332. But specific performance will not be decreed against remaindermen of the trustee's agreement to renew a lease

made by him and others in interest, when he had no power to bind the remainders. Bergengren v. Aldrich, 139 Mass. 259. See Asche v. Asche, 113 N. Y. 232; Bagley v. Kennedy, 81 Ga. 721.

cates of stocks, belonging to the trust estate; and he may maintain an action for their delivery, even against the *cestui que trust*.¹ All personal actions for injury to the personal property, or for its detention or conversion, such as trespass,² trover,³ detinue,⁴ or replevin,⁵ must be brought in the name of the trustee, although the possession is in the *cestui que trust*,⁶ (a) and although there may be a defect in the title of the trustee;⁷ for the possession of the *cestui que trust* is the possession of the trustee, and in law he is not allowed to dispute the title or possession of his trustee.⁸ The action of assumpsit is an equitable action, and, generally, if a promise is made to one for the benefit of another, the person for whose benefit the promise is made may bring the action; but if a promise is made to a trustee for the benefit of the *cestui que trust*, the trustee alone can sue.⁹ (b) So only those parties can sue on a contract with whom it is made, unless it is

¹ Jones v. Jones, 3 Bro. Ch. 80; Poole v. Pass, 1 Beav. 600; Beach v. Beach, 14 Vt. 28; Gunn v. Barrow, 17 Ala. 743; White v. Albertson, 3 Dev. 241; Guphill v. Isbell, 8 Rich. L. 463; Presley v. Stribling, 24 Miss. 257; Pace v. Pierce, 49 Mo. 393; Ryan v. Bibb, 46 Ala. 343; Western R. R. Co. v. Nolan, 48 N. Y. 513.

² McRaeny v. Johnson, 2 Fla. 520.

³ Hower v. Geesaman, 17 Serg. & R. 251; Poage v. Bell, 8 Leigh, 604; Coleson v. Blanton, 3 Hayw. 152; Guphill v. Isbell, 8 Rich. L. 463; Thompson v. Ford, 7 Ired. 418; Schley v. Lyons, 6 Ga. 530.

⁴ Jones v. Strong, 6 Ired. 367; Murphy v. Moore, 4 Ired. Eq. 118; Chambers v. Mauldin, 4 Ala. 477; Parsons v. Boyd, 20 Ala. 112; Stoker v. Yelby, 11 Ala. 327; Baker v. Washington, 3 Stew. & P. 142; Newman v. Montgomery, 5 How. (Miss.) 742.

⁵ Presley v. Stribling, 24 Miss. 527; Daniel v. Daniel, 6 B. Mon. 230.

⁶ Jones v. Cole, 2 Bail. 330; Wynn v. Lee, 5 Ga. 236.

⁷ Rogers v. White, 1 Sneed, 69.

⁸ White v. Albertson, 3 Dev. 241.

⁹ Treat v. Stanton, 14 Conn. 445; Porter v. Raymond, 53 N. H. 519.

(a) The *cestui's* possession of 2 Ch. 172. The beneficiary may chattels, provided for by a trust also sue in trover, if the trustee refuses to sue. Anderson v. Daley, of the trustee, who may sue in trover 56 N. Y. S. 511.

for their conversion, though he (b) See 1 Ames on Trusts (2d ed.), 258. has never taken actual possession thereof. Barker v. Furlong, [1891]

negotiable paper; therefore, substituted trustees cannot sue upon a contract made with their predecessors in the trust, but the suit must be in the names of the parties with whom it was made, for the benefit of the estate.¹ Generally, all notices and tenders² must be made to the trustees; and they must use all due diligence in prosecuting suits in favor of the estate and of the *cestui que trust*, and they must take the proper care in defending such suits; and if appeals are taken from decrees or judgments in favor of the estate, or of the *cestui que trust*, they must duly support the rights of the *cestui que trust* in whatever court the case may be carried.³ If the *cestui que trust* brings an action in the name of the trustee, the trustee may insist upon indemnity against the costs.⁴ If the trustee collusively releases such suit without the consent of the party beneficially interested, the court will set aside the release.⁵ So, if a trustee discharges a debt or mortgage without payment, the court would set aside the discharge;⁶ and if a trustee refuses to bring a suit, or to allow his name to be used, equity will compel him to take such steps as the interest of the estate and of the *cestui que trust* requires.⁷ In all such suits in the name of the trustee, a debt due from the *cestui que trust* cannot be set off.⁸ (a)

¹ *Binney v. Plumly*, 5 Vt. 500; *Ingersoll v. Cooper*, 5 Blackf. 420; *Davant v. Guerard*, 1 Spear, 212; *Wake v. Tinkler*, 16 East, 36.

² *Chahoon v. Hollenback*, 16 Serg. & R. 425; *Henry v. Morgan*, 2 Binn. 497.

³ *Wood v. Burnham*, 6 Paige, 513.

⁴ *Ins. Co. v. Smith*, 11 Penn. St. 120; *Annesley v. Simeon*, 4 Madd. 390; *Roden v. Murphy*, 10 Ala. 804.

⁵ *Anon. Salk.* 260; *Bauerman v. Radenius*, 7 T. R. 670; *Lagh v. Legh*, 1 B. & P. 417; *Payne v. Rogers*, Doug. 407; *Manning v. Cox*, 7 Moore, 617; *Hickey v. Burt*, 7 Taunt. 48; *Barker v. Richardson*, 1 Y. & J. 362; *Roden v. Murphy*, 10 Ala. 804; *Greene v. Beatty, Cox*, 112; *Kirkpatrick v. McDonald*, 11 Penn. St. 387.

⁶ *Woolf v. Bate*, 9 B. Mon. 210.

⁷ *Blin v. Pierce*, 20 Vt. 25; *Chisholm v. Newton*, 1 Ala. 371; *Robinson v. Mauldin*, 11 Ala. 978; *Welch v. Mandeville*, 1 Wheat. 233; *Parker v. Kelly*, 10 Sm. & M. 184; *McCullum v. Cox*, 1 Dall. 139.

⁸ *Wells v. Chapman*, 4 Sandf. Ch. 312; *Campbell v. Hamilton*, 4 Wash.

(a) See *Loder v. Allen*, 50 N. J. 1020; 1 Ames on Trusts (2d ed.), Eq. 631; *Harris v. Elliott*, 48 N. Y. S. 270.

If a trustee sue for matters pertaining to the trust estate, a private debt due from the trustee cannot be set off.¹ A trustee cannot set off against the assignee of the *cestui* a debt for money lent by him to the *cestui* before his appointment as trustee.²

§ 331. The trustee, being liable for a breach of the trust, if he permits any misapplication of the funds should of course have the possession and control of all personal property. So all the duties and privileges which attach to such property pertain to him. If the property consists of stocks in corporations, he may attend corporate meetings, vote, and hold office by virtue of such stock.³ If the trustee die, the personal property devolves upon his executor or administrator until the appointment of a new trustee, and such executor or administrator has a right to vote upon stocks at corporate meetings.⁴ So the trustee is rated or assessed for taxes, and must see that the taxes upon the trust property are paid. The statutes of the various States determine the localities where such property shall be assessed: real estate is generally assessed in the parish, town, or county where it is situated; and personal property, either in the place of the domicile of the trustee or of the *cestui que trust*, as the statutes of a State may direct. In the absence of a statute, the law would look upon the trustee as the owner, and assess the property at his domicile.⁵

§ 332. The trustee must prove a debt against a bankrupt debtor of the estate, as he is the person to receive the dividend. C. C. 93; *Woolf v. Bates*, 9 B. Mon. 211; *Beale v. Coon*, 2 Watts, 183; *Tucker v. Tucker*, 4 B. & Ad. 745; *Porter v. Morris*, 2 Harr. 509.

¹ *Page v. Stephens*, 23 Mich. 357.

² *Abbott v. Foote*, 146 Mass. 333.

³ *Matter of Barker*, 6 Wend. 509; *Re Phoenix Life Assur. Co.*, 2 John. & H. 279.

⁴ *North Shore Ferry Co.*, 63 Barb. 556; *People v. Tebbetts*, 4 Cow. 364; *Bailey v. Hollister*, 26 N. Y. 112; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135; *Runn v. Vaughan*, id. 345.

⁵ *Latrobe v. Baltimore*, 19 Md. 13; *Green v. Mumford*, 4 R. I. 313; and see the statutes of the various States.

dend;¹ but in special cases the concurrence of the *cestui que trust* may be required, as where he may have a right to receive the payment.²

§ 333. In England, trustees had at common law the right to vote for local officers and for members of parliament, by virtue of the qualification conferred upon them by the trust property, if it was sufficient in amount. Statutes have, however, changed the common law, and given the right in most cases to the *cestui que trust*. In the United States, property qualifications of voters are generally abrogated.³

§ 334. Trustees of real or personal estate may, *at law*, sell, convey, assign, or incumber the same, as if they were the beneficial owners,⁴ and each of several trustees may exercise all his rights of ownership. If the trustees are joint-tenants, each may receive the rents,⁵ and each may sever the joint-tenancy by a conveyance of his share,⁶ and each may collect the dividends on stocks, and on the death of one, the survivor may sell the whole estate.⁷ The general power of a trustee to sell and convey the estate is co-extensive with his ownership of the legal title; and this general power over the legal title is entirely distinct from the execution of a special power given in respect to the sale of an estate. Though the trustee may thus sell, even in breach of the trust, a conveyance without consideration will not injure the *cestui que trust*; as the grantee, who is a volunteer, will hold upon the same trusts as the trustee held, and if the purchaser for a valuable consideration have notice of the trust he will still hold the estate upon trust.⁸ In New York, however, a stat-

¹ *Ex parte Green*, 2 Dea. & Ch. 116.

² *Ex parte Dubois*, 1 Cox, 310; *Ex parte Butler*, Buck. 426; *Ex parte Gray*, 4 Dea. & Ch. 778; *Ex parte Dickenson*, 2 Dea. & Ch. 520.

³ See 5 Ired. Eq. Appendix; 4 Kent, Com. 195.

⁴ *Shortz v. Unangst*, 3 Watts & S. 55; *Canoy v. Troutman*, 7 Ired. 155.

⁵ *Townley v. Sherborne*, Bridg. 35.

⁶ *Boursot v. Savage*, L. R. 2 Eq. 134.

⁷ *Saunders v. Schmaelzle*, 49 Cal. 59.

⁸ See *ante*, § 321.

ute has converted the trustee's ownership of the legal title into a power, or power in trust;¹ and where a trust is expressly created by a written instrument, every sale in breach or contravention of the trust is declared to be absolutely void, even if the sale is under the sanction of a court.² Whether a trustee intends to convey an estate is frequently a question made upon conveyances, and it has been determined that a general assignment of all the trustee's estates, for the benefit of his creditors, does not pass estates held by him in trust.³

§ 335. As among the incidents of the trustee's legal title in the trust estate is his power to sell it, so he may devise it by his last will and testament. The principal question that here arises is, whether the words of the will of a trustee embrace estates held by him in trust, for a trust estate will not in all cases pass by the same words as would pass the beneficial ownership; for wherever an estate passes, not by operation of law, but by the intention of any one, it is necessary to find the intention from the instrument under the circumstances in which it is made; and an intention to devise a trust estate is not so readily inferred as an intention to devise a beneficial estate. If the trust is only a personal one, the donor using no words requiring continuance of the trust beyond the life of the immediate trustee, the estate cannot be devised by the trustee, but ceases at his death.⁴

§ 336. An assignment in general words by a trustee of all his estate for his creditors will not pass a trust estate, for the reason that the court will not presume that the trustee

¹ *Anderson v. Mather*, 44 N. Y. 249; *New York, &c. v. Stillman*, 30 N. Y. 174; *Fitzgerald v. Topping*, 48 N. Y. 441; *Fellows v. Heermans*, 4 Lans. 230; *Martin v. Smith*, 56 Barb. 600; *Critton v. Fairchild*, 41 N. Y. 289. The law is the same in Michigan. *Palmer v. Wilkins*, 24 Mich. 328. See *Jones v. Shaddock*, 41 Ala. 262; 1 Rev. Stat. 730, § 65; *Briggs v. Palmer*, 20 Barb. 392; *Briggs v. Davis*, 20 N. Y. 15; 21 N. Y. 574.

² *Cruger v. Jones*, 18 Barb. 468; *Lahens v. Dupasseur*, 56 Barb. 256.

³ *Ludwig v. Highley*, 5 Barr, 132; *Abbott, Pet'r*, 55 Maine, 480.

⁴ *Hinckley v. Hinckley*, 79 Maine, 320.

intended to commit a breach of trust;¹ for a similar reason it has at times been said that a devise of all a trustee's estates in general words would not operate upon estates that he held in trust, unless there appeared a positive intention that they should so pass.² The question was finally considered by Lord Eldon; and after a careful examination, the rule was declared to be, that "where the will contained words large enough, and there was no expression authorizing a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own, in such case the trust property would pass."³ Mr. Hill states the rule, "that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected."⁴ This general rule is acted upon in the United States.⁵

§ 337. Notwithstanding the rule, that a trust estate will pass by general words in a devise, unless there is something in the will to show a contrary intention, there has continued to be a conflict of opinion upon the propriety of the rule, and more conflict upon its application. But a charge of debts, legacies, and annuities upon the estate devised, or a power

¹ *Cook v. Tullis*, 18 Wall. 332; *Kelly v. Scott*, 49 N. Y. 595; *In re McKay*, 1 Lowell, 345; *Chase v. Chapin*, 130 Mass. 128.

² *Casborne v. Scarfe*, 1 Atk. 605; *Strode v. Russell*, 2 Vern. 625; *Leeds v. Munday*, 3 Ves. 348; *Ex parte Sergison*, 4 Ves. 147; *Ex parte Bowes*, cited note 1 Atk. 605; *Pickering v. Vowles*, 1 Bro. Ch. 198; *Att. Gen. v. Buller*, 5 Ves. 340.

³ *Braybrooke v. Inskip*, 8 Ves. 436; *Roe v. Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Langford v. Auger*, 4 Hare, 313; *Linsell v. Thacher*, 12 Sim. 178; *Ex parte Shaw*, 8 Sim. 159; *Hawkins v. Obeen*, 2 Ves. 559.

⁴ Hill on Trustees, 283.

⁵ *Taylor v. Benham*, 5 How. 270; *Heath v. Knapp*, 4 Barr, 228; *Jackson v. Delancy*, 13 Johns. 537; *Hughes v. Caldwell*, 11 Leigh. 312; *Merritt v. Farmers' Ins. Co.*, 2 Edw. Ch. 517; *Ballard v. Carter*, 5 Pick. 112; *Asay v. Hoover*, 5 Barr, 35; *Richardson v. Woodbury*, 43 Me. 206; *Drane v. Gunter*, 19 Ala. 731.

given to sell it, is an indication that the testator did not intend that the trust estate should pass under the words of his devise, for the reason that he could not have intended that his devisee should do that with the estate which would be a breach of trust.¹ So, if there is a limitation of the estate in strict settlement, with a great number of complicated conditions, contingencies, remainders, and limitations, it will not be presumed that a trustee intended to devise a dry trust in a legal title upon such terms, and the estate will not pass under general words;² so if the devise is to A. in tail with remainder over in strict settlement;³ so a devise to a testator's nephews and nieces in equal shares as tenants in common is to a class not ascertained at the date of the will, and will not by general words pass a trust estate.⁴ So a devise to a woman for her separate use, (a) imports a beneficial use, and not a dry legal estate, and the trust estate would not pass to her under general words.⁵ But a devise to a woman, her heirs and assigns, to her and their own sole and absolute use, passes the estate for the reason that there is nothing inconsistent with their holding the absolute use in trust;⁶ and a devise to A. and B. to be equally divided between them, as tenants in common, and their respective heirs, will

¹ *Rackham v. Siddall*, 16 Sim. 297; 1 Mac. & G. 607; *Hope v. Liddell*, 21 Beav. 183; *Life Assn. of Scotland v. Siddall*, 3 De G., F. & J. 58; *Wall v. Bright*, 1 Q. & W. 494; *Leeds v. Munday*, 3 Ves. 348; *Ex parte Marshall*, 9 Sim. 555; *Re Morley's Trusts*, 10 Hare, 293; *Sylvester v. Jarman*, 10 Price, 78; *Roe v. Reade*, 8 T. R. 118; *Att. Gen. v. Buller*, 5 Ves. 339; *Ex parte Morgan*, 10 Ves. 101; *Ex parte Brettell*, 6 Ves. 577; *Merritt v. Farmers' Ins. Co.*, 2 Edw. Ch. 547.

² *Braybrooke v. Inskip*, 8 Ves. 434.

³ *Thompson v. Grant*, 4 Madd. 438; *Ex parte Bowes*, cited 1 Atk. 603; *Galliers v. Moss*, 9 B. & Cr. 267; *Re Horsfall*, 1 McClel. & Y. 292.

⁴ *Re Finney's Est.*, 3 Gif. 465.

⁵ *Lindsell v. Thacher*, 12 Sim. 178; the case itself, not the marginal note.

⁶ *Lewis v. Mathews*, L. R. 2 Eq. 177.

(a) No particular form of words use. *In re Peacock's Trusts*, 10 Ch. D. 490; *Bland v. Dawes*, 17 id. 794. in a married woman for her separate

pass the estate.¹ A devise of all my estates will pass trust property.² So a devise to A., his heirs and assigns, to and for his and their own use and benefit;³ and a devise to A. and her heirs, to be disposed of, by her will or otherwise, as she shall think fit,⁴ will pass trust property under general words, for there is no necessary breach of the trust.

§ 338. The interest of a *mortgagee in fee* in the mortgaged land stands upon a somewhat different ground. The mortgagee has a debt due him which is the principal thing, and the mortgage is a beneficial interest in the land as security for the debt. This interest generally goes with the debt. And mortgage estates will pass by a general devise, notwithstanding a charge of debts and legacies, if the intent appears, to pass them as securities for money.⁵ But if there are special trusts for sale, or other special charges annexed to the devise, inconsistent with the idea of holding the estate as security for money, it would not pass under a general devise.⁶

§ 339. In allowing a trust estate to pass under general words of a devise, it is assumed that the testator does not

¹ *Ex parte* Whiteacre, cited Lewin on Trusts, 186; 1 Saund. Uses & Tr. 359; *Re* Morley's Trusts, 10 Hare, 293.

² *Braybrooke v. Inskip*, 8 Ves. 425; *Bangs v. Smith*, 98 Mass. 273; *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Stone v. Hackett*, 12 Gray, 237.

³ *Ex parte* Shaw, 8 Sim. 159; *Bainbridge v. Ashburton*, 2 Y. & C. 347; *Sharpe v. Sharpe*, 12 Jur. 598; *Ex parte* Brettell, 6 Ves. 577; *Heath v. Knapp*, 4 Barr, 228; *Abbott, Petitioner*, 55 Maine, 580.

⁴ *Ibid.*

⁵ *Ex parte* Barber, 5 Sim. 451; *Doe v. Benett*, 6 Exch. 892; *Re* Cantley 17 Jur. 124; *King's Mort.*, 5 De G. & Sm. 644; *Knight v. Robinson*, 2 K. & J. 503; *Rippen v. Priest*, 13 C. B. (N. S.) 508; *Re* Arrowsmith, 4 Jur. (N. S.) 1123; *Mather v. Thomas*, 6 Sim. 119; overruling *Galliers v. Moss*, 9 B. & C. 267; *Sylvester v. Jarman*, 10 Price, 78, and *Re* Cantley, 17 Jur. 124; *Ballard v. Carter*, 5 Pick. 112; *Asay v. Hoover*, 5 Barr, 35; *Richardson v. Woodbury*, 43 Maine, 206; *Field's Mort.*, 9 Hare, 414, overruling *Benvoize v. Cooper*, 10 Price, 78, and in opposition to *Doe v. Lightfoot*, 8 M. & W. 553.

⁶ *Re* Cantley, 17 Jur. 123.

intend by his devise to commit a breach of the trust. It is simply a question, whether the testator has devised, or can or should devise, a trust estate, or whether he should allow it to descend to his heir or legal representatives. It was said in *Cook v. Crawford*, that it was not lawful for the trustee to dispose of the estate, but that he ought to permit it to descend; that a devise did not differ from a deed *inter vivos*; and that it was only a *post mortem* conveyance.¹ On the other hand, it is said that there is a wide distinction between a conveyance and a devise. That during the trustee's lifetime there was a personal trust and confidence in his discretion, which he could not delegate; that the settlor could have reposed no confidence in the heir, for he could not know beforehand who the heir would be; that if the estate was allowed to descend, it might become vested in married women, infants, bankrupts, or persons out of the jurisdiction of the court; and that therefore it could not be a breach of trust for a trustee to devise the estate by will to persons capable of executing it, or of transferring it to other trustees.² (a) Mr. Lewin concludes from these observations, that whether the devise of the trust estate is proper or not depends upon the circumstances of each case. If the heir is a fit person to execute the trust, the testator ought not to intercept the descent and pass the legal estate to another, and especially not to an unfit person. In such case the estate of the testator might be liable for the costs of restoring the trust estate to its proper channel or to proper trustees. If, however, the heir is an unfit person, as an infant, bankrupt, insolvent, lunatic, married woman, or out of the jurisdiction, it may be proper to devise the estate.³ And this seems to be the result of the authorities.⁴

¹ *Cook v. Crawford*, 13 Sim. 98; and see *Beasley v. Wilkinson*, 13 Jur. 649.

² *Titley v. Wolstenholme*, 7 Beav. 435; *Macdonald v. Walker*, 14 Beav. 556; *Wilson v. Bennett*, 5 De G. & Sm. 479.

³ *Lewin on Trusts*, 187, 188.

⁴ *Beasley v. Wilkinson*, 13 Jur. 649.

(a) See *Osborne v. Rowlett*, 13 Lett, 15 id. 143; *In re Ingleby, &c.*, Ch. D. 774; *In re Morton and Hal- Ins. Co.*, 13 L. R. Ir. 326.

§ 340. It does not follow that the devisee can execute the trust from the fact that the legal title is devised to him, nor does it follow that the heir can execute the trust from the fact that the legal title descends to him. How far either can execute the trust depends upon the intention of the settlor, to be gathered from the terms of the instrument.¹ Thus, if an estate is so vested in A. that A. alone shall *personally* execute the trust, neither the heir nor the devisee of A. could execute it, although holding the legal title.² As if an estate is vested in A. and his heirs upon a trust to sell, and A. devises the estate, neither the heir nor the devisee can sell: for the heir has nothing in the estate to sell, it having gone to the devisee; and the devisee has no power, he not being mentioned in the original settlement.³ So, where property was vested in two trustees, their executors and administrators in trust, and the surviving trustee devised the property to A. and B., and appointed A., B., and C. executors, the court refused to hand over the property to A. and B., for the reason that devisees were not named as parties who could execute the trust; and the court refused to hand it over to the executors, for the reason that the legal title was given away from them; new trustees were therefore appointed to receive the property and execute the trust.⁴ But where the word "assigns" is part of the limitation of the estate to trustees, as where an estate is vested in A., his heirs, executors, administrators, and *assigns* in trust, and A. devises the estate, the devisee may execute the trust, for the reason that he comes within the limitation of the persons who may take the trust property and execute the trust.⁵

¹ Abbott, Pet'r, 55 Maine, 580.

² Mortimer v. Ireland, 6 Hare, 196; 11 Jur. 721; Ockleston v. Heap, 1 De G. & Sm. 640.

³ Mortimer v. Ireland, 6 Hare, 196; 11 Jur. 721; Ockleston v. Heap, 1 De G. & Sm. 640; Cook v. Crawford, 13 Sim. 91; Stevens v. Austen, 7 Jur. (N. S.) 873; Wilson v. Bennett, 5 De G. & Sm. 475.

⁴ *Re Burt's Est.*, 1 Dr. 319; Macdonald v. Walker, 14 Beav. 556.

⁵ Titley v. Wolstenholme, 7 Beav. 425; Saloway v. Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

This principle has been doubted and criticised,¹ but it seems to be acted upon in the English courts.²

§ 341. In New York, Michigan, Wisconsin, Alabama, and Missouri, (a) trust property, upon the death of the surviving trustee, does not descend to the heir, nor can it be devised, but it vests in the court, and will be administered by the court by the appointment of new trustees to execute the trust.³ In the other States, the trust estate descends to the heir, or vests in the devisee, as the legal title must go somewhere in the absence of a statute, upon the death of the surviving trustee.⁴ Courts in the United States do not have occasion often to consider the question, whether the heir or devisee can execute the trust, as new trustees can be appointed in any case at the desire of the parties, and, in many States, the trust property may be vested in the new trustees by an order of the court. In most cases, it would simply be a question whether the words of the will were comprehensive enough to pass the trust estate, or whether it had descended to the heir; and this question would be important only in determining who should make a conveyance of the trust property to the new trustees, if it became necessary that a conveyance should be made.

¹ *Ockleston v. Heap*, 1 De G. & Sm. 642.

² *Mortimer v. Ireland*, 6 Hare, 196; 11 Jur. 721; *Ashton v. Wood*, 3 Sm. & Gif. 436; *Hall v. May*, 3 K. & J. 585; *Lane v. Debenham*, 11 Hare, 188.

³ *Clark v. Crego*, 47 Barb. 597; *Hawley v. Ross*, 7 Paige, 103; *McCosker v. Brady*, 1 Barb. Ch. 329; *People v. Morton*, 5 Seld. 176; *McDougald v. Cary*, 38 Ala. 320; *Hook v. Dyer*, 47 Mo. 241. This rule is confined to real property. Trusts in personal property are governed by the ordinary rules that apply to them in other States. *Bucklin v. Bucklin*, 1 N. Y. Dec. 242.

⁴ Trusts of real estate, on the death of the trustee, vest in the heir trusts of personalty in the executor or administrator. *Schenck v. Schenck*, 16 N. J. Eq. 174.

(a) In Missouri, the heirs of the trustee take the legal title upon his death, and it is their duty to care for the property or to have a new trustee appointed. *Ewing v. Shannahan*, 113 Mo. 188.

§ 342. If an owner of real estate contracts to sell it, he becomes a trustee of the legal title for the vendee; and if he dies before conveying the legal title, it will descend to his heir or heirs, as the legal title must vest somewhere; and so he may devise it; and the heir, in case it descends, and the devisee, in case it is devised, may be called upon to convey it to the vendee.¹ In Massachusetts, there is a statute authorizing the vendor's executor or administrator to convey such estate, under the direction of the court of probate.²

§ 343. Trust property is generally limited to trustees, as joint-tenants; and if by the terms of the gift it is doubtful, whether the trustees take as joint-tenants, or tenants in common, courts will construe a joint-tenancy if possible, on account of the inconvenience of trustees holding as tenants in common; and, where statutes have abolished joint-tenancy, an exception is generally made in the case of trustees. And courts will not allow a process for the partition of a trust estate.³ Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor; and upon the death of the last survivor, if he has made no disposition of the estate by will or otherwise, it devolves upon his heirs if real estate, and upon his executors or administrators if it is personal estate.⁴ (a) The title in the surviving trustee is complete, and no breaches of trust after the death of his co-

¹ *Wall v. Bright*, 1 J. & W. 494; *Read v. Read*, 8 T. R. 118.

² Gen. Stat. c. 117, §§ 5 and 6; *Reed v. Whitney*, 7 Gray, 533.

³ *Baldwin v. Humphrey*, 41 N. Y. 609; *Saunders v. Schmaelzle*, 49 Cal. 59.

⁴ *Whiting v. Whiting*, 4 Gray, 236; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *De Peyster v. Ferrars*, 11 Paige, 13; *Shook v. Shook*, 19 Barb. 653; *Shortz v. Unangst*, 3 W. & S. 45; *Gray v. Lynch*, 8 Gill, 404; *Mauldin v. Armstead*, 14 Ala. 702; *Powell v. Knox*, 16 Ala. 361; *Richeson v. Ryan*, 15 Ill. 13; *Stewart v. Pettus*, 10 Mo. 755; *Jenks v. Backhouse*, 1 Binn. 91; *King v. Leach*, 2 Hare, 59; *Watkins v. Specht*, 7 Coldw. 585; *Webster v. Vanderventer*, 6 Gray, 429.

(a) See 1 Ames on Trusts (2d ed.), 346.

trustees can be charged upon their estate;¹ nor can the representatives of his cotrustees interfere with his management of the trust estate, even if he is insolvent or unfit for the trust.² (a) The *cestui que trust* alone can interfere or apply to the court for redress or relief. So all rights of action are in the surviving trustee, and he may sue in his own name or as survivor, according as the cause of an action accrued before or after the death of his cotrustees;³ and, in case of his death, his executor or administrator may continue the action.⁴ The rule is that actions must be brought in the names of the parties to the contract.⁵

§ 344. So absolute is the rule that the heir or administrator takes the trust property upon the death of the last surviving trustee, that a husband, as administrator of his wife, takes the personal property that she held in trust, but he must hold it upon the original trust.⁶ In England, the

¹ See *post*, § 426.

² *Shook v. Shook*, 19 Barb. 653.

³ *Richeson v. Ryan*, 15 Ill. 13; *Wheatley v. Boyd*, 7 Exch. 20.

⁴ *Nichols v. Campbell*, 10 Grat. 561; *Powell v. Knox*, 16 Ala. 364; *Mauldin v. Armstead*, 14 Ala. 702.

⁵ *Robins v. Deshon*, 19 Ind. 204; *King v. Lawrence*, 14 Wis. 238; *Farrell v. Ladd*, 10 Allen, 127; *Childs v. Jordan*, 106 Mass. 323.

⁶ *Ante*, § 264; *Kuster v. Howe*, 3 Ind. 268.

(a) The estate of a deceased trustee, who left the trust fund in a proper state of investment at his death, is not liable for a breach of trust subsequently committed. *Re Palk*, 41 W. R. 28. See *Laurel County Court v. Trustees*, 93 Ky. 379. A retiring trustee is not liable for his successor's breach of trust unless the very breach of trust committed was really contemplated by the former when his retirement and the new appointment took place. *Head v. Gould*, [1898] 2 Ch. 250. Nor is he liable for debts subsequently incurred, which he has no part in contracting. *Noyes v. Turnbull*, 54 Hun, 26; 130 N. Y. 639. A new trustee, who after his appointment participates in the trustee's breach of trust, becomes liable with him. *Riker v. Alsop*, 27 F. R. 251; see *U. S. Trust Co. v. Stanton*, 139 N. Y. 531.

A surviving partner is so far a trustee that, if he misappropriates the firm assets, he may in equity be held liable for breach of trust. *Russell v. McCall*, 141 N. Y. 437; *Darrow v. Calkins*, 154 N. Y. 503.

heir in case of real estate in trust, or the executor in case of personal, is competent to administer and execute the trusts, but they cannot execute discretionary trusts confided *personally* to the original trustee, unless the power and confidence are also confided in them by the instrument.¹ In the United States, the heirs or executors will take the trust property, and they must settle the accounts of the testator in relation to the trust. They must also see that the property is protected and preserved, but they are not under any obligation to execute the trust. They may decline the office, and generally the court will appoint new trustees to succeed to the original trustees. If the heirs or executors continue to act as trustees, they will be liable for no past breaches of trust, but only for breaches that occur under their own management.²

§ 345. It has been before stated that a general assignment for creditors does not pass a trust estate. In such case it requires special words to vest the estate in an assignee. So an assignment in bankruptcy of all the trustee's property does not pass estates which the bankrupt holds in trust.³ (a) If the bankrupt by a breach of trust has converted the trust estate into other property, the *cestui que trust* may follow it into the hands of the assignee, so far as he can identify the particular property obtained by breach of the trust.⁴ (b) But if the trust property has become so amalgamated with the general mass of the bankrupt's estate that it cannot be traced

¹ *Ante*, § 264; *Mansell v. Mansell*, Wilm. 36; *Cook v. Crawford*, 13 Sim. 91; *Hall v. Dewes*, Jac. 189; *Peyton v. Bury*, 2 P. Wms. 626; *Bradford v. Belfield*, 2 Sim. 264; *Cole v. Wade*, 16 Ves. 45; *Sharp v. Sharp*, 2 B. & A. 405. See *Townsend v. Wilson*, 1 B. & A. 608.

² *Baird's App.*, 3 W. & S. 459; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Hill v. State*, 2 Ark. 604.

³ *Ante*, § 336; *Scott v. Surman*, Willes, 402.

⁴ *Taylor v. Plumer*, 3 M. & S. 562; *Ex parte Sayers*, 5 Ves. 169.

(a) See *Bump on Bankruptcy* (10th ed.), p. 554; 1 *Ames on Ch. D.* 456; *Lister v. Stubbs*, 45 Trufts (2d ed.), p. 392. (b) See *Hancock v. Smith*, 41 Ch. D. 456; *id.* 1; *Patten v. Bond*, 60 L. T. 583.

or identified, the *cestui que trust* must prove his claim.¹ If an assignee should get possession of the trust estate, and refuse to restore it, the trustee, though a bankrupt, may maintain a suit for its restoration, or the *cestui que trust* may have a bill for the appointment of new trustees, and the conveyance of the property to them.² But if a bankrupt trustee has a beneficial interest in the trust property, it will pass to his assignee; and the assignee will hold the bankrupt's beneficial interest in trust for his creditors, and the remainder of the property in trust for the other parties beneficially interested.³

§ 346. It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration without notice, take subject to the trust, and they must either execute the trust themselves, or convey the property to new trustees appointed by the court. Thus the heir, executor, administrator, devisee, and the assignee by deed or in bankruptcy, are bound by the trust; so are those who take dower or curtesy in the trust estate, or a creditor who levies an execution upon it. (a) If the trust estate is forfeited to the crown or the State, it is still subject to the trust; so if it escheats upon the failure of heirs. But a disseizor is not an *assignee* of the trustee; he holds a wrongful title of his own, adversely to the trust. The *cestui que trust* has no remedy in such case, except to procure the trustee to bring an action upon his legal title to recover the possession. The *cestui que trust* could not maintain a suit in equity to compel the disseizor to hold upon the same trusts as the trustee; for

¹ *Ex parte Dumas*, 1 Atk. 232; *Ryall v. Rolle*, id. 172; *Scott v. Surman*, Willes, 403.

² *Winch v. Keely*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40.

³ *Carpenter v. Marnell*, 3 B. & P. 40; *Parnham v. Hurst*, 8 M. & W. 743; *D'Arnay v. Chesneau*, 13 M. & W. 809; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *Boddington v. Castelli*, 1 El. & Bl. 879.

(a) See *Freedman's S. Co. v.* § 437 *a*, note; *Lee v. Enos*, 97 Earle, 110 U. S. 710; *Brandeis v. Mich.* 276; *Ewing v. Shannahan*, *Cochrane*, 112 U. S. 344; *infra*, 113 Mo. 188.

there is no privity between the disseizor and disseizee.¹ (a) The only remedy of the *cestui que trust* is against the trustee; and if he refuses to bring an action to recover the estate, he may be removed and a new trustee appointed.

§ 347. Where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate; for a man cannot be a trustee for himself, nor hold the fee, which embraces the whole estate, and at the same time hold the several parts separated from the whole.² But in order that this may be true, the two estates must be commensurate with each other; or the legal estate must be more extensive or comprehensive than the equitable. The equitable fee cannot merge in a partial or particular legal estate.³ And there will be no merger, if it is contrary to the intention of the parties.⁴ (b) If A. should

¹ Finch's Case, 4 Inst. 85; Gilbert on Uses by Sugd. 249; Reynolds v. Jones, 2 Sim. & S. 206; Turner v. Buck, 22 Vin. Ab. 21; Doe v. Price, 16 M. & W. 603. But the *cestui que trust* is the beneficial owner, and the court will protect him in an entry and occupation against a stranger. Oatman v. Barney, 46 Vt. 594.

² Wade v. Paget, 1 Bro. Ch. 363; Selby v. Alston, 3 Ves. 339; Philips v. Brydges, id. 126; Goodright v. Wells, Doug. 771; Finch's Case, 4 Inst. 85; Harmood v. Oglander, 8 Ves. 127; Creagh v. Blood, 3 Jones & L. 133; James v. Morey, 2 Cow. 246; Mason v. Mason, 2 Sandf. Ch. 433; James v. Johnson, 6 Johns. Ch. 417; Cooper v. Cooper, 1 Halst. Ch. 9; Healy v. Alston, 25 Miss. 190; Brown v. Bontee, 10 Sm. & M. 268; Lewis v. Starke, id. 128; Nicholson v. Halsey, 1 Johns. Ch. 422; Butler v. Godley, 1 Dev. 94; Hopkinson v. Dumas, 42 N. H. 306; Gardner v. Astor, 3 Johns. Ch. 53; Downes v. Grazebrook, 3 Mer. 208; Ayliff v. Murray, 2 Atk. 59; Wills v. Cooper, 1 Dutch. (N. J.) 137; Habbergham v. Vincent, 2 Ves. Jr. 204.

³ Selby v. Alston, 3 Ves. 339; Hunt v. Hunt, 14 Pick. 374; Donalds v. Plumb, 8 Conn. 453; James v. Morey, 2 Cow. 284; Goodright v. Wells, Doug. 771; Philips v. Brydges, 3 Ves. 125; Robinson v. Cuming, t. Talbot, 164; 1 Atk. 475; Boteler v. Allington, 1 Bro. Ch. 72; Buchanan v. Harrison, 1 Jon. & Hen. 662; Merest v. James, 6 Madd. 118; Habbergham v. Vincent, 2 Ves. Jr. 204.

⁴ Gardner v. Astor, 3 Johns. Ch. 53; James v. Morey, 2 Cow. 246;

(a) See Ames on Trusts (2d ed.), 373. (b) "Where a purchaser of property pays off a charge on it, without

convey lands to B. in trust for C. and her heirs, and C. should be the heir of B., upon the death of B. the legal title would descend to C., and thus both the legal and equitable title would meet in C.; but if C. was a married woman, and it was plainly the intention of the grantor or settlor, to be gathered from the whole instrument, that the trust should not cease, but continue an active trust, the court would not allow the equitable estate to merge in the legal, but a new trustee would be appointed to take the legal title.¹ Of

Mechanics' Bank v. Edwards, 1 Barb. S. C. 272; *Starr v. Ellis*, 6 Johns. Ch. 393; *Donald v. Plumb*, 8 Conn. 453; *Den v. Vanness*, 5 Halst. 102; *Hunt v. Hunt*, 14 Pick. 374; *Nurse v. Yerwarth*, 3 Swanst. 608; *Saunders v. Bournford*, Finch, 424; *Thom v. Newman*, 3 Swanst. 603; *Mole v. Smith*, Jac. 490.

¹ *Gardner v. Astor*, 3 Johns. Ch. 53; *James v. Morey*, 2 Cow. 246; *Mechanics' Bank v. Edwards*, 1 Barb. S. C. 272; *Starr v. Ellis*, 6 Johns. Ch. 393; *Donald v. Plumb*, 8 Conn. 453; *Den v. Vanness*, 5 Halst. 102; *Hunt v. Hunt*, 14 Pick. 374; *Nurse v. Yerwarth*, 3 Swanst. 608; *Saun-*

showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchaser's deed or from other legitimate evidence." *Liquidation Estates P. Co. v. Wil- loughby*, [1896] 1 Ch. 726, 734; [1898] A. C. 321. See *In re Doug- las*, 28 Ch. D. 327. Whether there is a merger in case of a purchase, or the security is to be kept alive for the benefit of the transferee, de- pends, as in other cases of merger, upon the actual or presumed inten- tion of the one in whom the two es- tates are united. Hence there will be no merger against the mortga- gee's interest. If merger takes place, it would seem clear that the mortgage estate, at least where it

is regarded as simply a lien, must merge in the equity. *Adams v. Angell*, 5 Ch. D. 634; *Thorne v. Cann*, [1895] A. C. 11; *O'Loughlin v. Fitzgerald*, 7 Ir. R. Eq. 483; *Boardman v. Larrabee*, 51 Conn. 39; *Duffy v. McGuinness*, 13 R. I. 595; *Smith v. Roberts*, 91 N. Y. 470; *Fellows v. Dow*, 58 N. H. 21; *Ellinwood v. Holt*, 60 N. H. 57; *Gibbs v. Johnson*, 104 Mich. 120; *Patterson v. Mills*, 69 Iowa, 755; *Coryell v. Klehm*, 157 Ill. 462; *Clark v. Clark*, 76 Wis. 306; *Cox v. Ledward*, 124 Penn. St. 435; *Chase v. Van Meter*, 140 Ind. 321; *Collins v. Stocking*, 98 Mo. 290; *Hudson B. C. Co. v. Glencoe Co.*, 140 Mo. 103; *Gresham v. Ware*, 79 Ala. 192. See *Dickason v. Williams*, 129 Mass. 182; *Keith v. Wheeler*, 159 Mass. 161.

course, in law the estates will merge wherever the interests meet; but courts of equity will preserve the estates separate, where the rights or interests of the parties require it. If the trustee acquires the equitable interest by any breach of his duty, or by fraud, courts will not allow it to merge.¹ So if there are intervening heirs who would be squeezed out, the estates will not merge.² So if the legal estate comes to the *cestui que trust* by a conveyance which turns out to be void, there will be no merger.³ Whether charges upon an estate, as mortgages, will merge in the legal title, upon being paid off, depends upon the intention of the parties, and frequently upon the interests and equities between them.⁴ If a leasehold is held by a wife in her right, but is in the occupation of her husband, and he purchases the reversion, there will be no merger.⁵

§ 348. Thus if a tenant for life pays off a charge or incumbrance upon an estate, it will be considered that, as his interest ceases with his life, he could never have intended that the charge should be extinguished, and not survive for the benefit of his representatives.⁶ (a) And the same rule

ders *v. Bournford*, Finch, 424; *Thom v. Newman*, 3 Swanst. 603; *Mole v. Smith*, Jac. 490.

¹ 1 Spence, Eq. Jur. 572.

² *Lewis v. Stark*, 10 Sm. & M. 128.

³ *Elliott v. Armstrong*, 2 Blackf. 208; *Buchanan v. Harrison*, 1 John. & H. 662; *Brandon v. Brandon*, 31 L. J. Ch. 47.

⁴ *Hunt v. Hunt*, 14 Pick. 374; *Johnson v. Webster*, 4 De G., M. & G. 474; *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244; *Morley v. Morley*, 25 L. J. Ch. 1; *Compton v. Oxenden*, 2 Ves. Jr. 264; *Forbes v. Moffatt*, 18 Ves. 390; *Horton v. Smith*, 4 K. & J. 630; *Tomlinson v. Steers*, 3 Mer. 210; *Smith v. Phillips*, 1 Keen, 694; *Medley v. Horton*, 14 Sim. 226; *Brown v. Stead*, 5 Sim. 535; *Parry v. Wright*, 1 S. & S. 369; 5 Russ. 542; *Mocatta v. Murgatroyd*, 1 P. W. 193; *Greswold v. Marsham*, 2 Ch. Cas. 170; *Garnett v. Armstrong*, 2 Conn. & Laws. 458; *Watts v. Symes*, 16 Sim. 646; *Cooper v. Cartwright*, 1 John. 679.

⁵ *Clark v. Tennison*, 33 Md. 85.

⁶ *Pitt v. Pitt*, 22 Beav. 294; *Burrell v. Egremont*, 7 Beav. 205; *Red-*

(a) This presumption is not rebutted by the fact that the tenant for life and the remainderman are parent and child. *In re Harvey*,

applies, though the tenant for life may be ultimately entitled to the reversion in fee, subject to remainders which fail.¹ Even in this case, evidence may be given that the tenant for life intended the charge to be merged and extinguished.² A tenant in tail in possession has the power to convert the estate into an absolute fee; therefore, if he pays off an incumbrance, the presumption is that he intended it to merge.³ But if the estate of the tenant in fee-simple or in tail is subject to any executory limitations that may defeat their estate, or if they pay off the charges under any mistake as to their title, the court would not allow the charges to merge or become extinguished.⁴ But if a person pays or takes up the charges or incumbrances, and afterwards the legal title should come to him, the charges would merge.⁵ So if a person, having the legal title and holding charges and incumbrances upon the estate, conveys in fee or in mortgage, and makes no mention of the charges or incumbrances, they would merge as between the grantor and grantee.⁶ Generally, where the owner in fee-simple pays off a charge or incumbrance on an estate, the presumption of law is that such charge or incumbrance will merge;⁷ but if he owns

ington *v.* Redington, 1 B. & B. 139; Faulkner *v.* Daniel, 3 Hare, 217; State *v.* Kock, 47 Mo. 582.

¹ Wyndham *v.* Egremont, Amb. 753; Trevor *v.* Trevor, 2 Myl. & K. 675.

² Astley *v.* Milles, 1 Sim. 298.

³ St. Paul *v.* Dudley, 15 Ves. 173; Buckinghamshire *v.* Hobart, 3 Swanst. 199; Jones *v.* Morgan, 1 Bro. Ch. 206.

⁴ Drinkwater *v.* Combe, 2 S. & S. 340; Shrewsbury *v.* Shrewsbury, 3 Bro. Ch. 120; 1 Ves. Jr. 227; Wigsell *v.* Wigsell, 2 S. & S. 364; Horton *v.* Smith, 4 K. & J. 624; Buckinghamshire *v.* Hobart, 3 Swanst. 199; Kirkham *v.* Smith, 1 Ves. 528.

⁵ Horton *v.* Smith, 4 K. & J. 624; Trevor *v.* Trevor, 2 Myl. & K. 675; Wigsell *v.* Wigsell, 2 S. & S. 364.

⁶ Tyler *v.* Lake, 4 Sim. 351; Johnson *v.* Webster, 4 De G., M. & G. 474.

⁷ Hood *v.* Phillips, 3 Beav. 513; Pitt *v.* Pitt, 22 Beav. 294; Gunter *v.*

[1896] 1 Ch. 137. See *In re Good-* id. 542; *In re Morley*, id. 738; *In re*
enough, [1895] 2 Ch. 537; *In re* Pitcairn, [1895] W. N. 139.

Crowther, id. 56; *In re Cleveland*,

only a partial interest, the presumption is that the charge was to be kept on foot.¹ Mere possession of the property by the trustee or by the *cestui que trust* is no evidence of a merger.²

§ 349. Sometimes where an estate has been vested by deed or will in trustees for a *cestui que trust*, whether it is a fee or some lesser estate, the law will presume that the trustees have surrendered, conveyed, or assigned the estate, whatever it was, to the *cestui que trust*.³ This presumption of law is necessary for the quieting of titles. If such presumptions could not be made, some titles would remain forever imperfect. There might be an outstanding legal estate, which would at any time defeat the tenant, if there could not be a presumption of a conveyance or surrender by the trustee to the *cestui que trust*. This presumption is somewhat different from that prescription by which one tenant by an open, peaceable, and adverse occupation, under a claim of right, obtains the legal title as against another person. In such case, after a definite period of time, a grant or conveyance is presumed in favor of the tenant in occupation, though it may be well enough understood that no such grant or conveyance was ever made. So there may be a presumption that a trustee has conveyed to the *cestui que trust*, though such presumption may not always be founded on a belief that such

Gunter, 23 Beav. 571; Swinfen v. Swinfen, 29 Beav. 199; Tyrwhitt v. Tyrwhitt, 32 Beav. 244.

¹ Price v. Gibson, 2 Eden, 115; Swinfen v. Swinfen, 29 Beav. 199; Compton v. Oxenden, 2 Ves. Jr. 263; Donisthorpe v. Porter, 2 Eden, 162.

² Broswell v. Downs, 11 Fla. 62.

³ England v. Slade, 4 T. R. 682; Wilson v. Allen, 1 J. & W. 611; Noel v. Bewley, 3 Sim. 103; Cooke v. Salton, 2 S. & S. 154; Hillary v. Waller, 12 Ves. 239; Lade v. Holford, Bull. N. P. 110; Doe v. Hilder, 2 B. & A. 782; Emery v. Grocock, 6 Madd. 54; Townshend v. Champernown, 1 Y. & J. 583; Goodtitle v. Jones, 7 T. R. 47; Doe v. Sybourn, id. 2; Moore v. Jackson, 4 Wend. 59; Dutch Church v. Mott, 7 Paige, 77; Jackson v. Moore, 13 Johns. 513; 1 Green. Cruise Dig. 412; Matthews v. Ward, 10 Gill & J. 413; Jackson v. Pierce, 2 Johns. 226; Sinclair v. Jackson, 8 Cow. 543.

conveyance was actually made.¹ There is another difficulty between trustees and *cestuis que trust* which does not exist between adverse claimants of the same legal title. The titles of the trustee and *cestui que trust* are not adverse to each other, and generally the possession of the *cestui que trust* is the possession of the trustee; at any rate it is generally consistent with the legal title of the trustee. Therefore, mere length of time as between trustee and *cestui que trust* will afford no ground for a presumption of a conveyance or surrender from the trustee to the *cestui que trust*,² as *cestuis que trust* may occupy the estate indefinitely under a merely equitable title.

§ 350. This presumption has been discussed at length in several cases, and some difference of opinion has been expressed;³ (a) but it seems now to be well settled that three circumstances must concur in order to raise the presumption of a conveyance or surrender by the trustee to the *cestui que trust*: (1) It must have been the duty of the trustee to make the conveyance; (2) There must be some sufficient reason to support the presumption; (3) The presumption must be in support of a just title, and not to defeat it.

§ 351. Thus where the *cestui que trust* becomes absolutely entitled to the whole beneficial interest in the trust estate, and the active duties of the trustee have ceased, the statute of uses generally executes the legal title of the trustee to the *cestui que trust*, and he obtains the legal as well as the beneficial estate. (b) But there are cases where the active

¹ *Hillary v. Waller*, 12 Ves. 252.

² *Keene v. Deardon*, 8 East, 263; *Goodson v. Ellison*, 3 Russ. 588; *Hillary v. Waller*, 12 Ves. 251; 1 Sugd. V. & P. 350, 470; *Flournoy v. Johnson*, 7 B. Mon. 694; *Doe v. Langdon*, 12 Q. B. 719.

³ *Lade v. Holford*, Bull. N. P. 110; *Doe v. Sybourn*, 7 T. R. 2; *Goodtitle v. Jones*, id. 49; *Doe v. Read*, 8 T. R. 118; see note, 1 Green. Cruise, 410; 2 Pow. on Mort. 491.

(a) See also *M'Queen v. Meade*, §§ 49–58, taking away the trustee's title, when merely nominal, and

(b) The N. Y. Rev. Stats. p. 728, vesting it in the beneficiary, do not

duties of the trustee having ceased, the legal title does not pass without a conveyance. In such cases it is clearly the duty of the trustee to convey the legal title to the *cestui que trust*, or to such person as he shall appoint.¹ Therefore, if the beneficial owner has been a long time in possession, dealing with the estate in every respect as his own, it will be presumed that the trustee performed his duty and conveyed the legal estate to the proper person. As where a mortgage in fee was made to a trustee for the real mortgagee, and the *cestui que trust* or real mortgagee took a conveyance of the equity of redemption, and ever after dealt with the estate as if the legal fee was in him, a conveyance of the mortgage was presumed to have been made to him by the trustee.² There was a use of the estate in this case for one hundred years. Where lands were conveyed to trustees for a religious society, which was afterwards incorporated, it was held, after the use of the land for one hundred and forty years by the incorporated society, that a conveyance by the trustees might be presumed.³ So where several persons conveyed to a trustee a tract of land for the purposes of a partition by the trustee conveying back to each person his share in severalty, as set forth in the deed, it was held, after an occupation of many years by each person in severalty according to the intended partition, that the trustee might be presumed to have conveyed.⁴ Where the trustees are to convey upon a certain event, or at a certain time, as when a minor becomes twenty-one, the presumption will arise after a much shorter

¹ Langley v. Sneyd, 1 S. & S. 45; Carteret v. Carteret, 2 P. Wms. 134; Angier v. Stannard, 3 Myl. & K. 571; England v. Slade, 4 T. R. 682; Goodson v. Ellison, 3 Russ. 583.

² Noel v. Bewley, 3 Sim. 103.

³ Dutch Church v. Mott, 7 Paige, 77.

⁴ Jackson v. Moore, 13 Johns. 513.

apply when the trustee has himself an interest in the grant, either as an individual or with others. King v. Townsend, 141 N. Y. 358. See *supra*, § 142; Miller v. Rosenberger, 144 Mo. 292. Those statutes prohibit passive trusts. Townshend v. Grommer, 125 N. Y. 446; Murphey v. Cook (S. D.), 75 N. W. 387.

lapse of time.¹ Thus, where trustees were to convey to the testator's son immediately on his coming of age, the son became of age in 1788, and granted a long lease in 1789, the court presumed a conveyance in 1792, or only four years after the event, there being no proof of an actual conveyance. Lord Kenyon said "there was no reason why the jury should not presume a conveyance from the trustees. They were bound to make one, and a court would have compelled them to have done it if they had refused. It is rather to be presumed that they did their duty. And as to time, the jury may be directed to presume a conveyance and surrender in much less time than twenty years."² So where the direction to the trustee to convey applies to only a part of the estate, the court may presume a conveyance of the whole, if the circumstances require or warrant such presumption.³

§ 352. If the estate was originally conveyed to trustees for some particular purpose, as by way of security or indemnity, or to raise an annuity or portion, or for any other purpose, as soon as the purpose is accomplished, the trustees become mere dry trustees, and it is their duty to convey the estate to the beneficial owner.⁴ Where, from lapse of time joined with other circumstances, there is a moral certainty that the purposes of the trust have all been accomplished, the court will act upon the certainty, and presume a reconveyance although there is no direct proof of the fact.⁵

§ 353. Where an estate is vested in trustees upon an express trust, they must retain the legal title until the trusts

¹ *Wilson v. Allen*, 1 J. & W. 611 ; *Hillary v. Waller*, 12 Ves. 239 ; *Doe v. Sybourn*, 7 T. R. 2.

² *England v. Slade*, 4 T. R. 682 ; *Marr v. Gilman*, 1 Cold. 488.

³ *Hillary v. Waller*, 12 Ves. 239.

⁴ *Hillary v. Waller*, 12 Ves. 239 ; *Doe v. Sybourn*, 7 T. R. 2 ; *Cooke v. Soltau*, 2 S. & S. 154 ; *Ex parte Holman*, 1 Sugd. V. & P. 509 ; *Emery v. Grocock*, 6 Madd. 54 ; *Doe v. Wright*, 2 B. & A. 710 ; *Bartlett v. Downes*, 3 B. & Cr. 616.

⁵ *Emery v. Grocock*, 6 Madd. 54 ; *Hillary v. Waller*, 12 Ves. 252.

are fully executed. Therefore, no conveyance will be presumed, so long as the trustees have any duties to perform; for that would be to presume a breach of trust, which will never be presumed: the fact must be proved by competent evidence.¹ In *Aiken v. Smith*, the court presumed that the conveyance was made at the death of the tenant for life, that being the time fixed for the conveyance, and the time when the active duties of the trustees ceased.²

§ 354. But there must always be sufficient reason for presuming a reconveyance or surrender by the trustee; that is, there must be some evidence of such a conveyance, or some evidence upon which the presumption of the conveyance may be founded. The mere fact that the trustee was to convey upon the execution of the trust, or upon the happening of a certain event, is not enough. There must be some circumstance from which it may be reasonably concluded that he did in *fact* convey. Mere length of time is not enough. Courts have refused after the lapse of one hundred and twenty years to presume a reconveyance, when there were no intermediate transactions to give force to the length of time;³ for the possession during all that time may not be inconsistent with the trustee's title.⁴ However, great lapse of time is an important circumstance; and the fact that it was the duty of the trustees to convey is another important circumstance. Very slight circumstances added to these will be sufficient to justify a court or jury in presuming a conveyance; and a conveyance may be presumed where the estate has been dealt with by the beneficial owner in a manner in which reasonable men do not deal

¹ *Beach v. Beach*, 14 Vt. 28; *Doe v. Staple*, 2 T. R. 681; *Keene v. Deardon*, 8 East, 248; *Flournoy v. Johnson*, 7 B. Mon. 694.

² *Aiken v. Smith*, 1 Sneed, 304. This case is opposed to *Rees v. Williams*, 2 M. & W. 749.

³ *Goodright v. Swymmer*, 1 Kenyon, 385; *Goodson v. Ellison*, 3 Russ. 583; *Langley v. Sneyd*, 1 S. & S. 45; *Doe v. Lloyd*, *Mathews on Presumptions*, 215.

⁴ *Ibid.*; *Keene v. Deardon*, 8 East, 303; *Hillary v. Waller*, 12 Ves. 250.

with their estates, unless they are the legal as well as beneficial owners.¹

§ 355. It is further said that the purpose of the presumption must be to prevent a just title from being defeated by mere matter of form.² The presumption is a shield for defence and not a sword for attack, as was said of another principle of law. As the presumption was introduced for the security of estates and the protection of innocent purchasers, it cannot be set up to eject them from their estates; and therefore the presumption will be made only in favor of the person in whom the beneficial title is clearly vested for the time being, whatever may be the extent of his equitable interest.³ So it was not allowed to be set up in favor of a defendant who showed no title but a mere naked possession, which might have been obtained by a disseizin of the beneficial owner.⁴ And where two litigants both claimed to be the beneficial owners, a surrender of an outstanding legal estate or term was not presumed, lest either obtaining it should defeat the other without regard to the merits of his beneficial title.⁵

§ 356. In England, there was a system of conveyancing by which outstanding terms were made to attend the legal title and protect it. Much litigation and discussion has been had over these terms, their merging in the legal title, and their presumed surrender: They have very little importance in this country, and the statement of the law concerning them is not deemed necessary.⁶

¹ *Garrard v. Tuck*, 8 C. B. 248; *Cottrell v. Hughes*, 15 C. B. 532; *Hilary v. Waller*, 12 Ves. 239; *Wilson v. Allen*, 1 J. & W. 611.

² *Lade v. Holford*, Bull. N. P. 110; *Doe v. Sybourn*, 7 T. R. 2; *Goodtitle v. Jones*, 7 T. R. 47.

³ *Doe v. Cook*, 6 Bing. 179; *Tenny v. Jones*, 10 Bing. 75; *Bartlett v. Downes*, 8 B. & Cr. 616; *Noel v. Bewley*, 3 Sim. 103; *Wilson v. Allen*, 1 J. & W. 611.

⁴ *Doe v. Cook*, 6 Bing. 179; *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 T. R. 2.

⁵ *Doe v. Wrighte*, 2 B. & A. 710.

⁶ See Hill on Trustees, pp. 253-263.

CHAPTER XII.

EXECUTORY TRUSTS.

- §§ 357-359. Nature of an executory trust. The rule in Shelley's case.
§ 360. Distinction between marriage articles and wills.
§ 361. Construction of marriage articles and their correction.
§ 362. Where strict settlements will not be ordered.
§§ 363, 364. Settlement of personal property.
§ 365. Construction of marriage settlements.
§ 366. Executory trusts under wills.
§ 367. Who may enforce the execution of executory trusts.
§ 368. Inducements for marriage.
§§ 369, 370. Construction of executory trusts under wills.
§ 371. The words "heirs of the body" and "issue."
§ 372. When courts will reform executory trusts.
§ 373. How courts will direct a settlement of personal chattels.
§ 374. Whether courts will order a settlement in joint-tenancy.
§ 375. What powers the court will order to be inserted in a settlement.
§ 376. Settlement will be ordered *cy près* the intention.

§ 357. It is a fundamental proposition that equitable estates are governed by the same rules as legal estates, otherwise inextricable confusion would ensue.¹ If there was one rule on the equity side, and another on the law side of courts, there would be no certainty or uniformity of interpretation or construction. Thus at common law a grant to A. for life, remainder to the heirs of his body, vested an estate in fee-tail in A., which he could bar, and cut off the remainder. The same rule was applied to *executed* trusts. Thus if land is given to A. and his heirs in trust for B. for life, remainder to the heirs of his body, B. takes an equitable fee-tail;² for

¹ *Frye v. Porter*, 1 Mod. 300; *Price v. Sisson*, 2 Beas. 168; *Cowper v. Cowper*, 2 P. Wms. 753; *Burgess v. Wheate*, 1 Wm. Black. 123; *Cushing v. Blake*, 30 N. J. Eq. 689.

² This illustration states the law only in States where the rule in Shelley's case, as it is called, is in force. In States where the rule is abrogated by statute, those who take in remainder under the limitation, take as purchasers; and the same rule applies to equitable estates.

the same rules apply to the two species of estate.¹ Therefore where technical words are used in the creation of an executed trust estate, they will be taken in their legal technical sense,² though Lord Hardwicke once added this qualification, "unless the intention of the testator or author of the trust plainly appeared to the contrary."³ But this qualification has been time and again overruled, and it is now an established canon that a limitation in trust, perfected and declared by the settlor, shall have the same construction as in the case of an executed legal estate.⁴ But while technical words receive their technical meaning in equitable as well as legal estates, technical words are not always necessary to create and limit equitable estates in fee. Thus an equitable fee may be created in a deed without the word "heirs," and an equitable entail without the words "heirs of the body," if the words used in their popular sense are equivalent to the technical words, or if the intention is sufficiently expressed and clear.⁵ Thus if an estate is *devised* to A. and his heirs in trust for B. without other limitations, B. will take an equitable fee; for it is plain that B. is to take an equitable estate as large as the legal estate that passed to A. and his heirs, which is a legal fee.⁶ But if an estate is conveyed by *deed* to A. and his heirs in trust for the grantor for life, remainder for his children, without the word "heirs," the children take an estate for life only, in analogy to the rules of law.⁷

¹ *Noble v. Andrews*, 37 Conn. 346.

² *Wright v. Pearson*, 1 Eden, 125; *Bale v. Coleman*, 8 Vin. 268; *Jervoise v. Northumberland*, 1 J. & W. 571; *McPherson v. Snowdon*, 19 Md. 197.

³ *Garth v. Baldwin*, 2 Ves. 655.

⁴ *Brydges v. Brydges*, 3 Ves. Jr. 125; *Austen v. Taylor*, 1 Eden, 367; *Glenorchy v. Bosville*, Ca. t. Talb. 19; *Synge v. Hales*, 2 B. & B. 507; *Wright v. Pearson*, 1 Eden, 125. But see *Cushing v. Blake*, 30 N. J. Eq. 389; *Carter v. Montgomery*, 2 Tenn. Ch. 216.

⁵ *Shep. Touch.* by Preston, 106.

⁶ *Moore v. Cleghorn*, 10 Beav. 423; 12 Jur. 591; *Knight v. Selby*, 3 Man. & Gr. 92; *Doe v. Cafe*, 7 Exch. 675; *Watkins v. Weston*, 32 Beav. 238; *McClintock v. Irving*, 10 Ir. Ch. 481; *Brenan v. Boyne*, 16 Ir. Ch. 87; *Betty v. Elliott*, id. 110, n.; *Re Bayley*, id. 215.

⁷ *Overton v. Halliday*, 14 Beav. 467; 15 id. 480; 16 Jur. 71; *Lucas*

§ 358. The rule in Shelley's case was never a rule of intention, or of construction to reach and carry out the settlor's intention; but it was established as an absolute rule of property to obviate certain difficulties that would arise in relation to tenures, if certain persons to whom property was limited were allowed to take as purchasers, and not by descent.¹ (a) It is notorious that the rule disappointed the intention of settlors in most cases, and gave an absolute disposal of the inheritance to the first taker, where the settlor intended that such first taker should have only an estate

v. Brandreth, 28 Beav. 274; *Tatham v. Vernon*, 29 id. 604; *Nelson v. Davis*, 35 Ind. 474.

¹ Doeblér's App., 64 Penn. St. 9.

(a) The rule in Shelley's case applies to leasehold as well as freehold estates. *Hughes v. Nicklas*, 70 Md. 484. Under that rule, a devise to the testator's son for life with remainder to his legitimate child or children, if any, and if he dies without issue, then to another son of the testator for life and afterwards to his legitimate child or children, if any, was held to give to the first son, who died without issue, an estate tail in the testator's realty. *Bowen v. Lewis*, 9 A. C. 890; see *Morgan v. Thomas*, 9 Q. B. D. 643; *Evans v. Evans*, [1892] 2 Ch. 173; *Sandes v. Cooke*, 21 L. R. Ir. 445; *Neville v. Thacker*, 23 id. 344; *Clarkson v. Clarkson*, 125 Mo. 381; *Cowell v. Hicks* (N. J. Eq.), 30 Atl. Rep. 1091; *Thompson v. Tryon*, 66 Vt. 191; *Leake v. Watson*, 60 Conn. 498; *Taney v. Fahnley*, 126 Ind. 88; *Smith v. Collins*, 90 Ga. 411; *Seeger v. Leakin*, 76 Md. 500; *Hurst v. Wilson*, 89 Tenn. 270; *Earnhart v. Earnhart*, 127 Ind. 397; *Gladsden*

v. Desportes, 39 S. C. 131; *Starnes v. Hill*, 112 N. C. 1; *Hardage v. Stroope*, 58 Ark. 303; *Moore v. Waco*, 85 Texas, 206. The rule in Shelley's case is abolished by statute in Massachusetts, Mississippi, &c., and as to real estate in New Hampshire. *Trumbull v. Trumbull*, 149 Mass. 200; *Sims v. Pierce*, 157 Mass. 52; *Cloutman v. Bailey*, 62 N. H. 44.

The rule in Shelley's case appears, in England, to be a rule of law, to be applied even when a testator expressly declares that it shall not apply to any of the limitations of his will. *Van Grutten v. Foxwell*, [1897] A. C. 658; 66 L. J. Q. B. 745. And in this country the rule has been held when applicable, in the case of devises, not to be controlled by the testator's intention. *Lippincott v. Davis*, 59 N. J. L. 241. But see *De Vaughn v. Hutchinson*, 165 U. S. 566; *Hambel v. Hambel* (Iowa), 75 N. W. 673; *Brown v. Bryant* (Texas), 44 S. W. 399.

for life.¹ As trusts are wholly independent of tenure, they ought not to be affected by the rule, and a few cases have seemed to indicate that they were withdrawn from the operation of it;² but it is now established that the same rule shall apply to the same limitation whether it is of an equitable or a legal estate.³ Thus the rule in Shelley's case will be ap-

¹ For these reasons the rule is now abolished in many of the States by statute. The proposition of the text, however, should be read in the light of the remarks of Agnew, J., in Yarnall's App., 70 Penn. St. 340: "In regard to wills the cases show that technical phrases, as well as forms of expression decided in other cases, are not permitted to overturn the intent of the testator, when that intent is clearly ascertained to be different in the will under examination by the court. This broad principle needs no citation to support it, for it is founded on the universal rule that the intention of the testator is the guide for the interpretation of wills. The rule in Shelley's case is only an apparent not a real exception to this statement. It sacrifices a particular intent only to give effect to the main intent of the testator. All the authorities are agreed that this rule has no place in the interpretation of wills, and takes effect only when the interpretation has been first ascertained. Mr. Fearn, Contingent Remainders, p. 188, says, 'Nothing can be better founded than Mr. Hargrave's doctrine, that the rule in Shelley's case is no medium for finding out the intention of the testator; that, on the contrary, the rule supposes the intention already discovered and to be a superadded succession to the heirs, general or special, of the donee for life, by making such donee the ancestor *terminus* or *stirps*, from which the generation of posterity or heirs is to be accounted; and that whether the conveyance has or has not so constituted an estate of freehold, with a succession engrafted on it, is a previous question which ought to be adjusted before the rule is thought of; that, to resolve that point, the ordinary rules for interpreting the language of wills ought to be resorted to; that when it is once settled that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally to comprise the whole line of heirs of the tenant for life, and has really made him the *terminus*, or ancestor by reference to whom the succession is to be regulated, then comes the proper time to inspect the rule in Shelley's case.' In *Hileman v. Bouslaugh*, 1 Harris, 351, Ch. J. Gibson expresses the same idea in fewer words, thus: 'This operates only on the intention of the testator when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills; but when this is ascertained, is found to be within the rule, then there is but one way; it admits of no exception.' "

² *Withers v. Allgood*, cited, and *Bagshaw v. Spencer*, 1 Ves. 150.

³ *Garth v. Baldwin*, 2 Ves. 646; *Wright v. Parsons*, 1 Ed. 128; *Brydges*

plied to a gift to A. and his heirs in trust for B. for life, and remainder to his heirs, or heirs of his body. The reason of the rule as applied to legal estates was some real or fancied difficulty concerning tenures, or to bring estates one generation sooner into commerce, or some other reason: for neither judges nor text-writers are agreed upon the original reasons of the rule. The reason of the application of the rule to limitations of trust estates is to preserve a uniformity of the law in relation to the two kinds of estates in land. This leads Mr. Lewin to say, that although the rule is not *equally applicable* to trust estates, yet it is *equally applied*.¹ But the rule will not be applied to vest a fee or fee-tail in the first taker, unless the word "heir" is used as a term of succession, and not as a mere *designatio personæ*. Thus if an estate be *devised* to A. and his heirs in trust for B. for life, and after his decease in trust for the person who shall then be his heir, B. takes an estate for life only, and the person thus designated takes the estate by purchase.² So if the legal estate is given to A. *in trust* for B. for life, and the legal remainder to the heirs of B., at his decease the rule cannot apply; for the legal and equitable estate cannot so coalesce that B. can take a fee either legal or equitable.³

§ 359. But in order that technical words may receive their legal signification, and in order that the rule in *Shelley's case* may be applied to limitations of equitable estates, the trusts must be *executed* and *not executory*.⁴ All trusts

v. Brydges, 3 Ves. 120; *Jones v. Morgan*, 1 Bro. Ch. 206; *Webb v. Shaftesbury*, 3 Myl. & K. 599; *Roberts v. Dixwell*, 1 Atk. 610; *West*, 536; *Britton v. Twining*, 3 Mer. 175; *Spence v. Spence*, 12 C. B. (N. S.) 199; *Coape v. Arnold*, 2 Sm. & Gif. 311; *Noble v. Andrews*, 37 Conn. 316; *Cushing v. Blake*, 30 N. J. Eq. 689; *Sprague v. Sprague*, 12 R. I. 703.

¹ Lewin on Trusts, 88 (5th ed.).

² *Greaves v. Simpson*, 10 Jur. (N. S.) 609.

³ *Collier v. McBean*, 34 Beav. 426; L. R. 1 Ch. 81.

⁴ *Egerton v. Brownlow*, 4 H. L. Cas. 210; *Rochford v. Fitzmaurice*, 2 Dr. & W. 20; 4 Ired. Eq. 384; *Tatham v. Vernon*, 29 Beav. 604; *Bacon's App.*, 57 Penn. St. 504. This distinction was very early established. *Bale*

are *executory* in one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee.¹ But such is not the meaning of judges when they speak of *executed*

v. Coleman, 8 Vin. 267; *Stamford v. Hobart*, 3 Bro. P. C. 33; *Papillon v. Voice*, 2 P. Wms. 471; *Glenorchy v. Bosville*, t. Talb. 3; *Gower v. Grosvenor*, Barn. 62; *Roberts v. Dixwell*, 1 Atk. 607; *Baskerville v. Baskerville*, 2 Atk. 279; *Woodhouse v. Haskins*, 3 Atk. 24; *Read v. Snell*, 2 Atk. 648; *Marryat v. Townley*, 1 Ves. 102. Several of these cases were decided by Lord Hardwicke; but in *Bagshaw v. Spencer*, 1 Ves. 152, he nearly confounded and denied the distinction. In *Exel v. Wallace*, 2 Ves. 233, however, Lord Hardwicke explained his meaning, and desired to have it remembered that he did not mean to say that his predecessors were wrong. The distinction, as stated in the text, is now firmly established both in England and the United States. *Barnard v. Broby*, 2 Cox, 8; *Wright v. Pearson*, 1 Eden, 125; *Austen v. Taylor*, id. 366; *Stanley v. Lennard*, id. 95; *Lincoln v. Newcastle*, 12 Ves. 227; *Jervoise v. Northumberland*, 1 J. & W. 570; *Deerhurst v. St. Albans*, 5 Madd. 233; 2 Cl. & Fin. 611; *Blackburn v. Stables*, 2 V. & B. 369; *Douglass v. Congreve*, 1 Beav. 59; 4 Bing. N. C. 1; 5 Bing. N. C. 318; *Boswell v. Dillon*, 1 Dru. 297; *Neves v. Scott*, 9 How. 211; 13 How. 268; 4 Kent, Com. 218 *et seq.*; *Garner v. Garner*, 1 Des. 444; *Porter v. Doby*, 2 Rich. Eq. 49; *Dennison v. Goehring*, 7 Barr, 177; *Findlay v. Riddle*, 3 Binn. 152; *Edmondson v. Dyson*, 2 Kelly, 307; *Wiley v. Smith*, 3 Kelly, 559; *Wood v. Burnham*, 6 Paige, 518; 26 Wend. 19; *Imlay v. Huntington*, 20 Conn. 162; *Berry v. Williamson*, 11 B. Mon. 251; *Horne v. Lyethe*, 4 H. & J. 434; *Loring v. Hunter*, 8 Yerg. 31; *Bold v. Hutchinson*, 5 De G., M. & G. 558. Lord Northington said that the words "executory trusts" seemed to him to have no fixed signification. Lord King said a trust was executory where the party must come into court to have the benefit of the will. Mr. Lewin says the true criterion is, where the assistance of the court is necessary to complete the limitations, p. 89. Lord Eldon said the trust was executory where the testator had not completed the devise, but had left something to be done, so that the court must look to the intention. *Jervoise v. Northumberland*, 1 J. & W. 570. Lord St. Leonards distinguishes the two as follows: "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out, from general expressions, what his intention is, or has he so defined that intention that you have nothing to do but to take that which is given you, and to convert them into legal estates?" *Egerton v. Brownlow*, 4 H. L. Cas. 210.

¹ *Bagshaw v. Spencer*, 1 Ves. 142; *Egerton v. Brownlow*, 4 H. L. Cas. 210; *Coape v. Arnold*, 4 De G., M. & G. 585.

trusts, and *executory* trusts. These words refer rather to the manner and perfection of their creation than to the action of the trustee in administering the property. Thus a trust created by a deed or will, so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an *executed* trust. In these trusts, technical words receive their legal meaning, and the rules applicable to legal estates govern the equitable estates thus created.¹ On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the directions thus given.² They are called *executory*, not because the trust is to be performed in the future, but because the trust instrument itself is to be moulded into form and perfected according to the outlines or instructions made or left by the settlor or testator.³ (a) Thus land conveyed to A.

¹ Wright v. Pearson, 1 Eden, 125; Austen v. Taylor, id. 367; 4 Kent, Com. 220; Jones v. Morgan, 1 Bro. Ch. 206; Jervoise v. Northumberland, 1 J. & W. 559; Boswell v. Dillon, 1 Dru. 291.

² Austen v. Taylor, 1 Eden, 366; Wright v. Pearson, id. 125; Jervoise v. Northumberland, 1 J. & W. 570; Coape v. Arnold, 4 De G. M. & G. 585; Neves v. Scott, 9 How. 211; Wiley v. Smith, 3 Kelly, 559; Edmondson v. Dyson, 2 Kelly, 307; Wood v. Burnham, 6 Paige, 518; 26 Wend. 19; Thompson v. Fisher, L. R. 10 Eq. 207; Cushing v. Blake, 30 N. J. Eq. 689.

³ Ibid.

(a) When it is uncertain who the remaindermen will be, the trust is executory, and the remainder is an equitable, and not a legal estate. Cushman v. Coleman, 92 Ga. 772; Carney v. Kain, 40 W. Va. 758. "In practice the chief distinction between an executed and an executory trust lies in the fact that the former executes itself by converting its limitations into the corresponding legal estates, whereas in the latter, the court may direct that form of settlement or conveyance which will best give effect to the settlor's intention, and for this purpose may even disregard the construction the instrument would re-

upon trust, to settle the same upon B. and C. and their issue, in the event of their marriage, is an *executory trust*.¹ There is a conveyance or settlement to be executed by A., and the form or terms of this conveyance or settlement is to be determined by the intention of the original grantor.² When this conveyance or settlement is finally determined and made, the trust becomes *executed* in the sense of the word as applicable to this distinction, and it is afterwards governed by all the rules of an executed trust. The difference between the two kinds of trusts is this. In *executed* trusts the rules of property govern, and not the intention of the settlor, if it is contrary to the law or rule of property.³ Thus if, in an executed trust, an estate is given to A. in trust for B. for life, with remainder to his heirs, B. takes an equitable fee, and may convey the equitable inheritance and exclude his heirs, although it is perfectly certain that the settlor intended that B. should take an estate for his life only.⁴ But an executory trust is settled and carried into effect according to the *intention* of the settlor.⁵ Thus if an estate is conveyed to A. in

¹ Ibid.² Ibid.³ *Choice v. Marshall*, 1 Kelly, 97; *Schoonmaker v. Sheely*, 3 Hill, 165; *Grisland v. Rapelye*, 3 Edw. 2; *Brant v. Gelston*, 2 John. Ca. 384.⁴ Ibid.⁵ *Wood v. Burnham*, 6 Paige, 513; 26 Wend. 9; 4 Kent, Com. 219; 1 West, Ch. t. Hardwicke, 542. A mere direction to convey will not render the trust executory, if the directions are so clear, and the limitations are so certainly defined, that there is nothing to do but to convey in accordance with them. In order that the trust may be executory, there must be some room for construction, in order to determine the intention of the settlor; that is, to determine what limitation shall be, and what shall not be, introduced into the conveyance to be made. *Egerton v. Brownlow*, 4 H. L. Cas. 210; *Austen v. Taylor*, 1 Ed. 361; *Wight v. Leigh*, 15 Ves. 564; *Graham v. Stewart*, 2 Macq. H. L. Ca. 205; *Herbert v. Blunden*, 1 Dr. & Walsh, 78; *East v. Twyford*, 9 Hare, 713; *Doncaster v. Doncaster*, 3 K. & J. 26; *Stanley v. Stanley*, 16 Ves. 491; *Glenorchy v. Bosville*, 1 Lead. Ca. Eq. 20, and notes; *McElroy v. McElroy*, 113 Mass. 509; *Cushing v. Blake*, 30 N. J. Eq. 689.

ceive at law." *Per* Garrison, J., in *ton*, 59 N. H. 364; *supra*, § 82, note; *Pillot v. Landon*, 46 N. J. Eq. 310, *Pittman v. Pittman* (N. C.), 11 L. 313. See also *Smith's Estate*, 144 R. An. 456, and note. *Penn. St.* 428; *Bartlett v. Reming-*

trust, with instructions to convey it to B. for life, with remainder to his heirs, or to convey it in trust for B. for life, with remainder to his heirs, B. takes an estate for life only, and his heirs take by purchase at his decease, if such appeared to be the intention of the original gift or grant.¹

§ 360. In the history of executory trusts, still another distinction has been drawn, or a distinction between executory trusts created by marriage articles, and executory trusts created by wills. This is not so much a difference between two classes of executory trusts, as it is a difference between the rules that will be applied to the interpretation of *marriage articles and of wills*, in order to determine the intention of the settlor or the testator. Lord Eldon once said, that "there was no difference in the execution of an executory trust created by will, and a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity."² But the great chancellor afterwards modified his expression.³ And certainly there is no difference in the execution of the two trusts when it is settled what they are; but there is a difference in the construction of marriage articles and of wills in order to reach the intention of the creator of the trusts. Thus, in marriage articles, the intention of the parties to the articles is presumed to be a provision for the issue of the marriage, and such construction is given to the articles as to carry into effect this presumed intention if possible; while in construing wills, in order to settle the limitations of a trust, there is no such presumed leading intention; or, as Sir W. Grant put it, "I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. Where the object is to make a provi-

¹ Ibid.: *Savage v. Tyers*, L. R. 8 Ch. 356.

² *Lincoln v. Newcastle*, 12 Ves. 230; and see *Turner v. Sargent*, 17 Beav. 519; *Reed v. Palmer*, 53 Penn. St. 379.

³ *Jervoise v. Northumberland*, 1 J. & W. 574; *Townsend v. Mayer*, 3 Beav. 443; *Lassence v. Tierney*, 1 Mac. & G. 551; *Gardner v. Stevens*, 30 L. J. Ch. 199; *Crofton v. Davies*, L. R. 4 C. B. 159.

sion by the settlement for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement be to limit an estate for life with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention. But if a will directs a limitation for life with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement."¹

§ 361. Thus if, in marriage articles, the real estate of the husband or of the wife is limited to the *heirs of the body* or to the *issue*² of the contracting parties, or either of them, or to the issue of the body, or to the issue and their heirs,³ so that the words and limitations, taken in their legal sense, would enable the parents, or one of them, to defeat this provision for the children, equity will construe the articles to mean that the estate is limited to the parents for life, and the children will take at the decease of their parent or parents as purchasers; and equity will decree a formal settlement to be drawn in such way as to carry out this purpose.⁴ (a) If a settlement is already drawn *after* the marriage, but not in accordance with this rule, equity will correct and reform it so as to carry out this intention.⁵ But if the settlement

¹ Blackburn *v.* Stables, 2 Ves. & B. 369; Bale *v.* Coleman, 8 Vin. 267; Strafford *v.* Powell, 1 B. & B. 25; Syngé *v.* Hales, 2 B. & B. 508; Maguire *v.* Scully, 2 Hog. 113; Rochford *v.* Fitzmaurice, 1 Conn. & Laws, 173; 2 Dr. & War. 18; 4 Ir. Eq. 375; Jervoise *v.* Northumberland, 1 J. & W. 574; Deenhurst *v.* St. Albans, 5 Madd. 260.

² Dod *v.* Dod, Amb. 274.

³ Phillips *v.* James, 2 Dr. & Sm. 404.

⁴ Handick *v.* Wilkes, 1 Eq. Cas. Ab. 393; Gilb. Eq. 114; Trevor *v.* Trevor, 1 P. Wms. 622; Rochford *v.* Fitzmaurice, 1 Conn. & Laws. 173; 2 Dr. & War. 18; 4 Ir. Eq. 375; Cusack *v.* Cusack, 5 Bro. P. C. 116; Davies *v.* Davies, 4 Beav. 54; Griffith *v.* Buckle, 2 Vern. 13; Jones *v.* Langton, 1 Eq. Cas. Ab. 392; Stonor *v.* Curwen, 5 Sim. 269; Barnaby *v.* Griffin, 3 Ves. 206; Horne *v.* Barton, 19 Ves. 398; Coop. 257; 22 L. J. (N. S.) Ch. 225.

⁵ Warrick *v.* Warrick, 3 Atk. 293; Sheatfield *v.* Sheatfield, Ca. t. Talb.

(a) See Grier *v.* Grier, L. R. 5 H. L. 688, 699.

was formally drawn out before marriage contrary to this rule, the court will presume that the parties abandoned the articles, and entered into a new agreement, as expressed in the settlement.¹ If, however, a settlement before marriage is expressed on its face to be made to carry out the articles, and it does not carry them out in this respect, equity will reform it.² So if it can be shown in any other way that the formal settlement was intended to carry out the articles, and it does not do so, equity will reform it on the ground of mistake,³ or if the settlement is made in the very words of the articles, and the legal effect of the words of the articles and settlement is different from the intention of the parties, the settlement will be corrected and reformed in order to carry out the exact intention of the parties.⁴ If, however, there are any intervening rights, as those of an innocent purchaser without notice, his rights of course will be protected.⁵ So it is established that daughters are included under the general term of *heirs* or *issue*, and that they take as purchasers.⁶ And children includes grandchildren.⁷ This has been held in England.⁸ Of course in the United States, where primogen-

176; *Legg v. Goldwire*, id. 20; *Burton v. Hastings*, Gilb. Eq. 113; overruling same case 1 Eq. Cas. Ab. 393; *Briscoe v. Briscoe*, 7 Ir. Eq. 129.

¹ *Legg v. Goldwire*, Ca. t. Talbot, 20; *Warrick v. Warrick*, 3 Atk. 291.

² *Honor v. Honor*, 1 P. Wms. 123; *West v. Errissey*, 2 P. Wms. 349; *Roberts v. Kingsley*, 1 Ves. 238.

³ *Bold v. Hutchinson*, 5 De G., M. & G. 568; *Rogers v. Earl*, 1 Dick. 294; 1 Sugd. V. & P. 143.

⁴ *West v. Errissey*, 2 P. Wms. 349; *Roberts v. Kingsley*, 1 Ves. 238; *Honor v. Honor*, 1 P. Wms. 128; 2 Vern. 658; *Powell v. Price*, 2 P. Wms. 535; *Gaillard v. Pardon*, 1 McM. Eq. 358; *Neves v. Scott*, 9 How. 197; *Gause v. Hale*, 2 Ired. Eq. 241; *Smith v. Maxwell*, 1 Hill. Eq. 101; *Allen v. Rumph*, 2 Hill, Eq. 1; *Briscoe v. Briscoe*, 7 Ir. Eq. 129.

⁵ *Warrick v. Warrick*, 3 Atk. 291; *Trevor v. Trevor*, 1 P. Wms. 622; *West v. Errissey*, 2 P. Wms. 349. But if the purchaser have notice of the articles, they may be enforced against him. *Davies v. Davies*, 4 Beav. 54; *Thompson v. Simpson*, 1 Dr. & War. 491; *Abbott v. Geraghty*, 4 Ir. Eq. 15.

⁶ *West v. Errissey*, 2 P. Wms. 349; *Comyn*, R. 412; 1 Bro. P. C. 225.

⁷ *Scott v. Moore*, 1 Wins. (N. C.) Eq. 98.

⁸ *Burton v. Hastings*, 2 P. Wms. 535; Gilb. Eq. 113; 1 Eq. Cas. Ab.

iture is abolished, estates will be settled upon sons and daughters equally, or upon daughters alone in default of sons. But if the children or issue of the marriage are provided for in some other way, as by portions to be raised for them in such manner that it appears that they are not intended to take as purchasers of the particular estate under the settlement, then the rule in Shelley's case will prevail, and the parents or parent may sell the whole estate.¹ And so where there is an actual present conveyance of personal property by a marriage contract executed before marriage in trust for the wife, and at her death to the heirs of her body, it was held to be an executed trust, there being no further conveyances to be executed, and that the rule in Shelley's case applied.²

§ 362. In England, when a married woman could not convey her interest in real estate, a strict settlement was not ordered under marriage articles that limited the *husband's* estate to the heirs of the body of the wife, for the reason that this created an entail that could not be barred without considerable difficulty; but since the Fines and Recoveries Act, the difficulty is removed.³ Nor will the court order a strict settlement, if there is anything in the nature of the limitations, or otherwise on the face of the articles, which indicates that such was not the intention of the parties, for the reason that the rule now under discussion was established in order to carry out the intention of the parties. If, therefore, the intention of the parties appears to be in accordance with, or not contrary to, the ordinary rule, the ordinary rule will be allowed to prevail.⁴

393; *Hart v. Middlehurst*, 3 Atk. 371; *Maguire v. Scully*, 2 Hog. 113; 1 Beat. 370; *Marryat v. Townley*, 1 Ves. 105; *Phillips v. Jones*, 4 Dr. & Sm. 406; 3 De G., J. & S. 72.

¹ *Powell v. Price*, 2 P. Wms. 535; *Fearne's Con. Rem.* 103.

² *Carroll v. Renick*, 7 Sm. & M. 799; *Tillinghast v. Coggeshall*, 7 R. I. 383.

³ *Rochford v. Fitzmaurice*, 2 Dru. & W. 19; *Highway v. Banner*, 1 Bro. Ch. 587; *Howel v. Howel*, 2 Ves. 358; *Green v. Ekins*, 2 Atk. 477; *Honor v. Honor*, 1 P. Wms. 123.

⁴ *Rochford v. Fitzmaurice*, 2 Dru. & W. 19; *Highway v. Banner*, 1 Bro.

§ 363. If personal property is agreed to be settled on the parents for life, and then to their heirs, or the heirs of their bodies, the chattels will not vest in the parents absolutely, but in the heirs when they are born;¹ and it is not necessary that they should survive their parents, or become actual heirs,² unless the gift is to the parents and their heirs living at the death of the surviving parent, or there are other equivalent words.³

§ 364. If there is a covenant in marriage articles to settle personal property upon the same trusts, and for the same purposes, as the real estate is settled, the court will not apply the same limitations to the personal as to the real estate, for that would be to vest an absolute interest in the heirs at their birth; but the court will insert a provision making the personal property follow the course of the real estate.⁴ Courts will also insert a provision that the children or issue shall take, as tenants in common, and not as joint-tenants, on account of the inconveniences of joint-tenancies, and from the presumed intention of the parties;⁵ and so the court will

Ch. 587; *Howel v. Howel*, 2 Ves. 358; *Green v. Ekins*, 2 Atk. 477; *Honor v. Honor*, 1 P. Wms. 123; *Power v. Price*, 2 P. Wms. 535; *Chambers v. Chambers*, 2 Eq. Cas. Ab. 35; *Fitzg.* 127.

¹ *Hodgeson v. Bussey*, 2 Atk. 89; *Barn.* 195; *Bartlett v. Green*, 13 Sim. 218. ² *Theebridge v. Kilburne*, 2 Ves. 233.

³ *Read v. Snell*, 2 Atk. 642.

⁴ *Stanley v. Leigh*, 2 P. Wms. 690; *Gower v. Grosvenor*, *Barn.* 63; 5 Madd. 348; *Newcastle v. Lincoln*, 3 Ves. 387, 394, 397; *Scarsdale v. Curzon*, 1 John. & H. 51. The matter referred to in the text seldom or never arises in the marriage settlements made in the United States, as primogeniture is abolished, and entails on the eldest son are seldom resorted to. But where personal chattels are made to vest under a marriage settlement in the eldest son as heir, and such son dies under age, very awkward effects follow; and, under covenants to settle personal property upon the same limitations as are applied to a settlement of real estate wherein the eldest son takes as heir, it was a matter of great discussion in the Court of Chancery and in the House of Lords, what kind of provisions ought to be inserted to protect the parents and other children in case the eldest son died under age and without issue. *Newcastle v. Lincoln*, 3 Ves. 387; 12 Ves. 218.

⁵ *Taggart v. Taggart*, 1 Sch. & Lef. 88; *Rigden v. Vallier*, 3 Atk. 734;

insert other words and conditions, and vary the literal instruction of the articles in order to carry out the presumed intention, and promote a convenient settlement for the protection and security of all the parties,¹ as if the settlement is to be of all the property which the settlor might thereafter become entitled to, it will be construed to embrace only the property acquired during the marriage.² The court will not always order a formal settlement to be drawn out, but will declare the meaning and intention of the articles, and leave the parties to act upon the declaration, as if it was a formal settlement drawn out and executed by them.³ So the court will sometimes rectify the settlement drawn under articles by a decree, without ordering a new deed to be drawn out and executed.⁴

§ 365. Marriage settlements, whether made in pursuance of articles, or under directions contained in wills, or under decrees of the court, are matters in which courts exercise the most liberal principles of equity. If a settlement is drawn up under a decree, and it is not in all respects in accordance with the decree, the court will set it aside, and order a new settlement.⁵ In *Grout v. Van Schoonhoven*, the court ordered a new settlement, in substance that the trust should be for the wife during her life without power of anticipating the income; and upon her death for the use of her husband for life, in case he survived her; and, after the death of both, to be divided equally among all their children then living, and the descendants of such as had died leaving issue, *per stirpes*; with a power to make advances with the approbation of the trustees to the children, on their attaining full age or being married, out of the capital fund, in anticipation of the ulti-

Marryat v. Townley, 1 Ves. 103. Joint-tenancy is abolished by statute in most of the United States, with the exception, in some States, of gifts and grants to husband and wife.

¹ *Kentish v. Newman*, 1 P. Wms. 234; *Martin v. Martin*, 2 R. & M. 507; *Master v. De Croismar*, 11 Beav. 184; *Targus v. Puget*, 2 Ves. 194.

² *Steinberger v. Potter*, 3 Green, Ch. 452.

³ *Byam v. Byam*, 19 Beav. 58.

⁴ *Tebbitt v. Tebbitt*, 1 De G. & Sm. 506.

⁵ *Temple v. Hawley*, 1 Sandf. Ch. 154.

mate distribution, in order to set them up in the world.¹ An advance cannot be made in order that a child may put the money in his pocket, but an advance may be made to trustees under a marriage settlement for a child.² Where there was power of advancement to a married woman, it was held that an advance to her husband to set him up in business might be allowed;³ and so where there was power in a settlement to withdraw funds, and lay them out in the purchase of a trade for the benefit of husband and wife, the power may be exercised for the benefit of one after the death of the other.⁴ In *Imlay v. Huntington*, a husband covenanted that he would pay over to certain trustees \$10,000, and one-half of certain other expected moneys of his intended wife, to be held by said trustees in trust for the wife for the term of twenty years, after which time they were to convey to such persons as the wife should appoint. The marriage was consummated, and the husband received \$60,000, which he continued to hold and manage as his own during the lifetime of his wife, making no payment to the trustees, and neither the trustees nor the wife requesting him to pay the sum over, or to make any settlement in pursuance of the articles. On the death of the wife, at the end of twenty years, her brothers and sisters, there being no issue of the marriage, applied to the court by bill in equity for the execution of the marriage settlement, in accordance with the articles and covenants entered into by the husband before marriage: but it was held that it was competent for the wife to discharge the husband from the fulfilment of the covenants, and to abandon the trust; that, under the circumstances of the case, the articles were abandoned by the wife and all the parties; that the wife's personal property vested absolutely in the husband; and that the wife's heirs had no right to maintain the bill for any part of her personal estate.⁵

¹ *Grout v. Van Schoonhoven*, 1 Sandf. Ch. 342.

² *Roper v. Curzon*, L. R. 11 Eq. 452.

³ *In re Kershaw's Trust*, L. R. 6 Eq. 322.

⁴ *Doorly v. Arnold*, 18 W. R. 540.

⁵ *Imlay v. Huntington*, 20 Conn. 146; *Jones v. Higgins*, L. R. 2 Eq.

§ 366. In executory trusts created by *wills*, no presumption arises *a priori* that a provision was intended for the children of the first taker, as in marriage settlements, and that such children were intended to take as purchasers. If the trust be “for A. and the heirs of his body,”¹ or “for A. and the heirs of his body and their heirs,”² or “for A. for life and after his decease to the heirs of his body,”³ A. will be tenant in tail; and he may disappoint his heirs by barring the entail. So, where a testator directed an estate to be settled on his “daughter and her children, and, if she died without issue,” remainder over, the court held that the daughter was tenant in tail; and that in a voluntary devise the court must take it as they find it, though upon like words in a marriage settlement it might be different.⁴ So where a testator directed lands to be settled on his “nephew for life, remainder to the heirs male of his body, and the heirs male of every such heir male severally and successively, one after another, as they should be in seniority and priority of birth, every elder and the heirs male of his body to be preferred before the younger,” it was held that, although the nephew took by a voluntary executory devise, the court must execute it in the words of the will and according to the rules of law, and that equity could not carry the words further than the same words would operate at law, and that the nephew took an estate tail. The words in this case all went upon the idea of an entail.⁵ So if there is a direction that the trustees shall not give up their trust until “a proper entail was made to the heir male by them.”⁶ But in another similar executory trust, Lord Eldon declined to compel a purchaser to accept the title, on the ground that the entail was too doubtful to

¹ *Harrison v. Naylor*, 2 Cox, 247; *Bagshaw v. Spencer*, 1 Ves. 151; *Marshall v. Bousley*, 2 Madd. 166; *Robertson v. Johnston*, 36 Ala. 197.

² *Marryat v. Townley*, 1 Ves. 104.

³ *Blackburn v. Stables*, 2 V. & B. 270; *Seale v. Seale*, 1 P. Wms. 290; *Meure v. Meure*, 2 Atk. 266; *Robertson v. Johnston*, 36 Ala. 197.

⁴ *Sweetapple v. Bindon*, 2 Vern. 536.

⁵ *Legatt v. Sewell*, 2 Vern. 551; *McPherson v. Snowden*, 19 Md. 197.

⁶ *Blackburn v. Stables*, 2 V. & B. 367; *Marshall v. Bousley*, 2 Madd. 166; *Dodson v. Dodson*, 3 Bro. Ch. 405.

be acted upon in so grave a matter.¹ Where a testator devised real estate to his daughter, then unmarried, in trust for her heirs, she to receive the income for her and their support and education, and, if she should die leaving no heirs, then over to her brothers and sisters, it was held that the word "income" passed the estate to the daughter, that the word "heirs" was a word of limitation, and that the daughter took an estate tail.² In the gift of a fund the term "heirs at law" means next of kin or persons entitled under the statute of distributions relating to personal property.³

§ 367. In executory trusts under marriage articles, many distinctions arise upon the question, Who may enforce their specific performance, and compel the execution of the formal deed and the disposal of the property in accordance with the settlement that should have been made under the articles? Thus the general rule is, that parties, seeking a specific execution of such articles, must be those who come strictly within the reach and influence of the consideration of the marriage, or who claim through them, as the wife, or the husband, and the issue of the husband or wife, or both. As a general rule, mere volunteers, or collateral relatives of husband or wife, cannot interfere and ask for a specific performance of the articles.⁴ (a) But there are so many excep-

¹ *Jervoise v. Northumberland*, 1 J. & W. 559; *Woolmore v. Burrows*, 1 Sim. 512.

² *Allen v. Henderson*, 49 Pa. St. 333.

³ *White v. Stanfield*, 146 Mass. 424.

⁴ *Vernon v. Vernon*, 2 P. Wms. 594; *Edwards v. Warwick*, id. 171; *Osgood v. Strode*, id. 245; *Ithell v. Beane*, 1 Ves. 215; 1 Dick. 132; *Ste-*

(a) In *Re Cameron and Wells*, 37 Ch. D. 32, 37, Kay, J., said: "When any collateral takes an interest under a marriage settlement, it may be the bargain between the husband and wife that the collateral should so take; but that does not make him any the less a volunteer, because no consideration moves from him, which is the test whether the interest of the collateral is or is not that of a volunteer." It was there held that the rule of *Newstead v. Searles* (1 Atk. 265; 9 A. C. 320, n.), by which the limitations of a widow's marriage settlement in favor of her children by a former marriage are not voluntary, does not extend to the like limitations in the marriage settlement of a widower.

tions and qualifications to this rule, that a case is rarely decided upon it. The principle is, that, to bring collateral relations within the reach and influence of the consideration, there must be something over and above that flowing from the immediate parties to the marriage articles, from which it can be inferred that relatives beyond the issue were intended to be provided for, and that, if the provision in their behalf had not been agreed to, the superadded consideration would not have been given.¹ While this is the general rule, the court seize hold of the slightest valuable consideration to give effect to the settlement in favor of collateral relatives; and it need not appear that these slight considerations were inserted in favor of distant relatives: the court will presume such to be the case.² The result of all the cases is, that, if from the circumstances under which marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives in a given event should take the estate, and a proper limitation to that effect is contained in the articles, a court of equity will enforce the trust for their benefit. Such parties are not volunteers outside the deed, but come fairly within the influence of the consideration upon which it is founded. Such consideration extends through all the limitations of the articles for the benefit of the remotest persons provided for, consistent with the rules of law.³ But of course there is a more direct equity in favor

phens *v.* Trueman, 1 Ves. 73; Pulvertoft *v.* Pulvertoft, 18 Ves. 90; 2 Kent, Com. 172, 173; Atherly on Mar. Sett. 145; Bradish *v.* Gibbs, 3 Johns. Ch. 550; West *v.* Errissey, 2 P. Wms. 349; Kettleby *v.* Atwood, 1 Vern. 298, 471; Williamson *v.* Codrington, 1 Ves. 512; Colman *v.* Sarrel, 1 Ves. Jr. 50; 3 Bro. Ch. 13; Ellison *v.* Ellison, 6 Ves. 662; Graham *v.* Graham, 1 Ves. Jr. 275; Wycherly *v.* Wycherly, 2 Eden, 177, note; Bunn *v.* Winthrop, 1 Johns. Ch. 336; Gevers *v.* Wright, 3 Green, Ch. 330.

¹ Osgood *v.* Strode, 2 P. Wms. 245; Goring *v.* Nash, 3 Atk. 186; Hamerton *v.* Whitton, 2 Wils. 356; Williamson *v.* Codrington, 1 Ves. 512; Bleeker *v.* Bingham, 3 Paige, 246.

² Neves *v.* Scott, 9 How. 209; Stephens *v.* Trueman, 1 Ves. 73; Edwards *v.* Warwick, 2 P. Wms. 171.

³ Neves *v.* Scott, 9 How. 210; Canby *v.* Lawson, 5 Jones, Eq. 32;

of a wife and children.¹ So in respect to chattel interests, it has been held that a bond under seal, though voluntary, will uphold a decree for the execution of the trust in favor of those whom the obligor is under obligations to support, as wife or children; for a seal in law imports a consideration.² But this doctrine seems to be rejected; and it is now held that neither wife nor child can enforce a purely voluntary contract or settlement.³ (a)

§ 368. And where a third person—parent, agent, or friend of the parties—holds out any considerations of a pecuniary nature to induce a marriage, and articles are drawn up, and a marriage takes place, equity will compel the party holding out the inducements to make them good, or specifically perform the articles.⁴

§ 369. If, however, in an executory trust created in a will there are indications of an intention that the words “heirs of the body” shall be words of purchase and not of inheritance, they will receive that construction; that is, the inten-

Dennison v. Goehring, 7 Barr, 175; *King v. Whitely*, 10 Paige, 465. See this matter very learnedly discussed in *Neves v. Scott*, 9 Monthly Law Reporter, 67, Boston, June, 1846. This decision, however, was overruled in *Neves v. Scott*, 9 How. 98. The case was again discussed before the State court of Georgia, and the opinion of the circuit court of the district of Georgia was followed. That case was in turn overruled in 13 How. 268. The judgment of the Supreme Court of the United States was, that on the face of that instrument the consideration extended to brothers and sisters; and, further, that it was an executed trust, and that they had an interest.

¹ *Pulvertoft v. Pulvertoft*, 18 Ves. 99.

² *Bunn v. Winthrop*, 1 Johns. Ch. 336; *Minturn v. Seymour*, 4 Johns. Ch. 500; *Lechmere v. Carlisle*, 3 P. Wms. 222; *Walwyn v. Coutts*, 3 Mer. 708; *Antrobus v. Smith*, 12 Ves. 44; *Colman v. Sarrel*, 1 Ves. Jr. 54; *Beard v. Nuttall*, 1 Vern. 427.

³ *Jefferys v. Jefferys*, 1 Cr. & Phil. 138; *Holloway v. Headington*, 8 Sim. 325.

⁴ *Hammersley v. De Biel*, 2 Cl. & Fin. 45.

(a) See *Thompson v. Tucker-Osborn*, 111 Mich. 470; *supra*, §§ 122, note (a), 162, note (a).

tion of the testator will be carried out, if it is sufficiently clear, although the same words in an ordinary grant would create an estate tail. Thus, if there are other words in the will that indicate that the words "heirs of the body" are words of designation, and not of inheritance, such heirs will take by purchase, and the first taker of course will have only an estate for life. Thus, if the testator direct a settlement on A. for life "without impeachment of waste,"¹ or with a limitation "to preserve contingent remainders,"² or if he direct that "care be taken in the settlement that the tenant for life shall not bar the entail,"³ the superadded words show the intention to be, that the first taker shall have only an estate for life, with no power over the inheritance. So, where a gift was in trust for the separate use of a married woman for life, she alone to receive the rent, and her husband not to intermeddle, and, after her decease, to the heirs of her body, the wife took only for life, and the words "heirs of her body" were words of purchase; for if the wife takes the inheritance in tail, the husband will have curtesy, which would be contrary to the clause against his intermeddling.⁴ So, where a testator directed an estate to be settled on a married woman for life for her separate use, and at her death on her *issue*, she was not tenant in tail; for there would be only an equitable estate in her, while a legal estate would vest in her issue, and the two estates could not coalesce in such manner as to make her tenant in tail.⁵ So a direction to settle land on A. and the heirs of his body "as counsel shall advise,"⁶ or as "the executors shall think fit,"⁷ implies

¹ *Glenorchy v. Bosville*, Ca. t. Talb. 3; 1 Lead. Cas. Eq. 1, and notes.

² *Pappillon v. Voice*, 2 P. Wms. 471; *Rochford v. Fitzmaurice*, 1 Conn. & Laws, 158.

³ *Leonard v. Sussex*, 2 Vern. 526.

⁴ *Roberts v. Dixwell*, 1 Atk. 607; *West, Ca. t. Hardw.* 536; *Turner v. Sargent*, 17 Beav. 515; *Stanley v. Jackman*, 5 W. R. 302; *Stonor v. Curwen*, 5 Sim. 264; *Shelton v. Watson*, 16 Sim. 542.

⁵ *Stonor v. Curwen*, 5 Sim. 268; *Verulam v. Bathurst*, 13 Sim. 386; *Coape v. Arnold*, 2 Sm. & Gif. 311; 4 De G., M. & G. 574. And see *Collier v. McBean*, 34 Beav. 426.

⁶ *White v. Carter*, 2 Eden, 366; *Amb.* 670.

⁷ *Read v. Snell*, 2 Atk. 642.

that a simple estate tail is not intended, for if it was there would be no need of the additional words. And where the trust was to settle on A. for life without impeachment of waste, remainder to his issue in *strict settlement*, the court directed the estates to be settled on A. for life, without impeachment for waste, remainder to his sons successively in tail male, remainder to his daughters as tenants in common in tail male, with cross-remainders in tail male, and with limitations to trustees to preserve contingent remainders.¹

§ 370. Where a testator devised his estate to trustees for the term of six years, and to be then divided among his children or their issue, and conveyances to be given therefor, and directed that "in each deed or writing to any of my children shall be inserted and expressed a clause limiting such grant or interest conveyed to the grantee for life, *with remainder over to the right heirs of such grantee, their heirs and assigns forever*," it was held that the deeds must be so drawn as to give the children a life-estate only, and not a fee in their shares.² The same rule of construction has been established and enforced in Georgia,³ and in Tennessee,⁴ and has been recognized in South Carolina,⁵ Maryland,⁶ and Pennsylvania.⁷

§ 371. It will be observed that "heirs of the body" and "issue" are not synonymous terms. "Heirs" are technical

¹ Trevor v. Trevor, 13 Sim. 108; 1 H. L. Cas. 239; Coape v. Arnold, 2 Sm. & Gif. 311; 4 De G., M. & G. 574.

² Wood v. Burham, 6 Paige, 515, affirmed on appeal, 27 Wend. 9. The rule in Shelley's case was in force in New York at the time, and would have applied to this case if it had not been an executory trust. The rule in Shelley's case was soon after abrogated in that State, and the decision has ceased to be important; nor is the subject-matter now under discussion of importance in any State where the rule in Shelley's case is abolished by statute.

³ Edmondson v. Dyson, 2 Kelly, 307; Wiley v. Smith, 3 Kelly, 551, 559; Neves v. Scott, 9 How. 197; 13 How. 268.

⁴ Loring v. Hunter, 8 Yerg. 4.

⁵ Garner v. Garner, 1 Des. 437; Porter v. Doby, 2 Rich. Eq. 49.

⁶ Horner v. Lyeth, 4 H. & J. 431.

⁷ Findlay v. Riddle, 3 Binney, 139.

words of limitation, while the word "issue" is *prima facie* a word of purchase; and courts have ordered a strict settlement when the word "issue" was used, when it would probably have been otherwise if the word "heir" had been used.¹ (a) The words "heirs of the body,"² and "issue,"³ embrace daughters; for they equally answer the description, and are equally the objects of bounty; and where the words are words of purchase, the settlement, in default of sons, will be made upon daughters, as tenants in common in tail, with cross-remainders.⁴ In the United States, the settlement would be made

¹ *Moure v. Meure*, 2 Atk. 265; *Haddelsey v. Adams*, 22 Beav. 276; *Rochford v. Fitzmaurice*, 2 Conn. & Laws. 158; *Bastard v. Proby*, 2 Cox, 6; *Dodson v. Hay*, 3 Bro. Ch. 405; *Stonor v. Curwen*, 5 Sim. 264; *Horne v. Barton*, G. Coop. 257; *Crozier v. Crozier*, 2 Conn. & Laws. 311; *Ashton v. Ashton*, cited in *Bagshaw v. Spencer*, 1 Coll. Jur. 402; *McPherson v. Snowden*, 19 Md. 197. Where a testator intends the estate to go to the whole body of persons, in legal succession, constituting *in law* the entire line of descent lineal, he evidently means the same thing as if he had said "issue," or "heirs of the body;" or if he intends it to go to the whole line of descent, lineal and collateral, he means the same thing as if he had used the term "heirs," which, as a word of art, describes precisely the same line of descent. Per Agnew, J., in *Yarnall's App.*, 70 Penn. St. 340. And see *Kleppner v. Laverty*, 70 Penn. St. 70; *Kiah v. Grenier*, 1 N. Y. Sup. Ct. 388.

² *Bastard v. Proby*, 2 Cox, 6.

³ *Meure v. Meure*, 2 Atk. 265; *Trevor v. Trevor*, 13 Sim. 108; *Ashton v. Ashton*, *ut supra*.

⁴ *Marryat v. Townley*, 1 Ves. 105; *Meure v. Meure*, 2 Atk. 265; *Trevor v. Trevor*, 13 Sim. 108; 1 H. L. Ca. 239; *Bastard v. Proby*, 2 Cox, 6; *Ashton v. Ashton*, in *Spencer v. Bagshaw*, *ut supra*; *Shelton v. Watson*, 16 Sim. 543.

(a) The word "issue" in a deed or will, when used as a word of purchase, means, in the absence of an intention disclosed to the contrary, descendants generally. *Drake v. Drake*, 134 N. Y. 220, 224; *Soper v. Brown*, 136 N. Y. 244, 248; *Chwatal v. Schreiner*, 148 N. Y. 683; *Hall v. Hall*, 140 Mass. 267; *Jackson v. Jackson*, 153 Mass. 374. In a statute "issue" may include an adopted child. *Buckley v. Frasier*, 153 Mass. 525. A gift to "children" does not include grandchildren. *Pride v. Fooks*, 3 De G. & J. 252; *Osgood v. Lovering*, 33 Maine, 464. See *Williams v. Knight*, 18 R. I. 333; *Bailey v. Hawkins*, id. 573; *Edgerly v. Barker*, 66 N. H. 434. "Children" in a will may mean step-children. *In re Jeans*, 72 L. T. 835.

upon sons and daughters in common, with cross-remainders in default of issue, unless the direction was to settle upon some particular one of the heirs of the body or issue.

§ 372. If the limitations of an executory trust are imperfectly or defectively declared in a will, the court will rectify the limitations, and order the settlements to be made in accordance with the intention of the testator, and to be drawn up in proper form to effectuate that intention.¹ But if a testator undertake to be his own conveyancer, and himself draw up in his will all the particulars of the limitations upon which he desires his property to be settled, intending them to be final and to be carried into effect in the trusts, the court is bound by the words, as in *Austen v. Taylor*, where Lord Northington said that “the testator had referred no settlement to the trustees to complete, but had declared his own uses and trusts,” and that there was no authority in the court to vary them.²

§ 373. When a testator has devised lands in strict settlement, and then devises personal chattels as *heirlooms*, to be held by, or in trust for, the parties entitled to the use of the real estate under the limitations of the settlement; or when he expresses a desire that the heirlooms should be held upon the same trusts as the real estate, — “so far as the rules of law and equity will permit,” the tenant for life will have the use of the heirlooms, and they will vest absolutely in the first tenant in tail, upon his birth, though he die immediately after.³ In such cases, the court regards the trust, either as

¹ *Franks v. Price*, 3 Beav. 182; *Doncaster v. Doncaster*, 3 K. & J. 26; *Rochfort v. Fitzmaurice*, 1 Conn. & Laws. 173; 2 Dr. & War. 21.

² *Austen v. Taylor*, 1 Eden, 368. This case, however, has been criticised. See *Green v. Stephens*, 19 Ves. 76; *Jervoise v. Northumberland*, 1 J. & W. 572. And see *East v. Twyford*, 9 Hare, 713; *Meure v. Meure*, 2 Atk. 265; *Harrison v. Naylor*, 2 Cox, 247.

³ *Foley v. Burnell*, 1 Bro. Ch. 274; *Vaughan v. Burslem*, 3 Bro. Ch. 101; *Newcastle v. Lincoln*, 3 Ves. 387; *Carr v. Erroll*, 14 Ves. 478; *Trafford v. Trafford*, 3 Atk. 347; *Doncaster v. Doncaster*, 3 K. & J. 26; *Rowland v. Morgan*, 6 Hare, 463; 2 Phill. 674; *Gower v. Grosvenor*, Barn.

executed, or, if the trust is executory, that it has no authority to insert a limitation over in case of the tenant in tail dying under twenty-one. But such a limitation over is not illegal; and if the bequest of the heirlooms is clearly executory, and if the intention of the testator is plainly manifested that no person shall take the chattels absolutely who does not live to become possessed of the real estate, the court will execute the intention by directing the insertion of a limitation that the absolute interest of the first tenant in tail, if he should die under twenty-one, should go over to the next person in remainder.¹ And so where the absolute vesting of the chattels is coupled with the actual possession, and is therefore suspended until the death of the tenant for life, the chattels will vest in the child, who, after the death of the tenant for life, shall fulfil all the requisites of being tenant in tail in possession.² (a)

§ 374. If the words of a will, taken in their ordinary sense, create a *joint-tenancy*, the court cannot order a settlement giving a *tenancy in common*, as it may do under marriage articles. But in some cases, where a testator is providing for his children, or where a grandparent *in loco parentis* is providing for his grandchildren, the court will order a settlement that will create a tenancy in common.³ And, generally,

Ch. 54; 5 Madd. 337, overruled; *Evans v. Evans*, 17 Sim. 108; *Tollemache v. Coventry*, 2 Cl. & Fin. 611; 8 Bligh (N. S.), 547; *Stapleton v. Stapleton*, 2 Sim. (N. S.) 212; *Deerhurst v. St. Albans*, 5 Madd. 232, overruled; *Scarsdale v. Curzon*, 1 John. & H. 40, where all the cases are cited and commented on.

¹ *Potts v. Potts*, 3 Jo. & Lat. 353; 1 H. L. Cas. 671; *Trafford v. Trafford*, 3 Atk. 347; *Lincoln v. Newcastle*, 3 Ves. 387.

² *Scarsdale v. Curzon*, 1 John. & H. 40.

³ *Synge v. Hales*, 2 B. & B. 499; *Marryat v. Townley*, 1 Ves. 102. But there were other circumstances in these cases that indicated a tenancy in common. *McPherson v. Snowden*, 19 Md. 197.

(a) In a devise of plate and a trust or cut down the devisee's interest to a life estate. *In re Johnston*, 26 Ch. D. 533. "to be enjoyed with and to go with the title," do not create an executory

executory trusts under wills will be construed in the same manner as marriage articles entered into after marriage.¹

§ 375. When a settlement is directed in an executory trust, but there is no direction as to the powers to be given under it, the court cannot order the insertion of any powers,² except perhaps the power of leasing, which generally is an implied power to enable a party to enjoy the estate.³ But if the executory articles or the will contain a direction to insert the "*usual powers*," powers to lease for twenty-one years,⁴ of sale and exchange,⁵ of varying the securities,⁶ of appointing new trustees,⁷ and (according to the nature of the property) of partition, of leasing mines, and of granting building leases, will be inserted.⁸ But there is a distinction between powers for the management and enjoyment of the estate, and powers which are personally beneficial to one or more particular persons, such as powers of jointure, to charge portions, or to raise money for a particular purpose.⁹ The court cannot therefore order these latter powers to be inserted under the direction to insert the *usual powers*, for there is no rule by which the court could be governed in reducing the *corpus* of the estate.¹⁰ So if certain particular powers are directed to be inserted, the *usual powers* will be qualified by the direction. Thus, where it was directed that the settlement should contain a power of leasing for twenty-one years, a power of

¹ Rochford v. Fitzmaurice, 1 Conn. & Laws. 158.

² Wheete v. Hall, 17 Ves. 80; Brewster v. Angell, 1 J. & W. 628.

³ Woolmore v. Burrows, 1 Sim. 518; Fearne's P. W. 310; but see the late cases, Turner v. Sargent, 17 Beav. 515; Scott v. Steward, 27 Beav. 367; Charlton v. Rendall, 1 Hare, 296.

⁴ Hill v. Hill, 6 Sim. 144; Bedford v. Abercorn, 1 M. & Cr. 312.

⁵ Hill v. Hill, 6 Sim. 144; Bedford v. Abercorn, 1 M. & Cr. 312; Peake v. Penlington, 2 V. & B. 311.

⁶ Sampayo v. Gould, 12 Sim. 426.

⁷ Lindow v. Fleetwood, 6 Sim. 152; Sampayo v. Gould, 12 Sim. 426; Brewster v. Angell, 1 J. & W. 628.

⁸ Hill v. Hill, 6 Sim. 145; Bedford v. Abercorn, 1 M. & Cr. 312.

⁹ Hill v. Hill, 6 Sim. 144.

¹⁰ Higginson v. Barneby, 2 S. & S. 516.

sale and exchange, and of appointment of new trustees, it was held that a power of granting building leases could not be inserted.¹ So the powers must be inserted and executed as they are directed; as where a power was directed to be inserted of selling and exchanging estates in one county, *and all other usual powers*, it was held that the powers could not be extended to estates in other counties.² And where a testator directed the insertion of a power of making leases, *and otherwise according to circumstances*, and of appointing new trustees, the court refused to insert a power of sale and exchange, saying that, if where nothing is expressed nothing can be implied, it is impossible, where something is expressed, to imply more than is expressed, especially where the will notices what powers are to be given.³ But under particular directions as to certain powers, and general directions that other usual powers should be inserted, the two directions being separate and independent of each other, it was held that a power to appoint new trustees might be inserted.⁴ Where *proper powers* of making leases or otherwise were directed to be reserved in the settlement to the tenants for life while qualified to exercise them, and when disqualified to the trustees, and a power of sale and exchange was inserted in the settlement, Lord Eldon held that it was improperly introduced;⁵ and Sir T. Plummer gave a similar decision, on the ground that the tenant for life ought not to have a power of sale unless it was expressly directed, nor ought the trustees to have such a power in the absence of an express direction.⁶ But where there was a settlement of stock with a power of varying the securities, and also a covenant to settle real estate upon the same trusts and with like powers, it was held that a power to sell and exchange was

¹ *Pearse v. Baron*, Jac. 158.

² *Hill v. Hill*, 6 Sim. 141.

³ *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 439.

⁴ *Lindow v. Fleetwood*, 6 Sim. 152.

⁵ *Brewster v. Angell*, 1 J. & W. 625.

⁶ *Horne v. Barton*, Jac. 437.

properly introduced in analogy to the power of varying the securities.¹

§ 376. In drawing up the final deed of settlement under executory articles or a will, the intention of the settlor is to be carried out if possible. If the intention conflicts with any of the rules of law, it shall be executed so far, and as near as it can be. The doctrine of *cy près* applies to this class of executory trusts. Thus, if a settlement is directed which would create a perpetuity, the court will order a settlement which shall carry the trust as far as it can extend without running counter to the rules against perpetuities. As where there was a devise to a corporation in trust to convey to A. for life, and after his death to his first son for life, and so on to the first son of such first son for life; and, in default of male issue, then to B. for life, and to his son for life after the death of B., and so as in the case of A., Lord Cowper said the attempt to create a perpetuity was vain, yet the directions should be complied with, so far as consistent with the law, and he directed that all the sons already born should take estates for life in succession, with limitations to unborn sons in tail.² But if the devise is such that it cannot be carried into effect, in any form approximating the intention of the testator, without contravening the law against perpetuities or remoteness, the whole trust will be void.³

¹ William v. Carter, Append. to Treatise on Powers, 945 (8th ed.); Elton v. Elton, 27 Beav. 634; Horne v. Barton, Jac. 437.

² See § 383; Humberston v. Humberston, 1 P. Wms. 332; 2 Vern. 737; Pr. Ch. 455; Parfitt v. Hember, L. R. 4 Eq. 443; Peard v. Keke-
wick, 15 Beav. 173; Lyddon v. Ellison, 19 Beav. 565; Williams v. Teal,
6 Hare, 239, and cases; Vanderplank v. King, 3 Hare, 1; Monypenny v.
Dering, 16 M. & W. 418.

³ Blgrave v. Hancock, 16 Sim. 371.

CHAPTER XIII.

PERPETUITIES AND ACCUMULATIONS.

- § 377. Definitions of a perpetuity.
- § 378. Executory devises—springing and shifting uses.
- § 379. Growth of the rule against perpetuities.
- § 380. Application of the rule. Indefinite failure of issue.
- § 381. Applies to the possible vesting of estates—not to the actual.
- § 382. Applies equally to trust and legal estates.
- § 383. An equitable interest that may not vest within the rule is void. § 23.
- § 384. Distinction between private trusts and charitable trusts.
- § 385. A proper trust to raise money to be applied contrary to the rule.
Making estates inalienable.
- § 386. Equitable estates cannot be made inalienable in England.
- §§ 386 a, 386 b. How they may be made inalienable in some of the United States.
- § 387. Exception in the case of married women.
- § 388. How trusts can be limited, so that *cestui que trust* cannot alienate. See § 815 a.
- § 389. Limitation of personal estate to such tenant in tail as first attains twenty-one.
- § 390. When courts will alter trusts and when not.
- §§ 391, 392. Statutes of various States in relation to perpetuities.
Accumulations.
- § 393. Rule respecting trusts for accumulations.
- § 394. In England the rule was altered by the *Thellusson Act*.
- § 395. Construction of the *Thellusson Act*.
- § 396. Rule against accumulations—when it applies and when not.
- § 397. Application of the income in cases of illegal directions to accumulate.
- § 398. Statutes in various States as to accumulations.
- § 399. Accumulations for charitable purposes.
- § 400. Accumulations in cases of life insurance.

§ 377. THAT the same rules apply to trusts as to legal estates is further apparent from the rule against perpetuities. A perpetuity has been declared to be “an estate unalienable, though all mankind should join in the conveyance;”¹ and an executory devise is said to be “a perpetuity as far as it goes.” Again, it has been said, that “a perpetuity is when

¹ *Scattergood v. Edge*, Salk. 229.

if all that have interest join, yet they cannot pass the estate.”¹ These are characteristics of a perpetuity. There are other descriptions given, as that “a perpetuity is a thing odious in the law, and destructive to the commonwealth: it would stop commerce and prevent the circulation of property.”² Others have described the rule of law as respects the period of remoteness, rather than the thing itself called a perpetuity;³ thus, “a perpetuity is a limitation tending to take the subject out of commerce for a longer period than a life or lives in being and twenty-one years beyond, and, in the case of a posthumous child, a few months more, allowing for the term of gestation.”⁴ Mr. Saunders says: “A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee-simple of the property, discharged of such future use or estate, before the event is determined, or the period is arrived, when such future use or estate is to arise. If that period is within the bound prescribed by law, it is not a perpetuity.”⁵ This describes the thing itself, and not the rule of law, or the length of time, which may vary. Mr. Lewis gives a fuller definition: “A perpetuity is a future limitation, whether executory, or by way of remainder, and of either real or personal property, which is not to vest, until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation.”⁶ If such person is not yet in being,

¹ Washborne v. Downes, 1 Ch. Cas. 213.

² Duke of Norfolk's Case, 1 Vern. 164.

³ Stanley v. Leigh, 2 P. Wms. 688.

⁴ Rand. Perp. 48.

⁵ Uses and Trusts, 204.

⁶ Lewis on Perpetuity, 164. Jarman's Treatise on Wills contains this marked sentence: “*Te teneam moriens* is the dying lord's apostrophe to his manor, for which he is forging these fetters that seem, by restricting the dominion of others, to extend his own.” 1 Jar. on Wills, 226, note (ed. 1861).

as he may not be after an extended period, of course the estate cannot be conveyed, even if all the world join in the deed.

§ 378. Executory devises are a species of testamentary dispositions, allowed by courts of law, and when properly exercised, they pass the *legal* estate or interest to all persons in favor of whom the dispositions are made. They are devises to take effect at a certain time in the future, or upon a certain event, and in favor of certain persons. Limitations by way of springing or shifting uses are similar in effect, except that they are created by deeds *inter vivos*, and are based upon the statute of uses. Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use. These executory devises, and shifting and springing uses, must vest in the persons intended to be benefited within the time allowed by law, or they will be declared illegal and of no effect. The same rules apply in equity to trusts. In cases of trusts the legal estate is vested in certain trustees, and their heirs; but the beneficial interest, or equitable estate, is given by the grantor, testator, or settlor to such person or persons, and upon such terms and upon such events, as he shall declare. The settlor can change and shift the beneficial enjoyment of the equitable estate from one person to another, in the future, in a manner analogous to the limitations of springing or shifting uses under the statute of uses.¹ (a) Courts of equity always take special care

¹ *Harrison v. Harrison*, 36 N. Y. 543.

(a) See *In re Morgan*, 24 Ch. D. 114; *Welch v. Brimmer*, 169 Mass. 204; *Barney v. Arnold*, 15 R. I. 78; *Brown v. Addison G. Hospital*, 155 Mass. 323; *Smith v. Kimbell*, 153 Ill. 368; *Powers v. Bullwinkle*, 33 S. C. 293. A fee cannot be limited upon a fee by deed, but it can be so limited by will by way of execu-

tory devise. *Glover v. Condell*, 163 Ill. 566, 592; overruling *Ewing v. Barnes*, 156 Ill. 61. Shifting and springing uses and executory devises are all subject to the rule against perpetuities, even when alienable. *Gray on Perpetuities*, §§ 268, 317. In the case of a condition, the estate is to revert to the grantor or his

that future estates or interests shall not be destroyed by the present user of the property; and that the limitations of future equitable interests shall not transcend the limits assigned for the limitation of similar legal interests or executory devises, and shifting and springing uses at law.

§ 379. The rule against perpetuities has been gradually established by judicial decisions, and affords a most notable instance of the nice adaptation of the principles of the common law to the decision of a question which requires at once a due regard for the rights of persons and property, and a careful consideration of these larger principles of public policy so essential to the welfare of communities and States. For public policy is opposed to the perpetual settlement of property in families in such manner that it is forever inalienable, or inalienable so long as there may be a person to take, answering the designation of some testator who died generations before. The first stand of the judges was to allow only those limitations which would take effect at the end of one life from the death of the testator.¹ This was afterwards modified to include two or more lives in being, and running at the same time, "or where the candles are all burning at once;" for it is plain that such a space of time is only one

¹ *Pells v. Brown*, Cro. Jac. 590; 1 Eq. Cas. Ab. 187, c. 4 (A. D. 1621); see *Snow v. Cutler*, 1 Lev. 135, t. Raym. 162; 1 Keb. 151, 752, 800; 2 Keb. 11, 145, 296; 1 Sid. 153.

heirs, but in a conditional limitation or an executory devise, it is limited over to other persons. Even in the case of a condition, the power of alienation may be restricted, though it cannot be entirely taken away. *In re Dugdale*, 38 Ch. D. 176, 179; *Potter v. Couch*, 141 U. S. 296, 315; *Sellers v. Reed*, 88 Va. 377. An executory devise is valid under the rule against perpetuities when the limitation over is determined at the death of a grandchild. *Naylor v. Godman*, 109 Mo. 543. A gift to A. for life, and upon his decease to the use of such child or children of A. then living, and such issue then living of a deceased child of A. as either before or after his death shall become of age, or die under age and leave issue, is an executory devise and not a contingent remainder. *Dean v. Dean*, [1891] 3 Ch. 150. See *Symes v. Symes*, [1896] 1 Ch. 272. In construing a will, a remainder will always be preferred to an executory devise. *Watson v. Smith*, 110 N. C. 6.

life in being, — that of the longest liver.¹ The next step was much debated; but it was finally settled, that an executory devise might be made to vest at the end of lives in being and twenty-one years after, to allow for the infancy of the next taker, who by reason of infancy could not alienate the estate.² The statute of 10 & 11 Wm. III., c. 16, having provided that children *en ventre sa mère*, born after their father's death, should for the purposes of the limitations of estates be deemed to have been born in his lifetime, a further extension of nine or ten months was allowed for the period of gestation.³ The next step was to allow a period of nine months for gestation at the beginning of the term, as the life in being during which the term would run might be that of a child *en ventre sa mère*.⁴ Much discussion arose upon each one of these steps.⁵ For instance, the term of twenty-one years, it was said, could not be allowed as a term in gross, and without reference to the infancy of some person interested in the estate; this question was not settled until *Cadell v. Palmer*, in the House of Lords in 1833, when it was finally deter-

¹ *Goring v. Bickerstaff*, Pollexf. 31; 1 Ch. Cas. 4; 2 Freem. 163 (1664); 2 Harg. Jurid. Arg. 46; *Lloyd v. Carew*, Shower, P. C. 137; Pr. Ch. 72.

² *Taylor v. Biddal*, 2 Madd. 289; Freem. 243; 1 Eq. Cas. Ab. 188, c. 11; F. C. R. 432; *Laddington v. Kime*, 1 Raym. 203; *Gore v. Gore*, 2 W. Kel. 204; 2 P. Wms. 28; 2 Stra. 948; *Scattergood v. Edge*, 12 Mod. 277; *Duke of Norfolk's Case*, 3 Ch. Cas. 32; Ch. R. 229; 2 Freem. 72; Pollexf. 223; *Massenburgh v. Ash*, 1 Vern. 234; *Maddox v. Staine*, t. Talb. 228; 2 Harg. Jurid. Arg. 50.

³ *Stephens v. Stephens*, Cas. t. Talb. 228; *Forrest*, 228; *Goodtitle v. Woods*, Willes, 211; 7 T. R. 103 (n.); *Sheffield v. Orrery*, 3 Atk. 282; *Gulliver v. Wicket*, 1 Wils. 185; *Bullock v. Stones*, 2 Ves. 521; *Goodman v. Goodright*, 2 Burr. 873.

⁴ *Long v. Blackall*, 7 T. R. 100; 2 Harg. Jurid. Arg. 105; 6 Cru. Dig. 488.

⁵ *Davies v. Speed*, 12 Mod. 39; 2 Salk. 675; *Holt*, 731; *Bostock's Case*, Ley, 56; *Roe v. Tranmer*, 2 Wils. 75; *Lloyd v. Carew*, Show. P. C. 137; Pr. Ch. 72; 2 Harg. Jurid. Arg. 36; *Carwardine v. Carwardine*, 1 Ed. 34; *Blandford v. Thackerell*, 2 Ves. Jr. 241; 1 Sand. Uses & Tr. 198; *Thellusson v. Woodford*, 4 Ves. 337; *Routledge v. Dorrill*, 2 Ves. Jr. 357; *Keily v. Fowler*, Wilmot, 306; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & A. 801; T. & R. 25; *Bengough v. Edridge*, 1 Sim. 173, 271.

mined, that twenty-one years might be allowed as a term in gross, without reference to the infancy of any person, but that the period of nine months for gestation should be allowed in cases only where the gestation had commenced¹ of some persons who, if born, would take an interest in the estate. By such steps, by imperceptible degrees, and after two centuries of doubt and litigation, and unaided by legislation, the judges framed and completed the *great rule against perpetuities*.²

§ 380. Thus all future legal estates which arise by way of executory devise, conditional limitation, or shifting and springing uses, must vest within a life or lives in being at the death of the testator, and twenty-one years; and, in case the person in whom the estate or interest should then vest is *en ventre sa mère*, nine months more will be allowed; and all estates created as aforesaid, and so limited that they may not vest within that time, are void.³ If the estates are created and limited by deeds *inter vivos*, the lives in being must be those persons who are living at the execution of the deed, and not at the death of the grantor or settlor.⁴ And if an

¹ Cadell v. Palmer, 7 Bligh (N. S.), 202; 10 Bing. 140; 1 Cl. & Fin. 372; 1 Jarm. Wills, 222.

² Lewis on Perpetuity, pp. 140-162; 1 Powell on Devisees by Jar. 389, n.

³ Proprietors of Church in Brattle Square v. Grant, 3 Gray, 149; Sears v. Russell, 8 Gray, 86; 1 Shep. Touch. 126; 4 Kent, Com. 128 and notes; 2 Fearn, Cont. Rem. 50; Nightingale v. Burrell, 15 Pick. 111; 6 Cru. Dig. tit. 38, c. 17, § 23; Cadell v. Palmer, 1 Cl. & Fin. 372, 423; Bacon v. Proctor, T. & R. 31; Mackworth v. Hinxman, 2 Keen, 658; Ker v. Duncannon, 1 Dr. & War. 509; Com., &c. v. De Clifford, id. 245; Welsh v. Foster, 12 Mass. 97; Tilbury v. Barbut, 3 Atk. 617; Conklin v. Conklin, 3 Sandf. Ch. 61; Tyte v. Willis, Ca. t. Talb. 1; Att. Gen. v. Gill, 2 P. Wms. 369; Nottingham v. Jennings, 1 id. 25; Kampf v. Jones, 2 Keen, 756; Miller v. Macomb, 26 Wend. 229; Tator v. Tator, 4 Barb. 431; Ring v. Hardwicke, 2 Beav. 352; Ferris v. Gibson, 4 Edw. 707; Egerton v. Brownlow, 4 H. L. Cas. 1, 160.

⁴ Lewis on Perpetuity, 171, 172. Mr. Lewis observes an inconsistency in taking lives in being at the death of the testator, if the future interest is created by will, and lives in being at the date or execution of the deed, if such interests are created by deed. But it should be remembered that

absolute term is taken, and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years;¹ but a term of any number of years may be taken, provided the term is so connected with some life or lives in being that the interest must vest in some person living at the death of the testator and at the time of the vesting.² So estates limited to take effect after an indefinite failure of issue of a living or deceased person are void, for the reason that the issue of such persons may not fail until after the term of a life or lives in being and twenty-one years has expired.³(a) But a limitation over in case the

a will speaks as at the death of the testator, while a deed speaks as at the time of its execution, so that there is no inconsistency in principle. See *Tregonwell v. Sydenham*, 3 Dow, 194; 2 Jar. on Wills, 257; Ed. 1861.

¹ *Crooke v. De Vandes*, 9 Ves. 197; *Palmer v. Holford*, 4 Russ. 403; *Speakman v. Speakman*, 8 Hare, 180.

² *Lachlan v. Reynolds*, 9 Hare, 796.

³ *Randolph v. Wendel*, 4 Sneed, 646; *Van Vechten v. Pearson*, 5 Paige, 512; *Van Vechten v. Van Vechten*, 8 id. 104; *Hone v. Van Schaick*, 20 Wend. 564; *Watkins v. Quarles*, 23 Ark. 179; *Campbell v. Harding*, 2 Rus. & My. 390; *Condy v. Campbell*, 2 Cl. & Fin. 421, 427; *Harrison v. Harrison*, 36 N. Y. 543; *Allen v. Henderson*, 49 Penn. St. 233; *Fisher v. Webster*, L. R. 14 Eq. 287; *Newill v. Newill*, L. R. 7 Ch. 253; *Roe v. Jeffery*, 1 T. R. 589; *Hawley v. James*, 5 Paige, 318; 16 Wend. 61; *Miller v. Macomb*, 2 id. 229; 9 Paige, 265; *Lorillard v. Coster*, 5 id. 172; *Boehm v. Clark*, 9 Ves. 580; *Black v. McAulay*, 5 Jones, L. 375; *Jackson v. Billinger*, 18 Johns. 368; *Fisk v. Keen*, 35 Maine, 349; *Bramlet v. Bates*, 1 Sneed, 554; *Jordan v. Roach*, 32 Miss. 481; *Gray v. Bridgforth*, 33 Miss. 312; *Tongue v. Nutwell*, 13 Md. 415; *Jones v. Miller*, 13 Ind. 337; *Chism v. Williams*, 29 Mo. 288; *Dodd v. Wake*, 8 Sim. 615; *Traf-ford v. Boehm*, 3 Atk. 440; *Ellicombe v. Gompertz*, 3 Myl. & Cr. 127; *Murray v. Addenbrook*, 4 Russ. 407; *Hayes v. Hayes*, id. 311; *Bell v. Phyn*, 7 Ves. 453; *Thackeray v. Sampson*, 2 S. & S. 214; *Cross v. Cross*, 7 Sim. 201; *Bradshaw v. Skilbeck*, 2 Bing. N. C. 182; *Budd v. State*, 22 Md. 48; *Johnson v. Currin*, 10 Penn. St. 498; *Bedford's App.*, 40 id. 18; *Deihl v. King*, 6 Serg. & R. 29; *Eichelberger v. Barnitz*, 17 Serg. & R. 293; *Rice v. Satterwhite*, 1 Dev. & B. Eq. 69; *Postell v. Postell*, Bail. Ch. 390; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Brashear v. Marcy*, 3 J. J. Marsh. 89; *Allen v. Parkam*, 5 Munf. 457; *Mazyck v. Vanderhost*, Bail. Ch. 48; *Adams v. Chaplin*, 1 Hill, Eq. 265; *Lanesborough v. Fox*, Ca. t. Talb.

(a) *Hutchinson v. Tottenham*, [1898] 1 Ir. 403; *In re Gage*, [1898] 1 Ch. 498.

heirs of A.'s body living at her death die before reaching the age of twenty-one, is not void if A. leave no heirs of her body, but it takes effect at her death.¹

§ 381. It will be observed, that, in determining whether a particular devise is contrary to the rule against perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which an executory devise or shifting or springing use is to vest in some person may not happen within the time, the executory estate is void, although in fact the event actually happens within the time.² And it must further be observed, that, if the estate is to vest in some persons within the time limited, it will not be obnoxious to the rule against perpetuities, even if such person may not be entitled to the actual enjoyment of the property; that is, the rule as to perpetuities deals with the *vesting of the title*, and not with the *actual reception of the profits of an estate*.³ A gift may be to unborn children for life and then to an ascertained person, if the *vesting* of the estate in the latter is not postponed too long. The person who is to take must become certain within the period, the right of possession may be postponed longer. Moreover, if a certain estate is to vest within the time on a contingency which actually occurs, the devise is not affected by the fact that the estate was limited to take effect at an-

262; *Bennett v. Lowe*, 5 Moor. & P. 485; *Smith v. Dunwoody*, 19 Ga. 237; *McRee v. Means*, 34 Ala. 378; *Powell v. Brandon*, 24 Miss. 343; *Armstrong v. Armstrong*, 14 B. Mon. 333. As to the legislation in the various States upon the failure of issue, see 2 Washburn, Real Prop. 683 (3d ed.).

¹ *Egbert v. Schultz*, 29 Ind. 242.

² *Post*, § 393; *Langdon v. Simson*, 12 Ves. 295; *O'Neill v. Lucas*, 2 Keen, 313; *Moore v. Moore*, 6 Jones, Eq. 132; *Welch v. Foster*, 12 Mass. 97; *Craig v. Hone*, 2 Edw. Ch. 554; *Robinson v. Bishop*, 23 Ark. 378; *Sears v. Putnam*, 102 Mass. 5.

³ *Loring v. Blake*, 98 Mass. 253; *Murray v. Addenbrook*, 4 Russ. 407; *Phipps v. Kelynge*, 2 V. & B. 57. n. (c); *Curtis v. Lukin*, 5 Beav. 147; *Otis v. McLellan*, 13 Allen, 339; *Yard's App.*, 64 Penn. St. 95.

other time in the event of an alternate contingency which may be too remote.¹ If two constructions may be put upon a will, one of which will offend against the rule against perpetuities, and the other not, the construction which will not offend against the rule will be adopted, if in other respects it can be sustained.² And so a will speaks, upon the subject of remoteness, from the time of the last codicil, and not from the date of the original will.³

§ 382. The same rule applies with equal force in law and equity, and trusts and beneficial or equitable estates are subject to the same restrictions.⁴ (a) A perpetuity will no

¹ *Seaver v. Fitzgerald*, 141 Mass. 401.

² *Martelli v. Holloway*, L. R. 5 H. L. 532.

³ *Hosea v. Jacobs*, 98 Mass. 65.

⁴ *Duke of Norfolk's Case*, 3 Ch. Cas. 20; 2 Ch. R. 229; 2 Freem. 72; Pollexf. 293; *Massenburgh v. Ash*, 1 Vern. 254; *Schutter v. Smith*, 41 N. Y. 329; *Knox v. Jones*, 47 N. Y. 397; *Burrill v. Boardman*, 43 N. Y. 254. *Æquitas sequitur legem*, but courts of equity have rather led the law courts in fashioning the rules against perpetuities.

(a) See *Re Whitten*, 62 L. T. Estate, 150 Penn. St. 576; *Lawrence's Estate*, 136 id. 354; *Dulany v. Middleton*, 72 Md. 67; *Dana v. Murray*, 122 N. Y. 604; *Fowler v. Ingersoll*, 127 N. Y. 472; *Underwood v. Curtis*, id. 523; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Murphy v. Whitney*, 140 N. Y. 541; *Bird v. Pickford*, 141 N. Y. 18. The true object of the rule against perpetuities was not to remove restrictions on the immediate conveyance of property, but to prevent the creation of interests on remote contingencies. Gray on Perpetuities, §§ 269, 278; but see 8 Harv. L. Rev. 212. A gift to one then living, if still alive at the end of forty-nine years, and, if then deceased, to her issue, if she leaves issue, is not void for remoteness. *In re Daveron*, [1893] 3 Ch. 421.

more be tolerated when it is covered by a trust, than when it displays itself undisguised in the settlement of a legal estate.¹ "If," as Lord Guilford said, "in equity you could come nearer to a perpetuity than the common law admits, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might make well for the jurisdiction of chancery, but would be destructive to the commonwealth."

§ 383. Therefore, the creation of a trust or equitable interest, which may not vest in the object of the trust within the time limited by law for the vesting of legal estates, will be nugatory.² Thus where a testator devised his real estate to trustees, in trust to apply the rents to the support of his wife, and his present and future grandchildren, during the life of the wife, and on her death to convey the estates to all his present and future grandchildren, as they respectively attained the age of twenty-five years, to hold to them and their heirs as tenants in common, it was held that the trust to convey was void, for the reason that some of the grandchildren might not become twenty-five years old until after the expiration of the life of the tenant for life, and twenty-one years in addition.³ So a testator cannot authorize his

¹ *Norfolk's Case*, 1 Vern. 164; *Humberston v. Humberston*, 1 P. Wms. 332; *Parfitt v. Hember*, L. R. 4 Eq. 443; *Sears v. Putnam*, 102 Mass. 5; *Loving v. Worthington*, 106 Mass. 86.

² *Bailey v. Bailey*, 28 Hun, 603.

³ *Blagrove v. Hancock*, 16 Sim. 374; *Dodd v. Wake*, 8 Sim. 615;

No perpetuity arises upon a condition subsequent. *In re Stickney's Will*, 85 Md. 79, 103. A limitation which may be too remote does not invalidate another limitation depending upon an alternative contingency which is not obnoxious to the rule. *Perkins v. Fisher*, 59 Fed. Rep. 801. The rule against perpetuities does not relate to vested estates or interests, nor does it apply to trusts or powers that are

revocable at any time. *Pulitzer v. Livingston*, 89 Maine, 359. The rule is determined, as to personal property, by the law of the domicile. *Cross v. U. S. Trust Co.*, 131 N. Y. 330. Thus, the provisions of a foreign will may be valid in a State where the same legatees, taking there under the will, and citizens of that State, could not take under a domestic will. *Dammert v. Osborn*, 140 N. Y. 30; 141 id. 564.

trustees to limit an estate beyond the limits of the rule against perpetuities; but the persons appointed to take must be capable of taking directly under the will.¹ So where a testator devised land to a corporation in trust to convey the same to A. for life, with remainder to his oldest son for life, remainder to the son's oldest son for life, and so on in an endless series, and in default of issue of A., then to B. for life, and remainder to his oldest son for life, and so on in the same manner as to the sons of A., it was held to be void and vain as a perpetuity.² So if any directions are given which, if complied with, must enforce a perpetuity, they will be void; as when a testator gave land to a college, and directed that the same should be leased forever to his wife's relations at two-thirds its value, it was held to be a void direction, as tending to a perpetuity.³

§ 384. In private trusts the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit will be, competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity, as before stated. Nor can a settlor give his trustees a power to appoint the property subject to a trust, to new trusts to arise at or upon the termination of the trusts created by himself. But a trust created for charitable or public purposes is not subject to similar

Broughton v. James, 1 Coll. 26; 2 H. L. Cas. 406; *Walker v. Mower*, 16 Beav. 365; *Leake v. Robinson*, 2 Mer. 363; *Sears v. Russell*, 8 Gray, 86.

¹ *Marlborough v. Godolphin*, 1 Ed. 404; *Robinson v. Harcastle*, 2 T. R. 241, 380, 781; *Fonda v. Fenfield*, 56 Barb. 503; *Barnum v. Barnum*, 26 Md. 119. But a power to change trustees does not come within the principle. *Clark v. Platt*, 30 Conn. 282.

² *Humberston v. Humberston*, 1 P. Wms. 332; *Parfitt v. Hember*, L. R. 4 Eq. 442; *Floyer v. Bankes*, L. R. 8 Eq. 115.

³ *Att. Gen. v. Greenhill*, 9 Jur. (N. S.) 1307.

limitations, but it may continue for a permanent or indefinite time.¹ (a)

§ 385. A trust to raise a sum of money out of an estate will be good if properly limited, although the trust itself upon which the money is limited after it is raised is void as being too remote. In such case, the heir will take the money as personal estate.² Contingent remainders of trust estates do not follow the strict rules of legal estates, but they are made to wait upon the contingency. In legal estates, the contingency must happen before the time, or the estate is gone. In the contingent remainders of equitable estates here spoken of, if the contingency may happen within the time, the estate is made to wait: if it happens, the estate vests; if it does not happen, the estate fails.³

¹ *Christ's Hospital v. Granger*, 1 Mac. & G. 460; *Att. Gen. v. Foster*, 10 Ves. 344; *Att. Gen. v. Newcombe*, 14 Ves. 1; *Fearon v. Webb*, *id.* 19; *Walker v. Richardson*, 2 M. & W. 892; *Att. Gen. v. Aspinall*, 2 Myl. & Cr. 622; *Att. Gen. v. Heelis*, 2 S. & S. 76; *Att. Gen. v. Shrewsbury*, 6 Beav. 224; *Odell v. Odell*, 10 Allen, 1; *Gass v. Willhite*, 2 Dana, 183; *Griffin v. Graham*, 1 Hawks, 131; *Miller v. Chittenden*, 2 Iowa, 362; *Philadelphia v. Girard*, 45 Penn. St. 26; *Yard's App.*, 64 *id.* 95. The rule is held differently under the legislation of the State of New York. *Levy v. Levy*, 33 N. Y. 130; *Bascombe v. Albertson*, 34 N. Y. 598; *Beekman v. Bonsor*, 23 N. Y. 308; *Yard's App.*, 64 Penn. St. 95, and see *White v. Hale*, 2 Cold. 77.

² *Ellis v. Lynch*, 8 Bosw. 465; *Burnly v. Evelyn*, 16 Sim. 290; *Tregonwell v. Sydenham*, 3 Dow. 194. But see *Parson v. Snook*, 40 Barb. 144.

³ *Mogg v. Mogg*, 1 Mer. 654; *Monypenny v. Deering*, 7 Hare, 568;

(a) The rule against perpetuities *re* Tyler, [1891] 3 Ch. 252; *In re* Bowen, [1893] 2 Ch. 491; *In re* Nottage, [1895] 2 Ch. 649; *White v. Keller*, 68 F. R. 796; *Mills v. Davison*, 54 N. J. Eq. 659; *Webster v. Morris*, 66 Wis. 366; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Garrison v. Little*, 75 Ill. App. 402. The exception in favor of charities relates only to gifts, not to sales for a valuable consideration. *Holmes v. Trustees* (N. J. Eq.), 41 Atl. 102.

§ 386. A legal estate in fee cannot be conveyed to a person with a provision that it shall not be alienated, or that it shall not be subject to the claims of creditors; and so trusts cannot in general¹ be created with a proviso, that the equitable estate, or interest of the *cestui que trust*, shall not be alienated or charged with his debts.² (a) If it is ascertained that an interest is vested in the *cestui que trust*, the mode in which or the time when he is to reap the benefit is immaterial. The law does not allow property, whether legal or equitable, to be fettered by restraints upon alienation.

Alexander v. Alexander, 16 C. B. 59; Hopkins v. Hopkins, 1 Atk. 581; Festing v. Allen, 12 M. & W. 279; Sayer's Trusts, L. R. 6 Eq. 319; Litt v. Randall, 3 Sm. & G. 83; Hodson v. Ball, 14 Sim. 558; Jee v. Audley, 1 Cox, 324; Church in Brattle Square v. Grant, 3 Gray, 142; Arnold v. Congreve, 1 R. & M. 209; Wilson v. Wilson, 4 Jur. (N. S.) 1076; 28 L. J. (N. S.) 95; Storrs v. Benbow, 3 De G., M. & G. 390; Cattlin v. Brown, 11 Hare, 372; Griffith v. Pownall, 13 Sim. 393; Merlin v. Blagrove, 25 Beav. 125; Greenwood v. Roberts, 15 Beav. 92; Dungannon v. Smith, 12 Cl. & Fin. 546; Seaman v. Wood, 22 Beav. 591; Vanderplank v. King, 3 Hare, 1; Webster v. Boddington, 26 Beav. 128; Curtis v. Lukin, 5 Beav. 147; Hardenburg v. Blair, 30 N. J. Eq. 42; Newark Meth. Episc. Ch. v. Clark, 41 Mich. 730.

¹ This is the rule in England and in some of our States; but the contrary is strongly held in a Massachusetts case of the year 1882. See § 827 a.

² Snowdon v. Dales, 6 Sim. 524; Green v. Spicer, 1 R. & M. 395; Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Ves. 429; Ware v. Cann, 10 B. & Cr. 433; Bradley v. Peixoto, 3 Ves. 324; Hood v. Oglander, 34 Beav. 513; Bird v. Johnson, 18 Jur. 976; Blackstone Bank v. Davis, 21 Pick. 43; Etches v. Etches, 3 Drew. 441; Sparhawk v. Cloon, 125 Mass. 262; Daniels v. Eldredge, id. 350.

(a) Todd v. Sawyer, 147 Mass. 570; Winsor v. Mills, 157 Mass. 362; Cushing v. Spaulding, 164 Mass. 287. A gift to a certain bishop and his successors does not violate the rule against perpetuities when there is no restraint upon alienation. Lamb v. Lynch (Neb.), 76 N. W. 428. So of a mining lease for 999 years. Henderson v. Virden Coal Co., 78 Ill. App. 437. And of a mortgage to secure corporate bonds. Atlantic Trust Co. v. Woodbridge, &c. Co., 86 F. R. 976. The rule is violated by a devise which creates either an active trust or a power in trust whenever the right to alienate is suspended beyond the term allowed by it. Cottman v. Grace, 112 N. Y. 299; Claffin v. Claffin, 149 Mass. 19; Staples v. Hawes, 53 N. Y. S. 860.

Therefore, when an equitable interest is once vested in the *cestui que trust*, he may dispose of it, or it may pass to his assignees by operation of law, if he becomes a bankrupt. Thus a trust for a person's support,¹ or to pay the interest to a person for life, as the trustees may think proper,² or when it shall become payable,³ or in such sums or portions, and at such times and in such manner as the trustees think best,⁴ may be exercised according to the discretion of the trustees; (a) but the bankruptcy of the *cestui que trust* puts an end to the discretion of the trustees, and vests the whole interest in the assignees; and this is so, even where the trustees were directed to pay as they should think proper, and at their will and pleasure and not otherwise, so that the *cestui que trust* should have no right, claim, or demand, other than the trustees should think proper. The court thought, in *Snowdon v. Dales*, that, taking the whole instrument together, the *cestui que trust* had a vested interest, that these directions applied only to the manner of enjoyment, and that the equitable interest vested in the assignees at his bankruptcy.⁵ The test is, Would executors of the *cestui que trust* have a right to call for any arrears? if so, the assignees would have the right to call for the future income or interest.⁶

§ 386 a. This doctrine, that the incidents of a legal title attach to an absolute equitable interest, and that an equitable estate for life in any other than a married woman carries with it the power of alienation by the *cestui que trust*, and may be taken for the payment of his debts, and that no provision which does not operate to terminate his interest can protect it from the claims of creditors, is the well-settled law of England, and has been approved and applied in many *dicta*

¹ *Youngehusband v. Gisborne*, 1 Coll. 400.

² *Green v. Spicer*, 1 R. & M. 395.

³ *Graves v. Dolphin*, 1 Sim. 66.

⁴ *Piercy v. Roberts*, 1 Myl. & K. 4.

⁵ *Snowdon v. Dales*, 6 Sim. 524.

⁶ *Re Sanderson's Trust*, 3 K. & J. 497.

(a) See *infra*, § 327 a.

and decisions in the United States.¹ But it has not been allowed to pass unchallenged, and there is eminent authority in the Federal and the State courts for the proposition, that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to the objects of his bounty without making it alienable by them or liable for their debts, and that this intention, clearly expressed by the founder of a trust, must be carried out by the courts.²(a) In those States, however,

¹ *Ante*, § 386, cases cited: *Tillinghast v. Bradford*, 5 R. I. 205; *Smith v. Moore*, 37 Ala. 327; *Hallett v. Thompson*, 5 Paige, 583; *Bramhall v. Ferris*, 14 N. Y. 41, 44; *Williams v. Thorn*, 70 N. Y. 270; *Nichols v. Levy*, 5 Wall. 433, 441; *Sellick v. Mason*, 2 Barb. Ch. 79; *McIllvaine v. Smith*, 42 Mo. 45; *Heath v. Bishop*, 4 Rich. Eq. 46; *Rider v. Mason*, 4 Sandf. Ch. 352; *Easterly v. Keney*, 36 Conn. 18; *Nickell v. Handley*, 10 Grat. 336; *Girard Life Ins. Co. v. Chambers*, 46 Pa. St. 485; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Mebane v. Mebane*, 4 Ired. Eq. 131; *Pace v. Pace*, 7 N. C. 119. And a trust made void by an illegal suspension of the power of alienation is not made valid by a power of sale in the trustee, the proceeds remaining subject to the trust. *Garvey v. McDavitt*, 11 Hun (N. Y.), 457; *Brewer v. Brewer*, *id.* 147; but see *Braman v. Stiles*, 4 Pick. 460.

² *Nichols v. Eaton*, 91 U. S. 716; cited and approved in *Hyde v. Woods*, 94 U. S. 523; *Ashurst v. Given*, 5 Watts & S. 323; *Holdship v. Patterson*, 7 Watts, 547; *Brown v. Williamson*, 36 Penn. St. 338, *Still v. Spear*, 45 *id.* 168; *Shankland's App.*, 47 *id.* 113; *Pope v. Elliott*, 8 B. Mon. 56; *White v. White*, 30 Vt. 338; *Campbell v. Foster*, 35 N. Y. 361. The argument in these cases proceeds upon the ground, that the doctrine of the English cases must rest upon the rights of creditors; and it is claimed that the policy of the States of this Union has not been carried so far in furtherance of creditors' rights, that creditors can have no claim upon property which belonged to the founder of the trust, and of which he had the full and entire right of disposing as he chose, for the benefit of the *cestui que trust*, who parts with nothing in return, and that the intent of the donor clearly expressed in disposing of his property for a lawful purpose must be carried out; and the laws enacted in nearly or quite every State, exempting property of greater or less amounts in value from liability for the payment of debts, are relied on as showing the policy of these States. It is conceded that there are, however, limitations, which public policy or general statutes impose upon dispositions of property, such as

(a) See *infra*, § 827 a, and note (a).

where the doctrine of the English cases has been adopted, these distinctions and observations must be borne in mind. If the absolute equitable interest is in the *cestui que trust*, it goes to his assignees or creditors in case of insolvency. And it may be said that, if an absolute equitable interest is given to a *cestui que trust*, no restraints upon alienation can be imposed. But a trust may be so created that no interest vests in the *cestui que trust*; consequently, such interest cannot be alienated, as where property is given to trustees to be applied in their discretion to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So if property is given to trustees to be applied by them to the support of the *cestui que trust* and his family, or to be paid over to the *cestui que trust* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific pur-

those designed to prevent perpetuities and accumulations in corporations, &c. But the owner of property is governed by the rules of law, both in the use and enjoyment and in disposing of his property; and the doctrine in question seems to be founded upon the rule that title to property includes the right of alienation and liability for debts, and it seems impossible that there can be any reason in public policy, under a free government, having for its object the growth and development of a commercial people; for such a limitation of the incidents of title to property and the argument from the exemption laws would seem to be well answered by the maxim, *expressio unius est exclusio alterius*. Many of the American cases, where the English doctrine has been doubted or denied, seem to have been cases of trusts for the support and maintenance of the *cestui que trust*; and a clearly manifested intention on the part of the donor that the income of the fund shall be devoted to that purpose may impose a duty and give a consequent power in the trustee, either in his discretion or under the direction of the court, to pay over the income only in such manner as shall insure its application in accordance with the intent of the donor and protect it from the claims of creditors and the improvidence of the beneficiary, with substantially the same result upon the absolute character of the estate of the *cestui que trust* as if the instrument declaring the trust had expressly provided that the payments should be made at the discretion of the trustee,—a result more in accordance with the rules of interpretation than a strict adherence to a definition to the extent of defeating the accomplishment of the benefit intended by the donor.

pose, and is so limited that it is not repugnant to the rule against perpetuities and is in other respects legal, neither the trustees, nor the *cestui que trust*, nor his creditors or assignees, can divest the property from the appointed purposes.¹ (a) Any conveyance, whether by operation of law or by the act of any of the parties, which disappoints the purposes of the settlor by divesting the property or the income from the purposes named, would be a breach of the trust. Therefore it may be said, that the power to create a trust for a specified purpose does, in some sort, impair the power to alienate property.

§ 386 b. In the cases referred to in the last section, it will be perceived that the trust may be for a particular purpose, and that purpose may not be exclusively for the benefit of the primary *cestui que trust*; as where an estate was vested in trustees by a marriage settlement in trust to apply the annual produce thereof “for the *maintenance and support of A. B., his wife and children*,” it was held that the wife and children were to be supported, and that A. B. was entitled to the surplus after their support, and that such surplus would go to his assignees in case of his bankruptcy;² but when the trustees have an arbitrary power of applying such part of an income as they see fit to support of a *cestui que trust*, and for no other purpose, it was held that nothing passed to his assignees.³ And so if the trustees are to apply

¹ *Rife v. Geyer*, 59 Penn. St. 393; *Wells v. McCall*, 64 id. 207; *White v. White*, 30 Vt. 342; *Clute v. Bool*, 8 Paige, 83; *Bramhall v. Ferris*, 14 N. Y. 44; *Doswell v. Anderson*, 1 P. & H. (Va.) 185; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, id. 451; *Wetmore v. Truslow*, 51 N. Y. 338; *Graff v. Bonnett*, 31 N. Y. 9; *Locke v. Mabbett*, 3 Court of App. Dec. 63; *Blackstone Bank v. Davis*, 21 Pick. 42; *Etches v. Etches*, 3 Drew. 441; *Genet v. Beekman*, 45 Barb. 382; *Chase v. Chase*, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 340; *Cole v. Littlefield*, 35 Me. 439. See *ante*, § 117, and notes.

² *Page v. Way*, 3 Beav. 20.

³ *Twopenny v. Peyton*, 10 Sim. 487; *Re Sanderson's Trust*, 3 K. & J. 497; *Lord v. Bun*, 2 Y. & C. Ch. 98; *Holmes v. Penney*, 3 K. & J. 90.

(a) See *Young v. Snow*, 167 Mass. 287; *Sidway v. Nichol*, 62 Ark. 146.

the money to the support of one and his wife and children, nothing tangible can pass to the assignees;¹ but if the power is not arbitrary, but is imperative on the trustees to pay over the income for the support of the *cestui que trust* and another person or persons, the assignees are entitled to take a part upon the insolvency of one, or the whole in the event of the death of the others.²

§ 387. There is a further exception to the general rule, that an equitable interest, without the right to alienate, cannot be created; and that is in the case of trusts created for married women. It is not unusual to create trusts for married women, and give such women all the rights of unmarried women over their separate equitable interests, and at the same time to insert a clause against their anticipating the income, by which means they are unable to assign or transfer it, or in any way receive any benefit from the property, except by receiving the income, as it becomes due and payable.³

§ 388. But though a settlor cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon another in such manner that it cannot be alienated, and creditors and assignees cannot take it. But in such case the *cestui que trust* must lose the use of the property in case of his bankruptcy. Thus A. may settle property upon B. until alienation or bankruptcy, with a limitation over to C. upon either event. Or A. may give real or personal estate to B. with a *proviso*, that, on alienation or bankruptcy, it shall shift over to C.⁴ But a clause divesting the

¹ *Godden v. Crowhurst*, 10 Sim. 642; *Kearsley v. Woodcock*, 3 Hare, 185; *Wallace v. Anderson*, 16 Beav. 533; *Hall v. Williams et al.*, 120 Mass. 344.

² *Rippon v. Norton*, 2 Beav. 63; *Wallace v. Anderson*, 16 Beav. 533; *Perry v. Roberts*, 1 Myl. & K. 4.

³ *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, id. 96. See this matter stated *post*, chap. on Trusts for Married Women, §§ 670, 671.

⁴ *Muggeridge Trusts*, Johns. Ch. (Eng.) 625; *Kearsley v. Woodcock*, 3 Hare, 185; *Joel v. Mills*, 3 K. & J. 458; *Large's Case*, 2 Leon. 82;

property upon *alienation* alone, will embrace only the voluntary acts of the party, and will not apply to transfers by operation of law, as by bankruptcy,¹ unless it was intended that the clause should have so wide a signification.² Nor will a power to confess judgment be a voluntary act of alienation, unless it was within the contemplation of the parties;³ nor will the marriage of a woman be an alienation of her *choses in action*.⁴ So if there is a clause against anticipation, an assignment of arrears already accrued, and not of future income, is good.⁵ An assignment in general words will not embrace property which would be forfeited by such assignment.⁶

§ 389. If a testator devises his real estate in strict settlement, and then gives his personal estate to such tenant in tail as first attains the age of twenty-one, if the tenant in tail is not of age at the testator's death, the event may never occur, and the trust is void. But if the personal property is given upon trusts that correspond to the settlement of the real estate, with a proviso that it should not vest absolutely

Churchill *v.* Marks, 1 Coll. 441; Sharpe *v.* Cossent, 20 Beav. 470; Shee *v.* Hale, 13 Ves. 404; Lewes *v.* Lewes, 6 Sim. 304; Cooper *v.* Wyatt, 5 Madd. 482; Lockyer *v.* Savage, 2 Stra. 947; Yarnold *v.* Moorhouse, 1 R. & M. 364; Stephens *v.* James, 4 Sim. 499; *Ex parte* Oxley, 1 B. & B. 257; Rochford *v.* Hackman, 9 Hare, 475; *Ex parte* Hinton, 14 Ves. 598; Stanton *v.* Hall, 2 R. & M. 175; Hall *v.* Williams, 120 Mass. 344; Nichols *v.* Eaton, 91 U. S. 716.

¹ Lear *v.* Leggett, 2 Sim. 479; 1 R. & M. 690; Wilkinson *v.* Wilkinson, G. Coop. 259; 3 Swanst. 528; Whitfield *v.* Prickett, 2 Keen, 908.

² Cooper *v.* Wyatt, 5 Madd. 482; Dommett *v.* Bedford, 6 T. R. 684.

³ Avison *v.* Holmes, 1 John. & H. 530; Barnet *v.* Blake, 2 Dr. & Sm. 117.

⁴ Bonfield *v.* Hassell, 32 Beav. 217.

⁵ *Re* Stulz Trusts, 4 De G., M. & G. 404; 1 Eq. R. 334.

⁶ *Re* Waley's Trust, 3 Eq. R. 380. And as to the general effect of proceedings in insolvency and bankruptcy, and of annulling the proceedings, see Lloyd *v.* Lloyd, 1 W. N. 307; Pym *v.* Lockyer, 12 Sim. 394; Brandon *v.* Aston, 2 Y. & C. Ch. 24; Churchill *v.* Marks, 1 Coll. 441; Townsend *v.* Early, 34 Beav. 23; Martin *v.* Margham, 14 Sim. 230; Graham *v.* Lee, 23 Beav. 388.

in any tenant in tail unless he attained twenty-one, the trust is good.¹

§ 390. Thus where trusts are complete in themselves, or are what are termed executed trusts, courts will not mould, alter, or put any peculiar construction on them, in order to avoid or evade the rule against perpetuities. The ordinary rules of construction will be adhered to without regard to the consequences of avoiding trusts that are illegal.² But in cases of executory trusts, where trustees are directed to settle a formal deed of trust upon terms which are faintly and incompletely sketched, another rule will be applied. If from the articles or will it appears that a perpetuity was intended, that must be the end of the trust, whether executed or executory. But if the direct object of the limitations suggested in the articles is not the creation of a perpetuity, and if the remoteness is confined to some of the distant links only in the chain of limitations, equity, in decreeing the settlement, will carry into effect the general intention, especially if the expression of that intention clearly indicates that the limitations are to be carried out so far as the law allows.³

¹ *Gosling v. Gosling*, 1 De G., J. & S. 1, 17, Am. ed. Perkins, note 1; s. c. L. R. 1 H. L. 279; *Lincoln v. Newcastle*, 12 Ves. 218; *Dungannon v. Smith*, 12 Cl. & Fin. 546; *Scarsdale v. Curzon*, 1 John. & H. 40.

² *Blagrove v. Hancock*, 16 Sim. 371.

³ *Ante*, § 376; *Banks v. Le Despencer*, 10 Sim. 576; 7 Jur. 210; 11 Sim. 508; *Lincoln v. Newcastle*, 3 Ves. 387; 12 Ves. 218; *Phipps v. Kelynge*, 2 V. & B. 57, n.; *Woolmore v. Burrows*, 1 Sim. 512; *Dorchester v. Effingham*, 10 Sim. 587, 588, n.; 3 Beav. 180; *Kampf v. Jones*, 2 Keen, 756; *Tregonwell v. Sydenham*, 3 Dow, 194; 1 Jar. on Wills, 235, n.; see argument of Sir Edward Sugden in *Bengough v. Edridge*, 1 Sim. 226, 227; *Mogg v. Mogg*, 1 Mer. 654; 1 Jar. on Pow. Dev. 414, and note; *Trevor v. Trevor*, 13 Sim. 108; 1 H. L. Cas. 239; *Tennent v. Tennent*, Drury, 161; *Boydell v. Golightly*, 14 Sim. 316; *White v. Briggs*, 15 Sim. 17; *Vanderplank v. King*, 3 Hare, 5; *Monypenny v. Deering*, 7 Hare, 568; 2 De G., M. & G. 145; 16 M. & W. 418; *Hale v. Pew*, 25 Beav. 335; *Humberston v. Humberston*, 2 Vern. 737; 1 P. Wms. 332; Pr. Ch. 455; *Deerhurst v. St. Albans*, 5 Madd. 232; *Jervoise v. Northumberland*, 1 J. & W. 559; *Blackburn v. Stables*, 2 V. & B. 367; *Rowland v. Morgan*, 2 Phill. 763; *Parfitt v. Hember*, L. R. 4 Eq. 443.

§ 391. In some of the States, legislation has been had whereby the period within which estates must vest is shortened. Thus in Alabama¹ estates may be given to wife and children, or children only, severally, successively, and jointly, and to the heirs of the body of the survivor, if they come of age, and in default thereof over. But gifts to others than wife and children must vest within the term of three lives in being, and ten years thereafter. In Connecticut,² no estate can be given by deed or will to any person or persons, except such as are in being, or to the immediate issue or descendants of such as are in being at the time of making the deed or will. In New York,³ Michigan,⁴ Minnesota,⁵ and Wisconsin,⁶ the absolute power of alienation cannot be suspended, by any limitation or condition, for a longer period than the continuance of two lives in being at the creation of the estate, except that a contingent remainder in fee may be limited on a prior remainder in fee to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined during their minority. Successive limitations of estates for life are not valid except to persons in being at the time of their creation. And if a remainder is limited on more than two successive estates for lives in being, all the subsequent successive estates are void; and upon the death of those two persons the remainder will take effect as if no other life-estate had been created. No remainder can be created for the life of a person other than the grantee or devisee of such estate, unless such remainder is in fee; nor can a remainder be created upon such an

¹ Code, 1852. § 1309.

² Comp. Stat. 1854, p. 630, § 4.

³ 2 Rev. Stat. (4th ed.) 133, §§ 15-20; *Knox v. Jones*, 47 N. Y. 398; *Wood v. Wood*, 5 Paige, 596; *Amory v. Lord*, 5 Seld. 503; *Schutter v. Smith*, 41 N. Y. 328; *Gott v. Cook*, 7 Paige, 531; *Van Vechten v. Van Vechten*, 8 Paige, 104.

⁴ Comp. Laws, 1857, c. 85, §§ 15-26.

⁵ Comp. Stat. 1859, c. 31, §§ 15-26.

⁶ Rev. Stat. 1858, c. 83, §§ 15-26.

estate in a term of years, unless it is for the whole residue of the term. If more than two lives are named, the remainder takes effect upon the death of the two persons first named, in the same manner as if no other persons had been named or lives introduced. A contingent remainder cannot be limited on a term for years, unless the contingency on which it is limited is such that it must vest during the continuance of two lives in being at the creation of such remainder, or at the termination of such term of years. Thus a limitation to A. for life, remainder to B. for life, remainder to C. and D., and the survivor of them, is within the statute, and void as to C. and D. as a limitation upon more than two lives in being.¹ If the power of alienation is suspended for an indefinite period, the trust is void.²

§ 392. In Ohio,³ no estate can be limited to any person or persons, except they are in being, or to the immediate descendants of such as are in being at the time of making of the deed or will. In Mississippi,⁴ fees-tail are prohibited, and converted into fees-simple; and estates may be limited in succession to two donees in being, and to the heirs of the body of the remainder-man, and in default thereof to the heirs of the donor in fee. In Indiana,⁵ the power of selling lands cannot be suspended, by any limitation or condition, longer than the continuance of any number of specified lives in being at the time of the creation of the estate; except that contingent remainders in fee may be limited on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall be under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined during their minorities. In Kentucky,⁶ the

¹ Arnold v. Gilbert. 5 Barb. 190.

² Donaldson v. American Tract Soc., 1 N. Y. Sup. Ct. Add. 15; Leonard v. Bell, 1 N. Y. Sup. Ct. 608; Kiah v. Grenier, id. 388.

³ Rev. Stat. 1854, c. 42, § 1.

⁴ Code, 1857, c. 38, § 1, art. 3; see Jordan v. Roach, 32 Miss. 481.

⁵ Rev. Stat. 1852, p. 238, § 40.

⁶ Rev. Stat. c. 80, § 34.

absolute power of alienation cannot be suspended by limitations or conditions for a longer period than during a life or lives in being and twenty-one years and ten months; which is substantially the common-law rule in the form of a statute. So, in Iowa,¹ alienation cannot be suspended for a period longer than lives in being and twenty-one years. In Arkansas² and Vermont,³ their constitutions declare that a perpetuity shall not be allowed. What is a perpetuity in those States would necessarily, in the absence of legislation, be determined by the common-law rule. So it is conceived that the common law prevails in those States. In all the other States, except perhaps Louisiana, where the rules of property were derived from the civil law or the code of France, and California, where they were derived from the Spanish laws, the common-law rules as to perpetuities are in force, and trusts that are contrary to these rules are void.

§ 393. Intimately connected with this matter is the rule against accumulations. Trusts for accumulation must be strictly confined within the limits of the rule against perpetuities. It has been seen that a settlor may restrain the alienation of property for a life or lives in being and twenty-one years; and, in case the beneficiary is then *en ventre sa mère*, an addition of nine months may be made to the term. In analogy to this rule, a settlor may prevent the beneficial enjoyment of property for the same length of time, by directing an accumulation of the interest, income, rents, or profits.⁴

¹ Code, 1851, p. 1191.

² Const. art. 2, § 19.

³ Const. pt. 2, § 36; Gen. Stat. 1863, pp. 25, 446.

⁴ *Fosdick v. Fosdick*, 6 Allen, 43; *Hooper v. Hooper*, 9 Cush. 122; *Thorndike v. Loring*, 15 Gray, 391; *Boughton v. James*, 1 Coll. 26; 1 H. L. Cas. 406; *Southampton v. Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Curtis v. Lukin*, 5 Beav. 147; *Brown v. Stoughton*, 14 Sim. 369; *Scarisbrooke v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcome*, 3 K. & J. 16; *Craig v. Craig*, 3 Barb. Ch. 76; *Mathews v. Keble*, L. R. 1 Eq. 467; L. R. 3 Ch. 691; *Killam v. Allen*, 52 Barb. 605; *Dutch Reform Church v. Brandon*, id. 228; *White v. Howard*, id. 294; *Hillyard v. Miller*, 10 Barr, 326.

If a trust for accumulation may possibly exceed this limit, it is wholly void, and it cannot be cut down to the legal limit. (a)

§ 394. The above is the rule where there are no statutes to control it. Trusts, by which the vesting, alienation, or enjoyment of property is postponed beyond the legal period, are considered as contrary to public policy, and therefore void; and as courts cannot substitute legal directions in the place of illegal provisions in a will, the whole fails if there is an illegal gift for accumulation. The period during which accumulation might go on was found to be inconvenient in case a settlor availed himself of all its terms. Thus Mr. Thellusson, by an ingenious and skilful use of these legal limitations, constructed a will by which a fortune of £600,000 was left to accumulate for some person to come into existence in the future, answering a certain description, while mere pittancees were given to his children and grandchildren then in being. It was calculated that accumulations might go on under this will from seventy-five to one hundred years, and that the gross accumulation would amount to a sum from £32,000,000 to £100,000,000, according to the time during which it might accumulate. The will was most carefully considered and discussed in all the courts, but it was found to be drawn carefully within the law, and all its provisions were sustained.¹ Thereupon Parliament interfered, and passed a statute, usually called the Thellusson Act, which curtailed the period during which accumulations

¹ Thellusson v. Woodford, 4 Ves. 227; 11 Ves. 112; 4 Kent, Com. 285.

(a) See *Scott v. West*, 63 Wis. 529. An accumulation for more than twenty-one years may legally take place by operation of law. *Bryan v. Collins*, 16 Beav. 17. A direction to apply rents or income in payment of a specified sum to a designated person is not a direction to accumulate. *Rogers' Estate*, 179 Penn. St. 602. In New York, directions to accumulate rents, except during the minority of legatees, are void by statute. See *Spencer v. Spencer*, 56 N. Y. S. 460.

might be directed.¹(a) This act established four alternate periods during which accumulations might be made: (1) The life of the settlor; (2) Twenty-one years from the death of the settlor; (3) The minority or minorities of any persons living at the death of the settlor; (4) During the minority or minorities of any person or persons who, if of full age, would be entitled under the limitations to the income which is directed to be accumulated.

§ 395. It has been determined that these four periods are alternative, and not cumulative, and that accumulations must be confined to one of them.² If the accumulation does not begin until several years after the testator's death, it must cease at the end of twenty-one years from his death,³ excluding the day of his death.⁴ The act further directs, that any accumulation directed contrary to its provision shall be void. By these words accumulations directed contrary to the statute are not wholly void, as at common law, but only the excess beyond the time allowed by the statute is void.⁵ Mr.

¹ Stat. 39 and 40 Geo. III. c. 98.

² *Ellis v. Maxwell*, 3 Beav. 587; *Rosslyn's Trust*, 16 Sim. 391; *Wilson v. Wilson*, 1 Sim. (N. S.) 288.

³ *Nettleton v. Stephenson*, 3 De G. & Sm. 366; *Att. Gen. v. Poulden*, 3 Hare, 555; *Webb v. Webb*, 2 Beav. 493; *Shaw v. Rhodes*, 1 Myl. & Cr. 135.

⁴ *Toder v. Sansom*, 1 Brown, P. C. 468; *Lester v. Garland*, 15 Ves. 248; *East v. Lowndes*, 11 Sim. 434. And the day of the death was excluded by the rules of the common law, independently of the statute. *Toder v. Sansom*, *ut supra*.

⁵ *Griffiths v. Vere*, 9 Ves. 127; *Palmer v. Holford*, 4 Russ. 403; *Langdon v. Simson*, 12 Ves. 295; *Rosslyn's Trust*, 16 Sim. 391; *Freke v. Lord Carbery*, L. R. 16 Eq. 461. There are a great number of cases upon this construction, but they are not important in America. The reader can see 1 Jarm. on Wills, 286; Hill on Trustees, 394; *Lade v. Holford*, Amb. 479; *Eyre v. Marsden*, 2 Keen, 564; 4 Myl. & Cr. 231; *Marshall v. Holloyay*, 3 Swanst. 432; *Southampton v. Hertford*, 2 V. & B. 61; *Haly v. Bannister*, 4 Madd. 277.

(a) See *Smith v. Cuninghame*, 729. Upon the Accumulations Act 13 L. R. Ir. 480. The periods allowed by this Act are not cumulative. *Jagger v. Jagger*, 25 Ch. D. 633.

Lewis calls this a "rule of construction entirely novel."¹ It is also said, that the act is one of restraining force, and cannot give validity to trusts for accumulation, which are in themselves void, as transgressing the common-law limits of a perpetuity. Thus a direction to accumulate beyond the time allowed by the statute, but within the time allowed by the common law, will be good for the actual time allowed by the statute, and void only for the excess; but a direction to accumulate, beyond the rule of common law against perpetuity, is wholly void notwithstanding the statute. Consequently, in England a trust for accumulation may verge *almost* upon the outside of the limit of a perpetuity, and yet be void only for the excess beyond the time established in the statute; but if a trust for accumulation transcends in the slightest degree the boundary of a perpetuity, it is wholly void, and will fail without regard to the actual course of events.²

§ 396. If a good bequest is made to a devisee, subject to an illegal or void direction to accumulate, as where such direction is independently engrafted upon the devise, and can be stricken out without destroying the substantial form of the gift, the gift may be held to be good, but the direction to accumulate void.³ But where the gift is limited to take effect *after* a prescribed period of accumulation, and out of the accumulated fund, as part of the subject-matter of the gift, and such period of accumulation is illegal or too remote, the gift itself will fail, as the form of the gift in such case is of the substance of it. If the gift and all its accumulations are of necessity to vest in some person absolutely, in such manner that he will have a right to call for the fund,

¹ Lewis on Per. 593.

² Lewis on Per. 593, 594; Hargrave, Accum. 91, 110; 1 Pow. on Devi. by Jarm. 419; 2 Prest. Abst. 183.

³ Haxtum v. Corse, 2 Barb. Ch. 506; Craig v. Craig, 3 Barb. Ch. 76; Martin v. Margham, 14 Sim. 230; Williams v. Williams, 4 Selden, 525; Phelps v. Pond, 23 N. Y. 69; Kilpatrick v. Johnson, 15 N. Y. 322; Hawley v. James, 5 Paige, 318; Philadelphia v. Girard, 45 Penn. St. 1.

⁴ Amory v. Lord, 5 Selden, 403.

and stop the accumulations within the legal period, the bequest will be good, although such persons should allow the accumulations to go on as directed;¹ that is, the same rule applies as in the case of perpetuities. The law concerns itself with the possibilities of an illegal accumulation, and not with the fact, whether a person, having an absolute vested right to a fund, allows it to go on accumulating in accordance with a void direction.²

§ 397. When a direction to accumulate is void for a part of the term, the income during such void part will belong to the heir or next of kin, or to the residuary legatee. Mr. Jarman has pointed out the destination of such income as follows: (1) Where there is a present gift in possession, and the direction for accumulation is merely to govern the mode of enjoyment, the result is to give those entitled the present income, the same as if the direction had not been given.³ (2) Where the trust for accumulation is grafted upon an estate where vesting is deferred or made contingent until after the period of accumulation, the statute by stopping the accumulation does not hasten the vesting or the possession, and the income goes to the residuary legatee or the heir, according as it is personal or real estate, until the vesting or possession of the estate is matured. But where the residue is not given absolutely, but only for life or years, the interest upon a legacy thus directed to be accumulated beyond the legal period goes into the residue of the estate as capital.⁴(a) (3) Where a residue is directed to be accumulated,

¹ *Phipps v. Kelynge*, 2 Ves. & B. 57, n., 63, 62; *Tregonell v. Sydenham*, 3 Dow, 194; *Lewis on Per.* 640; *Conner v. Ogle*, 4 Md. Ch. 443; *Saunders v. Vautier*, 4 Beav. 115; *Cr. & Phil.* 240; *Oddie v. Brown*, 4 De G. & J. 179; *Bateman v. Hotchkin*, 10 Beav. 426; *Bacon v. Proctor*, T. & R. 31; *Briggs v. Oxford*, 1 De G., M. & G. 363; *Williams v. Lewis*, 6 H. L. Cas. 1013.

² *Ante*, § 181.

³ *Trickey v. Trickey*, 3 Myl. & K. 560; *Clulow's Trust*, 5 Jur. (N. S.) 1002; 28 L. J. Ch. 696; *Combe v. Hughes*, 11 Jur. (N. S.) 194; 1 Jarm. on Wills, 292; *Hawley v. James*, 5 Paige, 318.

⁴ *Jones v. Maggs*, 9 Hare, 605; *Macdonald v. Brice*, 2 Keen, 276;

(a) See *Vine v. Raleigh*, [1891] 467; *In re Philips*, 49 L. J. Ch. 198; 2 Ch. 13; *In re Mason*, [1891] 3 Ch. *Brown v. Wright*, 168 Mass. 506.

the income, when its accumulation becomes illegal, will go to the heir or next of kin, according as the property may be real or personal estate.¹ (a) (4) The income of the accumulations follows the same rule as the accumulation.² These are substantially the same rules that apply to the distribution of income which is illegally directed to be accumulated at common law.

§ 398. In New York,³ (b) Michigan,⁴ Wisconsin,⁵ (c) and Minnesota,⁶ the common-law rules in relation to accumulations are changed by statutes, which are substantially the

Eyre v. Marsden, id. 574; *Ellis v. Maxwell*, 3 Beav. 587; *Nettleton v. Stephenson*, 3 De G. & Sm. 366; *Barrington v. Liddell*, 10 Hare, 429; *Att. Gen. v. Poulden*, 3 Hare, 555; *Crawley v. Crawley*, 7 Sim. 427; *Morgan v. Morgan*, 4 De G. & Sm. 175; *Hull v. Hull*, 24 N. Y. 647; 1 Jarm. on Wills, 292.

¹ *Skrymsher v. Northcote*, 1 Swanst. 566; *Macdonald v. Bryce*, 2 Keen, 276; *Pride v. Fooks*, 2 Beav. 437; *Elborne v. Goode*, 14 Sim. 165; *Wilson v. Wilson*, 1 Sim. (N. S.) 288; *Bourner v. Buckton*, 2 Sim. (N. S.) 91; *Oddie v. Brown*, 4 De G. & J. 179; *Halford v. Stains*, 16 Sim. 488; *Wilde v. Davis*, 1 Sm. & G. 475; *Eyre v. Marsden*, 2 Keen, 564; 4 Myl. & Cr. 431; *Edwards v. Tuck*, 3 De G., M. & G. 40; *Burt v. Sturt*, 10 Hare, 415; 1 Jarm. on Wills, 292.

² *Crawley v. Crawley*, 7 Sim. 427; *O'Neill v. Lucas*, 2 Keen, 316; *Morgan v. Morgan*, 4 De G. & Sm. 175; 20 L. J. Ch. 441; 1 Jarm. on Wills, 292.

³ Rev. Stat. (4th ed.) p. 135; *Craig v. Craig*, 3 Barb. Ch. 76; *Killam v. Allen*, 52 Barb. 605; *Hawley v. James*, 5 Paige, 480; *Hull v. Hull*, 24 N. Y. 647; *Robinson v. Robinson*, 5 Lansing, 167; *Williams v. Williams*, 8 N. Y. 358; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Haxtun v. Corse*, 2 Barb. Ch. 508; *Lang v. Ropke*, 5 Sandf. S. C. 363; *Meserole v. Meserole*, 1 Hun, 66; *Pray v. Hedgeman*, 27 Hun, 603.

⁴ Comp. Laws, 1857, c. 85, §§ 15-26.

⁵ Rev. Stat. 1858, c. 83, §§ 15-26.

⁶ Comp. Stat. 1859, c. 31, §§ 15-26.

(a) See *In re Dallmeyer*, [1896] 1 Ch. 372. (c) The Wisconsin statute limits the rule to real estate, and does not

(b) See *Roe v. Vingut*, 117 N. Y. 204; *Dunklee v. Butler*, 56 N. Y. S. 491; *Farley v. Bucklin*, 16 R. I. 378. apply to personality. *Dodge v. Williams*, 46 Wis. 70

same in each State. In those States accumulations may be directed by deed or will, during the minority of one or more persons, to commence with the creation of the estate out of which the accumulation is to be made, and to end with the minority of the persons named. If there is a direction for an accumulation for a longer period, the excess only is void. In Alabama,¹ accumulations can go on only for ten years, unless they are for the benefit of a minor child in being at the creation of the trust, or at the death of the testator, in which case they may continue during its minority. In Pennsylvania,² trusts for accumulation cannot be created for a longer term than the life or lives of the grantor or testator, and the term of twenty-one years from the death of such grantor or testator, and if these limits are exceeded, the excess is void. In the other States, the common-law rules, as before stated, are supposed to prevail. The rule in regard to accumulation is analogous to the rules in regard to the vesting of executory estates. At common law, the same rule prevails in both cases. In many of the States, the rules regulating the vesting of such estates have been altered by statutes. Whether the modification of those rules by statute, without reference to the rule as to accumulations, would also alter the rule as to accumulations in those States does not seem to have been considered.

§ 399. Where there are no statutes regulating accumulations, a direction to accumulate a fund for a charity, for a term beyond the common-law limit, does not vitiate the gift for the charity,³ although no limit has been determined by courts during which an accumulation for a charity may be permitted. It is probable that courts would take care that no extraordinary or extravagant term for accumulation should be allowed for a future and prospective good. But where there are statutes against accumulations, charities

¹ Code, 1852, § 1310.

² *Purd. Dig.* 1861, p. 853, § 9.

³ *Odell v. Odell*, 10 Allen, 1; but see *Hillyard v. Miller*, 10 Penn. St. 326; *Philadelphia v. Girard*, 45 id. 1.

will be governed by the same rules unless they are specially excepted.¹ (a)

§ 400. In *Bassil v. Lister*,² it was determined that a direction of a testator that premiums on policies of insurance should be paid out of his estate, upon the lives of his sons during their lives, was not a direction for an accumulation within the prohibition of the statute. The case is severely criticised in *Jarman on Wills*;³ but it would seem, that it would not be illegal for a testator to direct the premiums to be paid upon a life policy, if the primary object of such a direction is not accumulation, but security or safety. The question cannot arise, however, in the absence of statutory provisions upon the subject of accumulations; for it can be an accumulation for one life only in being at the time, and such an accumulation is legal by the rules of the common law. (b)

¹ *Martin v. Margham*, 14 Sim. 230.

² *Bassil v. Lister*, 9 Hare, 177.

³ 1 Jarm. 294-297.

(a) See *Wharton v. Masterman*,
[1895] A. C. 186.

(b) See *Re Errington*, 76 L. T.
616.

CHAPTER XIV.

GENERAL PROPERTIES AND DUTIES OF THE OFFICE OF TRUSTEE.

- § 401. A trustee, having accepted the office, is bound to discharge its duties.
- § 402. He cannot delegate his authority except to agents in proper cases.
- § 403. Not responsible if he follow directions in employing agents.
- § 404. Where agents must be employed.
- § 405. When responsible for agents and attorneys.
- § 406. When not responsible.
- § 407. Difference of liability in law and equity.
- § 408. Trustees responsible for all mischiefs arising from delegating discretionary powers.
- § 409. Employing agents or attorneys may not be a delegation of authority or discretion.
- § 410. A sale or devise of the trust estate not a delegation of the trust.
- § 411. Several trustees constitute but one collective trustee.
- §§ 412, 413. When they must all act and when not.
- § 414. As to the survivorship of the office of trustee.
- § 415. General rule as to liability for cotrustees.
- § 416. May make themselves liable, where otherwise they would not be.
- § 417. Trustees must use due diligence in all cases, or they will be liable for cotrustees.
- § 418. Cases of a want of due care and prudence.
- § 419. In case of collusion or gross negligence, a trustee will be liable for acts of cotrustees.
- § 420. When cotrustees are liable for others upon sales of real estate under a power.
- § 420 *a*. Indemnifying of one trustee by another.
- § 421. As to liability of coexecutors for the acts of each other.
- § 422. An executor must not enable his coexecutor to misapply the funds.
- § 423. When executors must all join they are not liable for each other's acts; but they must use due diligence.
- § 424. An executor must not allow money to remain under the sole control of his coexecutor.
- § 425. Executors and administrators governed by the same rules.
- § 426. Rule where coexecutors or cotrustees give joint bonds for security of the administration of the estate.
- § 427. Trustees can make no profit out of the office.
- § 428. Cannot buy up debts against the estate or *cestui que trust* at a profit.
- § 429. Cannot make a profit from the use of trust funds in business, trade, or speculation.
- § 430. All persons holding a fiduciary relation, subject to the same rule.

- § 431. All persons holding fiduciary relations to an estate, subject to the same rule.
- § 432. Can receive no profit for serving in their professional characters a trust estate.
- § 433. Trustees can set up no claim to the trust estate, and ought not to betray the title of the *cestui que trust*.
- § 434. In England, upon failure of heirs to the *cestui que trust*, trustee may hold real estate to his own use.
- § 435. Speculative questions.
- § 436. In the United States, the interest of the *cestui que trust* in real estate escheats.
- § 437. So it does in England and the United States in personalty.
- § 437 a. Contracts of trustee.
- § 437 b. Signature of trustee.

§ 401. A TRUSTEE, having accepted a trust, cannot renounce it. If any one undertakes an office for another, he is bound to discharge its duties, and he cannot free himself from liability by mere renunciation. He must be discharged by a court of equity, or by a special power in the instrument of trust, or by the consent of all parties interested in the estate, if they are *sui juris*: if all the parties are not *sui juris*, recourse must be had to a court of equity, in the absence of any provisions in the instrument of trust.¹ (a) Nor can a party qualify his own acts. Where he is named trustee or executor, and acts in behalf of certain parties in the management of the estate, he cannot protest that he is not acting generally, and that he will not be responsible for any mismanagement. On the contrary, if he so acts, and his coexecutors accept the trust, and commit a *devastavit*, he will be equally responsible.² Even if a trustee gives a bond for the due execution of the trust, and in a suit upon

¹ *Post*, §§ 920-922; *Doyle v. Blake*, 2 Sch. & Lef. 245; *Chalmer v. Brady*, 1 J. & W. 68; *Read v. Truelove*, Amb. 417; *Manson v. Baillie*, 2 Macq. II. L. Cas. 80; *Switzer v. Skiles*, 3 Gilm. (Ill.) 529; *Diefendorf v. Spraker*, 6 Seld. 246; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Matter of Jones*, 4 Sandf. 615; *Cruger v. Halliday*, 11 Paige, 314; *Courtenay v. Courtenay*, 3 Jo. & Lat. 529.

² *Lowry v. Fulton*, 9 Sim. 123; *Doyle v. Blake*, 2 Sch. & Lef. 231; *Read v. Truelove*, Amb. 417; *Urch v. Walker*, 3 Myl. & Cr. 702; *Van Horn v. Fonda*, 5 Johns. Ch. 403.

(a) *Speakman v. Tatem*, 48 N. J. Eq. 136.

the bond is obliged to pay the full amount, he is not discharged from the trust, nor does the trust property vest in him beneficially. He is still a trustee, and must account for the trust property, and all the income and profits. Courts of equity, however, in such cases have power to do equity; and the trustee would not be ordered to convey the trust property without repayment to him of the money paid out on his bond.¹ Until the trustee has been discharged, the *cestui que trust* may require the due execution of the trust; and where the trustee will not take proper steps to enforce a claim against a debtor, he may file a bill against the trustee for the execution of the trust and to obtain the proper order for using the trustee's name or for obtaining a receiver to use the trustee's name.² Trustees will be held to great strictness in their dealings with the estate, but courts will treat them leniently when they act in good faith.³ A trustee is bound to exercise ordinary care and judgment, and it is no excuse for him that he did not possess them; by accepting a trust, whether gratuitous or not, he undertakes that he does possess and will exercise them.⁴ (a)

§ 402. The office of trustee is one of personal confidence, and cannot be delegated. If a person takes upon himself the

¹ Moorcroft v. Dowding, 2 P. Wms. 314. See Barker v. Barker, 14 Wis. 131; Saunders v. Webber, 39 Cal. 287.

² Sharpe v. San P. Ry. Co., L. R. 8 Ch. 597.

³ Crabb v. Young, 92 N. Y. 56.

⁴ Hun v. Cary, 82 N. Y. 65.

(a) "Trustees are not bound to do anything dishonest or immoral for the sake of their *cestuis que trust*." Per Kekewich, J., in Budgett v. Budgett, [1895] 1 Ch. 202, 215.

In England, § 30 of Lord St. Leonard's Act (22 & 23 Vict. ch. 30), enabling trustees to obtain the advice or direction of the court of chancery, does not relate to nice questions of law, but was intended to procure for trustees the assistance

of the court upon points of minor importance in the management of the trust estate. *In re Tyrrell's Trusts*, 23 L. R. Ir. 263.

A court of equity will not advise a trustee upon speculative questions, or those relating to his future duties. *White v. Massachusetts Institute of Technology*, 171 Mass. 84; *Quincy v. Att. Gen.*, 160 Mass. 431, 437; *O'Cain v. O'Cain*, 51 S. C. 348.

management of property for the benefit of another, he has no right to impose that duty on others, and if he does he will be responsible to the *cestui que trust*, to whom he owes the duty.¹ Therefore, if a trustee confides his duties or the trust fund to the care of a stranger,² or to his attorney,³ or even to his cotrustee or coexecutor,⁴ he will be personally responsible. But, before this responsibility can arise, the trustee must have accepted the office. Where a person named executor received a bill by post, and passed it over to a co-executor who had accepted the trust, it was held that the act might be considered as the act of a stranger, and did not impose any responsibility.⁵ So where a coexecutor collected money, and paid it to a banker, who was also his coexecutor, and whom the testator employed as his banker, he was held excused for trusting the same person as his coexecutor whom the testator trusted as his banker.⁶

¹ *Turner v. Corney*, 5 Beav. 517; *Taylor v. Hopkins*, 41 Ill. 442.

² *Adams v. Clifton*, 1 Russ. 297; *Kilbee v. Sneyd*, 2 Moll. 199; *Hardwick v. Mynd*, 1 Anst. 109; *Venables v. Foyle*, 1 Ch. Cas. 2; *Douglass v. Browne*, Mont. 93; *Ex parte Booth*, id. 248; *Walker v. Symonds*, 3 Swanst. 79, n. (a); *Char. Corp. v. Sutton*, 2 Atk. 405; *Wilkinson v. Parry*, 4 Russ. 272; *Hulme v. Hulme*, 2 Myl. & K. 682; *Black v. Irwin*, Harp. L. 411; *Berger v. Duff*, 4 Johns. Ch. 368; *Pearson v. Jamison*, 1 McLean, 199; *Newton v. Bronson*, 3 Kern. 587; *Andrew v. N. Y. Bible Soc.*, 4 Sandf. 156; *Niles v. Stevens*, 4 Denio, 399; *Beekman v. Bonsor*, 23 N. Y. 298; *Whittlesey v. Hughes*, 39 Mo. 13; *Graham v. King*, 50 Mo. 22; *Howard v. Thornton*, id. 291; *Bales v. Perry*, 51 Mo. 449.

³ *Chambers v. Minchin*, 7 Ves. 196; *Griffiths v. Porter*, 25 Beav. 236; *Ingle v. Patridge*, 32 Beav. 661; 34 Beav. 411; *Bostock v. Floyer*, L. R. 1 Ch. 26; *Ex parte Townsend*, 1 Moll. 139; *Ghost v. Waller*, 9 Beav. 497; *Turner v. Corney*, 5 Beav. 115; *Sinclair v. Jackson*, 8 Cow. 582.

⁴ *Langford v. Gascoyne*, 11 Ves. 333; *Clough v. Bond*, 3 Myl. & Cr. 497; *Eaves v. Hickson*, 30 Beav. 136; *Davis v. Spurling*, 1 R. & M. 66; *Anon.*, Mos. 35, 36; *Harrison v. Graham*, 1 P. Wms. 241, n. (y); *Kilbee v. Sneyd*, 2 Moll. 200; *Marriott v. Kinnersley*, Tam. 470; *Thompson v. Finch*, 22 Beav. 316; 8 De G., M. & G. 560; *Dines v. Scott*, T. & R. 361; *Cowell v. Gatcombe*, 27 Beav. 568; *Trutch v. Lamprell*, 20 Beav. 116; *Ex parte Winnall*, 3 D. & C. 22; *Berger v. Duff*, 4 Johns. Ch. 368.

⁵ *Balchen v. Scott*, 2 Ves. Jr. 678.

⁶ *Churchill v. Hobson*, 1 P. Wms. 241; *Chambers v. Minchin*, 7 Ves. 198. And see 1 P. Wms. 241, n. (y).

§ 403. So trustees are not responsible, if they follow the directions of the settlor. Thus, where a testator recommended his executors to employ a person who had been his own agent and clerk, and they employed him to collect moneys, and he became insolvent, it was held that, as the testator pointed out the agent to whom certain business might be delegated, the executors were not liable for the loss, if they used due diligence to recover the money.¹ So if an executor pays over money which he has no right to retain. Thus a testator appointed A., B., and C. his executors, and authorized A. to sell real estate for certain purposes. A. employed B. as his agent to sell the real estate; B. sold the estate and paid the money over to A., who misapplied it; and it was held that B. received the money, not as executor, but as agent of A., and as A. had authority to sell, he had a right to the money, and that B. could not retain it, and was not responsible for it.²

§ 404. But there are circumstances where the trustees must employ agents. (a) Lord Hardwicke said: "There are two sorts of necessity, *legal* necessity and *moral* necessity. As to the first a distinction prevails. Where two *executors* join in giving a discharge for money, and only one of them receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if *trustees* join in giving a discharge and one receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts prudently for the trust, as he would have done for himself, 'and according to the usage of business;' as if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable. So in the

¹ Kilbee v. Sneyd, 2 Moll. 199; Doyle v. Blake, 2 Sch. & Lef. 239.

² Davis v. Spurling, 1 R. & M. 64; Tam. 199; Keane v. Roberts, 4 Madd. 332, 356; Crisp v. Spranger, Nels. 109.

(a) See *supra*, § 246, note.

employment of stewards and agents; for none of these cases are on account of necessity, but because the persons acted in the usual method of business."¹ Other cases have held that "necessity includes the usual course of business,"² as in employing a broker in making investments of a class usually so made.³ But the agent must not be employed out of the scope of his regular business.⁴ Where an executor in London remitted money to an executor in the country to pay debts there due, it was held to be a *necessary* transaction in the course of business, and the executor in London was not responsible for the loss of the money by his coexecutor in the country.⁵ So, where A. and B. were assignees of a bankrupt, and A. signed dividend checks and delivered them to B. for his signature, and for delivery to the creditors, and they were stolen from B. and negotiated at the bank, it was held that A. was not responsible for the loss, as he had delegated the checks to B. in the necessary course of the business.⁶ So a trustee is not called upon, in the ordinary course of business, to take security from the agent or other person whom he employs.⁷ One trustee may employ his cotrustee as his agent, or one trustee may act for the whole, within the scope of those duties where an agent may be employed.^{8(a)}

¹ *Ex parte* Belchier, Amb. 219.

² *Bacon v. Bacon*, 5 Ves. 335; *Clough v. Bond*, 3 Myl. & Cr. 497; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Chambers v. Minchin*, 7 Ves. 193; *Langford v. Gascoyne*, 11 Ves. 335; *Davis v. Spurling*, 1 R. & M. 66; *Munch v. Cockerell*, 5 Myl. & Cr. 214; *Hawley v. James*, 5 Paige, 487; *May v. Frazer*, 4 Litt. 391; *Telford v. Barney*, 1 G. Greene (Iowa), 575; *Blight v. Schenck*, 10 Barr. 285; *Lewis v. Reed*, 11 Ind. 239; *Mason v. Wait*, 4 Scam. 132.

³ *Speight v. Gaunt*, 22 Ch. D. 727.

⁴ *Fry v. Tapson*, 28 Ch. D. 268.

⁵ *Joy v. Campbell*, 1 Sch. & Lef. 341; *Barrings v. Willing*, 4 Wash. C. C. 251; *Jones's App.*, 8 Watts & S. 147; *State v. Guilford*, 15 Ohio, 593; *Deaderick v. Cantrell*, 10 Yerg. 251; *Thomas v. Scruggs*, id. 401; *Mac-cubbin v. Cromwell*, 7 G. & J. 157.

⁶ *Ex parte* Griffin, 2 G. & J. 114; *Wackerbath v. Powell*, Buck, 495; 2 G. & J. 151.

⁷ *Ex parte* Belchier, Amb. 220.

⁸ *Ex parte* Rigby, 19 Ves. 463; *Abbott v. American Hard Rubber Co.*,

(a) If a testator empowers his estate who may be one of them-trustees to appoint a factor to the selves, but directs them to require

§ 405. It was held in one case, that assignees were responsible for the loss of money by an attorney employed by them to collect debts due the estate, on the ground that there was no *necessity* for them to allow the attorney to receive a shilling of the money except the costs, as he could not give a valid receipt for the same;¹ and Lord Eldon was cited as an authority for this. Mr. Lewin questions this case, and says that trustees must not allow money to remain in the hands of an attorney, but that the authorities are doubtful which say that money may not pass through the hands of an attorney in the ordinary course of business. The case is authority, however, thus far, that attorneys cannot sign receipts for trustees, and if they authorize them so to do, the trustees will be responsible as for the acts of an agent improperly appointed.²

§ 406. If money is to be transmitted to a distant place, a trustee may do so through the medium of a responsible bank, or he may take bills from persons of undoubted credit, payable at the place where the money is to be sent; but the bills must be taken to him *as trustee*: if he neglects these precautions he will be responsible for any loss.³

§ 407. It is said that there is a difference in the rule, as applied to executors in a court of law and a court of equity. Thus, in a court of law, an executor will be charged with all

33 Barb. 579; *Sinclair v. Jackson*, 8 Cow. 543; *Webb v. Ledsom*, 1 K. & J. 385; *Leggett v. Hunter*, 19 N. Y. 445; *Bowers v. Seeger*, 3 Watts & S. 222.

¹ *Ex parte Townsend*, 1 Moll. 149; *Anon.* 12 Mod. 560; *Re Fryer*, 3 K. & J. 317.

² *Lewin on Trusts*, 208.

³ *Wren v. Kirton*, 11 Ves. 380; *Ex parte Belchier*, 219; *Routh v. Howell*, 3 Ves. 566; *Massey v. Banner*, 1 J. & W. 247; *Knight v. Plymouth*, 1 Dick. 120; 3 Atk. 480.

annual accounts, the trustees are *ruthers v. Carruthers*, [1896] A. C. guilty of gross negligence if they 659.
do not call for such accounts. Car-

the assets that come to his hands to be administered, and he must discharge himself by showing a legal administration of all of them; and he cannot discharge himself at law by showing that he intrusted them to another in the ordinary course of business; that he used due caution and prudence, and reposed a reasonable confidence in such other person; and that the assets were lost without negligence or default on his part. Such a state of facts would not sustain a plea of *plene administravit* in a court of law. But a court of equity would adjust the account of the executor upon equitable principles.¹ A court of probate, in taking the account, would also act upon equitable principles.²

§ 408. If a trust is of a *discretionary* nature, the trustee will be responsible for all the mischievous consequences of the delegation, and the exercise of the discretion will be absolutely void in the substitute.³ (a) Nor can a *discretionary* trust be delegated to a cotrustee.⁴ Where a sum of money was given to three trustees to be distributed in charity in their *discretion*, and they divided it into three parts, and each took control of a third, Lord Hardwicke said: "I am of opinion that the trustees could not divide the charity into three parts, and each trustee nominate a third absolutely, because the determination of the propriety of every

¹ Cross v. Smith, 7 East, 246; Jones v. Lewis, 2 Ves. 241; Poole v. Munday, 103 Mass. 174; Upson v. Badeau, 3 Bradf. Sur. 13.

² Ibid.

³ Alexander v. Alexander, 2 Ves. 643; Att. Gen. v. Scott, 1 Ves. 413; Wilson v. Dennison, Amb. 82; 7 Bro. P. C. 296; Bradford v. Belfield, 2 Sim. 264; Hitch v. Leworthy, 2 Hare, 200; Doe v. Robinson, 24 Miss. 688; Singleton v. Scott, 11 Iowa, 589; Pearson v. Jamison, 3 McLean, 69, 197.

⁴ Crewe v. Dicken, 4 Ves. 97.

(a) A power of appointment cannot be delegated. Hood v. Haden, 82 Va. 588; *supra*, § 287. Discretionary powers can be delegated only as to details not requiring the exercise of discretion. Keim v. Lindley (N. J. Eq.), 30 Atl. Rep. 1063; 54 N. J. Eq. 418; Bradford v. Monks, 132 Mass. 405; Smith v. Swan, 2 Tex. Civ. App. 563; Whitlock v. Washburn, 62 Hun, 369; Wilson v. Mason, 158 Ill. 304, 313.

object was left by the testator to the discretion of *all* the executors.”¹

§ 409. But it must be observed that the appointment of an attorney, proxy, or agent is not necessarily a delegation of the trust. The trustee must act at times through attorneys or agents, and if he determines in his own mind how to exercise the discretion, and appoints agents or instruments to carry out his determination, he cannot be said to delegate the trust, even though deeds or other instruments are signed by attorneys in his name. (a) So, if he gives instructions to his attorneys and agents how to act, it cannot be said to be a delegation of the trust.²

§ 410. It has been before stated that a sale or devise of the trust estate by the trustee will not be a delegation or communication of a discretionary trust to the vendee or devisee, unless the original instrument of trust contemplated and authorized such an act by vesting the trust or power annexed to the estate in the trustee and his assigns or devisees.³

§ 411. Where a settlor vests his property in several co-trustees, they all form, as it were, one collective trustee; therefore they must perform their duties in their joint capacity,⁴

¹ Att. Gen. v. Gleg, 1 Atk. 356; *ante*, § 287.

² Att. Gen. v. Scott, 1 Ves. 413; *Ex parte* Rigby, 19 Ves. 463; Ord v. Noel, 5 Madd. 498; Sinclair v. Jackson, 8 Cow. 582; Hawley v. James, 5 Paige, 487; Newton v. Bronson, 3 Kern. 587; Blight v. Schenck, 10 Barr, 285; *Ex parte* Belchier, Amb. 219; Bacon v. Bacon, 5 Ves. 335; Clough v. Bond, 3 Myl. & Cr. 497; Lewis v. Reed, 11 Ind. 239; Mason v. Wait, 4 Scam. 132; Powell v. Tuttle, 3 Comst. 396; Bales v. Perry, 51 Mo. 449.

³ *Ante*, § 340; Saunders v. Webber, 39 Cal. 287.

⁴ Smith v. Wildman, 37 Conn. 384; White v. Watkins, 23 Mo. 423; *Ex parte* Griffin, 5 G. & J. 116; Shook v. Shook, 19 Barb. 653; De Peyster v. Ferrers, 11 Paige, 13; Franklin v. Osgood, 14 Johns. 560; Cox v.

(a) A trustee may employ broker of business. Speight v. Gaunt, 9 A. C. 1; 22 Ch. D. 727.
are employed in the ordinary course

even in making a purchase.¹ In law there is no such person known as an *acting* trustee apart from his cotrustees. All who accept the office are acting trustees. If any one trustee who has accepted, refuses to join in the proposed act, or is incapable, the others cannot proceed without him, but an application must be made to the court.² (a) So, if trustees bring suits, or defend suits in court, they must act jointly, (b) and they should all employ the same counsel. If they sever in their defence and incur extra costs, they might be compelled to bear them personally.

§ 412. A receipt for money, in the absence of special directions in the instrument of trust, must be signed by all

Walker, 26 Maine, 504; Hill v. Josselyn, 13 Sm. & M. 597; Crewe v. Dicken, 4 Ves. 97; Fellows v. Mitchell, 1 P. Wms. 83; 2 Vern. 516; Churchill v. Hobson, id. 241; Chambers v. Minchin, 7 Ves. 198; Leigh v. Barry, 3 Atk. 584; Belchier v. Parsons, Amb. 219; *Ex parte* Rigby, 19 Ves. 463; Webb v. Ledsam, 1 K. & J. 385; Latrobe v. Tiernan, 2 Md. Ch. 480; Vandever's App., 8 Watts & S. 405; Sinclair v. Jackson, 8 Cow. 544; Ridgeley v. Johnson, 11 Barb. 527; Austin v. Shaw, 10 Allen, 552; King v. Stone, 6 Johns. Ch. 323; Powell v. Tuttle, 3 Comst. 396; Sherwood v. Read, 7 Hill, 431.

¹ Holcomb v. Holcomb, 3 Stockt. 281.

² Smith v. Wildman, 37 Conn. 384; Doyley v. Sherratt, 2 Eq. Cas. Ab. 742; *Re* Cong. Church v. Smithwick, 1 W. N. 196; Scruggs v. Driver, 31 Ala. 274; Matter of Wadsworth, 2 Barb. Ch. 381; Matter of Mechanics' Bank, id. 446; Burrill v. Sheil, 2 Barb. 457; Wood v. Wood, 5 Paige, 596; Davis v. McNeil, 1 Ired. Eq. 344; Matter of Van Wyke, 1 Barb. Ch. 565; Guyton v. Shane, 7 Dana, 498; Ridgeley v. Johnson, 11 Barb. 527; *Ex parte* Belchier, Amb. 219.

(a) See Allen's Appeal, 69 Conn. 702; Wheeler's Appeal, 70 Conn. 511; Tarlton v. Gilsey (N. J. Eq.), 37 Atl. 467; Hadley v. Hadley, 147 Ind. 423; Duckworth v. Ocean S. Co., 98 Ga. 123; Hunter v. Anderson, 152 Penn. St. 386; 1 Ames on Trusts (2d ed.), 512, n. When a will devises property, with power of sale, to executors or trustees who are different persons, they should all join in selling. Poole v. Anderson, 80 Md. 454. If several executors have as such a joint power to sell, and one of them is disqualified, the others may act in the matter. Lippincott v. Wikoff, 54 N. J. Eq. 107. See Carr v. Hertz, id. 127, 700.

(b) McGeorge v. Bigstone Gap Imp. Co., 88 F. R. 599.

the trustees, or it will be invalid.¹ Where the trustees are numerous, the court generally inserts an order that moneys may be paid to two or more.² This rule is, however, relaxed in the United States; and it has been held that payment of a mortgage to one of two trustees is a valid payment.³ So all the trustees must join in proving a debt against a bankrupt;⁴ but, under special circumstances, the court may order the proof to be made by one or more, even when payment must be made to all the trustees.⁵ A different rule prevails in regard to bank stocks, for the bank recognizes only the legal title, and at law one joint-tenant may receive moneys; so one trustee may receive dividends upon public stocks,⁶ or the rents of real estate, unless the tenant has had notice not to pay to one;⁷ but all the trustees must join in conveying such stocks or in executing a conveyance of land,⁸ or pledging the trust property.⁹ A deed of land executed by one trustee does not convey his share, as in the case of ordinary joint-tenants.¹⁰ Where a deed was executed by two of three trustees, the burden was put upon the purchaser to prove that the other trustee was dead.¹¹ It has been said, however, that in a case of necessity, and after considerable time, the concurrence of a cotrustee may be presumed in some transactions.¹² A banker may require checks to be signed by one only, or by

¹ *Walker v. Symonds*, 3 Swanst. 63; *Hall v. Franck*, 11 Beav. 519.

² *Att. Gen. v. Brickdale*, 8 Beav. 223.

³ *Bowers v. Seeger*, 8 Watts & S. 222.

⁴ *Ex parte Smith*, 1 Dea. 191; *M. & A.* 506; *Ex parte Phillips*, 2 Dea. 331.

⁵ *Ibid.*

⁶ *Williams v. Nixon*, 2 Beav. 472.

⁷ *Williams v. Nixon*, 2 Beav. 472; *Townley v. Sherborne*, Bridg. 35; *Gouldsworth v. Knight*, 11 M. & W. 337; *Husband v. Davis*, 1 C. B. 645. See *Webb v. Ledsam*, 1 K. & J. 385; *Mendes v. Guedalla*, 2 John. & H. 259.

⁸ *Ibid.*; *Morville v. Fowle*, 144 Mass. 109, 113.

⁹ *Ham v. Ham*, 58 N. H. 70.

¹⁰ *Sinclair v. Jackson*, 8 Cow. 543.

¹¹ *Ridgeley v. Johnson*, 11 Barb. 527; *Learned v. Welton*, 40 Cal. 339; *Burngarner v. Cogswell*, 49 Mo. 259.

¹² *Vandever's App.*, 8 Watts & S. 405.

all the trustees. But if trustees place money at a banker's in such manner that one of their number can withdraw it in his sole name, all the trustees will be liable in case of a loss under such an arrangement.¹

§ 413. In the case of a public trust, where there are several trustees, the act of the majority is held to be the act of the whole number;² but the act of the majority must be strictly within the sphere of their power and duty.³ When a special power is given to trustees, it cannot be exercised by a majority only: all must join.⁴ If a settlement declares, that, on the death or resignation of a trustee, the surviving trustees shall appoint his successor, all the surviving trustees must join in the appointment.⁵ Where the trustees are numerous, as in the case of a charity, the court may direct that a majority shall form a quorum. Private trusts, where the rule prevails that all must join, cannot be affected by these principles, or by any agreements that may be made by the parties.⁶ But an instrument of trust may contain express directions that the trust shall be administered according to the will of the majority of the trustees, in which case the minority will be compelled to give effect to the determinations of the majority.⁷ So if the power is given to either of two trustees.⁸ So trustees are bound to concur in every merely ministerial act necessary for the execution of the trust; and if they refuse, they may be compelled by order of the court. But where it is a mere matter of personal discre-

¹ *Townley v. Sherborne*, Bridg. 35.

² *Wilkinson v. Malin*, 2 Tyr. 544; *Perry v. Shipway*, 1 Gif. 1; 4 De G. & J. 353; *Att. Gen. v. Shearman*, 2 Beav. 104; *Att. Gen. v. Cuming*, 2 Y. & C. Ch. 139; *Younger v. Welham*, 3 Swanst. 180; *Att. Gen. v. Scott*, 1 Ves. 413; *Wilson v. Dennison*, Amb. 82.

³ *Ward v. Hipwell*, 3 Gif. 547; *Sloo v. Law*, 3 Blatch. 66, 459.

⁴ *Re Cong. Church v. Smithwick*, 1 W. N. 196.

⁵ *Ibid.*

⁶ *Swale v. Swale*, 22 Beav. 585; *State v. Lord*, 31 L. J. Ch. 391.

⁷ *Att. Gen. v. Cuming*, 2 Y. & C. Ch. 139; *Taylor v. Dickinson*, 15 Iowa, 483.

⁸ *Taylor v. Dickinson*, 15 Iowa, 486.

tion, the court cannot interfere, unless a cotrustee refuses to act from a corrupt or selfish motive.¹ But a majority of trustees cannot deprive one of their number of his right and interest in the trust property.²

§ 414. A *bare authority*, committed to several persons, ceases upon the death of one; but if the authority is coupled with an interest, it passes to the survivors.³ (a) The committee of a lunatic's estate are mere protectors without any interest, and the death of one extinguishes the office.⁴ An executorship survives, for the joint executors have an interest in the estate.⁵ So testamentary guardianship survives, as such guardians have an authority over the estate.⁶ So cotrustees have an authority coupled with an interest in the legal title of the estate, and the office is impressed with the quality of survivorship.⁷ If land is given to two trustees in trust to sell, and one dies, the other may sell, as he holds the legal title in the land, and the office of trustee.⁸ Other-

¹ *Clarke v. Parker*, 19 Ves. 1; *Tomlin v. Hatfield*, 12 Sim. 167; *Gouldsworth v. Knight*, 11 M. & W. 337; *Burrill v. Sheil*, 2 Barb. 457; *Matter of Mechanics' Bank*, id. 446.

² *Meth. Ep. Church v. Stewart*, 27 Barb. 553.

³ *Co. Litt.* 113 a; *Eyre v. Shaftsbury*, 2 P. Wms. 108, 121, 124; *Att. Gen. v. Gleg*, 1 Atk. 356; *Amb.* 584; *Mansell v. Vaughn*, Wilm. 49; *Butler v. Bray*, Dyer, 189 b; *Peyton v. Bury*, 2 P. Wms. 628. See § 286.

⁴ *Ex parte Lyne*, t. Talb. 143.

⁵ *Adams v. Buckland*, 2 Vern. 514; *Hudson v. Hudson*, t. Talb. 129.

⁶ *Eyre v. Shaftsbury*, 2 P. Wms. 102. But if joint guardians are appointed by the court, the death of one destroys the guardianship. *Bradshaw v. Bradshaw*, 1 Russ. 528; *Hall v. Jones*, 2 Sim. 41.

⁷ *Hudson v. Hudson*, t. Talb. 129; *Co. Litt.* 113 a; *Att. Gen. v. Gleg*, *Amb.* 585; *Billingsley v. Mathew*, Toth. 168; *Gwilliams v. Rowell*, Hard. 204; *Stewart v. Peters*, 10 Mo. 755; *Butler v. Bray*, Dyer, 189 b; *Dominick v. Sayre*, 3 Sandf. 555; *Belmont v. O'Brien*, 2 Kern. 394; *De Peyster v. Ferrers*, 11 Paige, 13; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Shook v. Shook*, 19 Barb. 653; *Gregg v. Currier*, 36 N. H. 200; *Powell v. Knox*, 16 Ala. 364; *Parsons v. Boyd*, 20 Ala. 112; *Leggett v. Hunter*, 19 N. Y. 445; *Aubuchon v. Lory*, 23 Mo. 99; *Barton v. Tunnell*, 5 Harr. 182; *Smith v. McConnell*, 17 Ill. 135; *Hopper v. Adees*, 3 Duer, 235; *Britton v. Lewis*, 8 Rich. Eq. 271.

⁸ *Warburton v. Sandys*, 14 Sim. 622; *Watson v. Pearson*, 2 Exch. 594;

(a) See *supra*, § 248, n. (a).

wise, the precaution taken by a settlor to guard his estate, by increasing the number of trustees, would be futile; for the death of one of them might result in defeating his whole trust. Where the trust was to raise £2000 out of the testator's estate, by sale or otherwise at the discretion of the trustees, who should invest the same in their own names upon trust, one of the trustees died and the other sold; and Vice-Chancellor Wood held that the survivor could make a good title. He said: "I find a clear estate in the vendor, and a clear duty to perform. Is it to be said that the sale is a breach of trust, because the cotrustee is dead? If I were to lay down such a rule, it would come to this, that when an estate is vested in two or more trustees, to raise a sum by sale or mortgage, you must come into this court on the death of one of the trustees."¹ The survivorship of the trust will not be defeated, because the settlement contains a power for restoring the original number of trustees by new appointments,² unless there is something in the instrument that specially manifests such an intention.³ Where an act of Parliament declared that "survivors should, and they were thereby required" to appoint new trustees, the court expressed an opinion that the clause was not imperative, but simply directory.⁴

§ 415. The general rule is, that one trustee shall not be responsible or liable for the acts or defaults of his cotrustee. This rule was established in the time of Charles the First, after very great consideration and consultation by the judges in the case of *Townley v. Sherborne*,⁵ wherein it was resolved

Att. Gen. v. Litchfield, 5 Ves. 825; *Att. Gen. v. Cuming*, 2 Y. & C. Ch. 139; *Slater v. Wheeler*, 9 Sim. 156.

¹ *Lane v. Debenham*, 11 Hare, 188; *Hind v. Poole*, 1 K. & J. 383.

² *Doe v. Godwin*, 1 D. & R. 259; *Att. Gen. v. Cuming*, 2 Y. & C. Ch. 139; *Jacob v. Lucas*, 1 Beav. 436; *Warburton v. Sandys*, 11 Sim. 622; *Hall v. Dewes*, Jac. 193; *Att. Gen. v. Floyer*, 2 Vern. 748; *Townsend v. Wilson*, 1 B. & A. 608.

³ *Foley v. Woutner*, 2 J. & W. 245; *Jacob v. Lucas*, 1 Beav. 436.

⁴ *Doe v. Godwin*, 1 D. & R. 259. And see *Att. Gen. v. Locke*, 3 Atk. 166; *Stamper v. Millar*, id. 212; *Rex v. Flockwood*, 2 Chit. 252.

⁵ *Townley v. Sherborne*, Bridg. 35; 3 Lead. Cas. Eq. 718, and notes;

“that where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his cotrustee shall not be charged or be compelled in chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for they being by law joint-tenants*, or tenants in common, every one by law may receive either all or as much of the profits as he can come by; it is no breach of trust to permit one of the trustees to receive all or the most part of the profits; it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits. (a) But his lordship and the said judges did resolve, that if, upon the proofs or circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing.” And the same doctrine has been acted upon from that day to this.¹ Connivance, co-operation, permission, acquiescence, or participation will bring liability;² and ignorance of the default of a cotrustee if it results from neglect is no excuse, as

Bowers v. Seeger, 8 Watts & S. 222; Sinclair v. Jackson, 8 Cow. 543; Vandever's App., 8 Watts & S. 405. And see Leigh v. Barry, 3 Atk. 584; Anon. 12 Mod. 560; Taylor v. Benham, 5 How. 233; Ochiltree v. Wright, 1 Dev. & B. Eq. 336; Ray v. Doughty, 4 Blackf. 115; Jones's App., 8 Watts & S. 143; Peters v. Beverly, 10 Peters, 532; 1 How. 134; Taylor v. Roberts, 3 Ala. 86; State v. Guilford, 18 Ohio, 509; Latrobe v. Tiernan, 2 Md. Ch. 480; Worth v. McAden, Dev. & B. Eq. 109; Boyd v. Boyd, 3 Grat. 114; Glenn v. McKim, 3 Gill, 366; Stell's App., 10 Penn. St. 149; Banks v. Wilkes, 3 Sandf. Ch. 99. And see Royall v. McKenzie, 25 Ala. 363.

¹ Ibid.

² Hinson v. Williamson, 74 Ala. 180; Knight v. Haynie, id. 542.

(a) See Bruen v. Gillet, 115 N. Y. 883; Darnaby v. Watts (Ky.), 21 10; Re Blauvelt, 131 N. Y. 249; S. W. 333; Litzenberger's Estate, Purdy v. Lynch, 145 N. Y. 462; 33 N. Y. S. 155; Cozzens' Estate, Fesmire's Estate, 134 Penn. St. 67; 15 id. 771; Dyer v. Riley, 51 N. J. Barroll v. Foreman (Md.), 40 Atl. Eq. 124.

where one trustee collects a fund and keeps it without reinvestment, the other trustees may be liable.¹

§ 416. In the same case of *Townley v. Sherborne*, it was determined that if the trustees joined in signing a receipt for money, they should each be responsible for it.² But where the administration of a trust is vested in several trustees, they must all join in signing a receipt for the principal or capital sum of the trust fund, and it is now established that a trustee who joins in the receipt for *conformity*, but without receiving any of the money, shall not be answerable for the misapplication of the money by his cotrustee who receives it; as it would be tyranny to punish a trustee for an act which the nature of his office compelled him to do.³ But in such case the burden is on the trustee to prove that his acknowledgment of the receipt of the money was merely for conformity, and that in fact he received none of the money, and that his cotrustee received it all.⁴ If there is

¹ *Richards v. Seal*, 2 Del. Ch. 266.

² *Townley v. Sherborne*, Bridg. 35; *Spalding v. Shalmer*, 1 Vern. 303; *Sadler v. Hobbs*, 2 Bro. Ch. 114; *Bradwell v. Catchpole*, cited 3 Swanst. 78, note (a); *Fellowes v. Mitchell*, 2 Vern. 516.

³ *In re Freyer*, 3 K. & J. 317; *Brice v. Stokes*, 11 Ves. 324; 3 Lead. Cas. Eq. 730; *Harden v. Parsons*, 1 Eden, 147; *Westley v. Clarke*, id. 359; *Heaton v. Marriott*, cited Pr. Ch. 173; *Ex parte Belchier*, Amb. 219; *Leigh v. Barry*, 3 Atk. 584; *Fellowes v. Mitchell*, 1 P. Wms. 81; *Gregory v. Gregory*, 2 Y. & C. 316; *Sadler v. Hobbs*, 2 Bro. Ch. 117; *Chambers v. Minchin*, 7 Ves. 198; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Harrison v. Graham*, 3 Hill's MS. 239, cited 1 P. Wms. 241; *Carsey v. Barsham*, cited 1 Sch. & Lef. 344; *Anon. Mose.* 35; *Ex parte Wackerbath*, 2 G. & J. 151; *Kip v. Deniston*, 4 Johns. 23; *Jones's App.*, 8 Watts & S. 147; *Irwin's App.*, 35 Penn. St. 294; *Sterrett's App.*, 2 Penn. 419; *Wallis v. Thornton*, 2 Brock. 434; *Monell v. Monell*, 5 Johns. Ch. 283; *Deaderick v. Cantrell*, 10 Yerg. 264; *Aplyn v. Brewer*, Pr. Ch. 172; *Churchill v. Hodson*, 1 P. Wms. 241; *Att. Gen. v. Randell*, 7 Bacon, Ab. 184; *Murrell v. Cox*, 2 Vern. 173; *Terrell v. Mathews*, 11 L. J. (N. S.) Ch. 31; *McMurray v. Montgomery*, 2 Swanst. 374; *Griffin v. Macaulay*, 7 Grat. 476; *Worth v. McAden*, 1 Dev. & B. Eq. 199; *Stowe v. Bowen*, 99 Mass. 194.

⁴ *Brice v. Stokes*, 11 Ves. 324; *Scurfield v. Howes*, 3 Bro. Ch. 95, note (8); *Chambers v. Minchin*, 7 Ves. 186; *Monell v. Monell*, 5 Johns. Ch. 394; *Hall v. Carter*, 8 Ga. 388; *Manahan v. Gibbons*, 19 Johns. 427;

no evidence upon this point, all the trustees who join in signing the receipt will be held responsible *in solido*, on the ground that the acknowledgment in the receipt is *prima facie* evidence of the facts stated.¹ At law the receipt is *conclusive* evidence and estops the trustee from denying that he received any of the money;² but a court of equity rejects estoppels, and pursues the actual truth, and will determine and decree according to the verity and justice of the fact.³ But if a trustee, signing a receipt, receives any part of the money, and it does not appear how much, he will be answerable for the whole; as, where he mixes his corn with another's heap, he must lose the whole.⁴

§ 417. It was said in *Townley v. Sherborne*,⁵ that individuals are sometimes joined in a trust, where it is not expected that they are to take an active part in its management; and it is well settled that each of several trustees is not bound to take upon himself the active management of every part of a trust; and it seems that the management of the whole may be left to any one of the number.⁶ So trustees may apportion their duties among themselves, as where one of two guardians accepted the trust, saying he would take care of the real estate, but would have nothing to do with receiving and disbursing money, which duties the other guardian assumed, it was held that the former was not answerable for the defaults of the latter.⁷ It sometimes happens that the conven-

Martindale v. Picquot, 3 K. & J. 317; *Cottam v. Eastern Counties Ry. Co.*, 1 John. & H. 243.

¹ *Ibid.*; *Westley v. Clarke*, 1 Eden, 359; *Maccubbin v. Cromwell*, 7 G. & J. 157; *Hengst's App.*, 24 Penn. St. 413. The answer of the trustee in chancery would not be sufficient evidence unless responsive to the bill. *Monell v. Monell*, 5 Johns. Ch. 283; *Maccubbin v. Cromwell*, 7 Gl. & J. 157. But as parties are now witnesses, the rule is not very important.

² *Harden v. Parsons*, 1 Eden, 147.

³ *Ibid.*; *Fellowes v. Mitchell*, 1 P. Wms. 83.

⁴ *Ibid.*

⁵ *Bridg.* 35.

⁶ *Ray v. Doughty*, 4 Blackf. 115; *Ochiltree v. Wright*, 1 Dev. & B. Eq. 336; *State v. Guilford*, 18 Ohio, 500.

⁷ *Jones's App.*, 8 Watts & S. 143. But see *Gill v. Att. Gen.*, Hardr. 314.

ience or necessities of business require the trust funds to be in the hands of one trustee. If a loss happens from the default of such trustee, the others will not be held to answer. As where a bond is to be collected by one trustee, or money is put in the hands of one to be paid away; or where a fund was given to three trustees, one in London and two in Cornwall, to build an almshouse in London, it was held that the fund was properly in the hands of the trustee in London, and that during the construction of the almshouse the others were not answerable for the loss of part of it by his insolvency.¹ The same rule applies where the shares of a company are required to be in the name of a single individual;² and so where the settlor appoints one of the trustees to perform certain acts, or make certain sales, or receive certain moneys.³ But if trustees expressly agree to be answerable for each other, courts will hold them to their agreement.⁴ So this power to apportion the duties of the trust, or the rule that a trustee not receiving the money shall not be liable for the defaults of his cotrustees, does not excuse him for not exercising a general superintendence and care over the trust, or for not intervening, if the fact come to his knowledge that the fund is unsafe, or that it ought not longer to remain under the control of the other trustee.⁵ Even a direct provision in the deed of settlement, that trustees shall not be liable for the defaults of their cotrustees, does not excuse them from this general care and superintendence, and from the duty of intervening, if they hear any fact tending to call

¹ *Att. Gen. v. Randell*, 2 Eq. Cas. Ab. 742; 7 Bacon, Ab. 184; *Clough v. Bond*, 3 M. & Cr. 497; *Townley v. Sherborne*, Bridg. 35; 3 Lead. Cas. Eq. 718, notes; *Ex parte Griffin*, 2 G. & J. 114; *Bacon v. Bacon*, 5 Ves. 331; *Hovey v. Blakeman*, 4 id. 596; *Williams v. Nixon*, 2 Beav. 172; *Curtis v. Mason*, 12 L. J. (N. S.) Ch. 442; *Broadhurst v. Balguy*, 1 N. C. C. 28; *Hanbury v. Kirkland*, 3 Sim. 265. But see *Cowell v. Gatchcombe*, 27 Beav. 568.

² *Consterdine v. Consterdine*, 31 Beav. 331.

³ *Davis v. Spurling*, 1 R. & M. 61; *Paddon v. Richardson*, 7 De G., M. & G. 563; *Birls v. Betty*, 6 Madd. 90.

⁴ *Leigh v. Barry*, 3 Atk. 583; *Brazer v. Clark*, 5 Pick. 96; *Towne v. Ammidown*, 2 Pick. 535.

⁵ *Clark v. Clark*, 8 Paige, 153; *Evans's Est.*, 2 Ash. 470.

for their intervention; nor will it justify them in paying over the money to the sole credit of one trustee; and generally it will not authorize them to do any acts which would be a breach of trust, if such clause was not in the deed or will.¹ While one trustee is not liable for the defaults of cotrustees which he has not the means of preventing or guarding against, yet he must exercise due care in the approval of or acquiescence in the acts of his associates.² If the trustees join in accounting, and hold themselves out, in joint accounts, as acting together and as jointly liable, they will be estopped to deny their joint liability to those who have acted on a knowledge of such accounts; and this would be almost conclusive evidence of a joint liability in all cases.³ So, if the will makes them all liable for the acts of each, or contemplates the joint action and joint liability of all, they cannot excuse themselves if they accept the trust.⁴

§ 418. Though a trustee may join in a receipt without receiving any of the money, and may not be liable or answerable for it, yet he may be responsible for the whole, though he receives none; thus, if knowing that his cotrustee has no character or credit, and is unfit to manage the trust funds,

¹ *Mucklow v. Fuller*, Jac. 198; *Williams v. Nixon*, 2 Beav. 472; *Leigh v. Barry*, 3 Atk. 584; *Dawson v. Clark*, 18 Ves. 254; *Underwood v. Stevens*, 1 Mer. 712; *Hanbury v. Kirkland*, 3 Sim. 265; *Langston v. Olivant*, Coop. 33; *Brumridge v. Brumridge*, 27 Beav. 5; *Rehden v. Wesley*, 29 id. 213; *Drosier v. Brereton*, 15 id. 221; *Fenwick v. Greenwell*, 10 id. 418; *Pride v. Fooks*, 2 id. 430; *Sadler v. Hobbs*, 2 Bro. Ch. 114; *Bone v. Cook*, McClel. 168; 13 Price, 332; *Clough v. Dixon*, 8 Sim. 594; 3 M. & Cr. 490; *Dix v. Burford*, 19 Beav. 409; *Litchfield v. White*, 3 Selden, 438; *Wilkins v. Hogg*, 3 Gif. 116; 10 W. R. 47; *Worrall v. Harford*, 8 Ves. 8; *Moyle v. Moyle*, 2 R. & M. 170; *Munch v. Cockerell*, 9 Sim. 339; 5 M. & Cr. 178; *Macdonnel v. Harding*, 7 Sim. 176. But a testator can draw the indemnity clause so broad that cotrustees will not be liable even for gross negligence. *Wilkins v. Hogg*, 3 Gif. 116; 10 W. R. 47.

² *Earle v. Earle*, 93 N. Y. 104.

³ *Hengst's App.*, 24 Penn. St. 413; *Clark's App.*, 18 id. 175; *Duncom-mun's App.*, 17 id. 268.

⁴ *Burrill v. Sheil*, 2 Barb. 457; *Contee v. Dawson*, 2 Bland, 264; *Wood v. Wood*, 5 Paige, 596; *Weigand's App.*, 28 Penn. St. 471.

he suffers the money to be received by him, or to remain in his hands, he will be answerable, as if he receives it himself, on the ground that he has committed a breach of trust in not using due care and diligence;¹ and the same rule will apply if he suffers the money to remain in the hands of his cotrustee, however competent and responsible, longer than is necessary.² It is also the duty of the trustee to ascertain the actual facts, and not rely upon the bare assertion of his cotrustee, in relation to the condition of the trust fund.³ Thus, where two trustees allowed their cotrustee to open a box at their banker's in which were stocks and bonds, and he converted some of the trust property to his own use, but assured his cotrustees that all was right, they were held to answer for the loss, because they had not taken the pains to ascertain the facts, but had relied upon the assertion of their cotrustee.⁴ So trustees must ascertain the condition of the funds at all times within which a reasonable man should ascertain the condition of his own property; as where a mortgage to three trustees had been paid off, and the money came to the hands of one, and was invested in bills and notes of the East India Company payable in two years, and these were paid into the hands of the same trustee to whom the mortgage had been paid, and the acting trustee asked to have the money remain in his hands on a mortgage to be given; and it so remained for a year, no mortgage being executed, the other trustees taking no active steps for several years to know the actual condition of the trust fund; this was held to

¹ *Clark v. Clark*, 8 Paige, 153; *Wyman v. Jones*, 4 Md. Ch. 500; *Elmendorf v. Lansing*, 4 Johns. Ch. 562; *Ringgold v. Ringgold*, 1 H. & G. 11; *State v. Guilford*, 15 Ohio, 593; *Pim v. Downing*, 11 Serg. & R. 71; *Evans's Est.*, 2 Ash. 470; *Jones's App.*, 8 Watts & S. 117. But the circumstances must be such as would put a reasonable man upon his guard in relation to his own property. *Jones's App.*, 8 Watts & S. 117; *Lincoln v. Wright*, 4 Beav. 427; *Lockwood v. Riley*, 1 De G. & J. 464.

² *Brice v. Stokes*, 11 Ves. 319; *Re Freyer*, 3 K. & J. 317; *Gregory v. Gregory*, 2 Y. & C. 313; *Bone v. Cook*, McClel. 168; *Thompson v. Finch*, 22 Beav. 316; *Lincoln v. Wright*, 4 Beav. 427.

³ *Thompson v. Finch*, 22 Beav. 316; 8 De G., M. & G. 560; *Hanbury v. Kirkland*, 3 Sim. 265; *Bates v. Underhill*, 3 Redf. (N. Y.) 365.

⁴ *Mendes v. Guedalla*, 2 John. & H. 259.

be a breach of trust, and they were decreed to make good the loss.¹ A trustee is bound to inquire and ascertain for what purpose a cotrustee desires the money; what investments he proposes to make, and what securities he proposes to take, and he must take pains to see that the proposed investments are actually made.² If a trustee performs his duty in these respects, and his cotrustee, in spite of these precautions, squanders or wastes the fund, he will not be answerable therefor. So if the cotrustee gets possession of the trust fund by a fraud or crime, the others will not be liable.³ But if a trustee receive any portion of the funds from a transaction, he must personally see to the application of them: he cannot pass them over to his cotrustee for investment or distribution; and if he do so, he will be personally responsible for the acts and defaults of such cotrustee.⁴

§ 419. In the original case of *Townley v. Sherborne*, it was determined that if there was any *dolus malus*, or any evil practice, or fraud, or ill intent in him that permitted his companion to receive the whole fund, *he* should be charged that received nothing.⁵ Thus, if one trustee stands by and sees his cotrustee misemploy or misapply the money;⁶ or acquiesces in the wrongful use of the money by his co-

¹ *Walker v. Symonds*, 3 Swanst. 1. See *Thompson v. Finch*, 22 Beav. 326.

² *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Thompson v. Finch*, 22 Beav. 326.

³ *Cottam v. Eastern Counties R. R. Co.*, 1 John. & H. 243; *Mendes v. Guedalla*, 2 John. & H. 259; *Barnard v. Bagshaw*, 9 Jur. (N. S.) 220; 3 De G., J. & S. 355; *Trutch v. Lamprell*, 20 Beav. 116; *Baynard v. Woolley*, id. 583; *Griffiths v. Porter*, 25 Beav. 236; *Eager v. Barnes*, 31 Beav. 579; *Margetts v. Perks*, 34 L. J. Ch. 109.

⁴ *Sterrett's App.*, 2 Penn. 219; *Clark's App.*, 18 Penn. St. 175; *Nyce's App.*, 5 Watts & S. 254; *Commonwealth v. McAlister*, 28 Penn. St. 480; *Deaderick v. Cantrell*, 10 Yerg. 263; *McMurray v. Montgomery*, 2 Swanst. 374; *Hughlett v. Hughlett*, 5 Humph. 453; *Mumford v. Murray*, 6 Johns. Ch. 1; *Ray v. Doughty*, 4 Blackf. 115; *Worth v. McAden*, 1 Dev. & B. Eq. 199; *Graham v. Davidson*, 2 Dev. & B. Eq. 155; *Sparhawk v. Buell*, 9 Vt. 41; *Edmonds v. Grenshaw*, 14 Peters, 166.

⁵ *Townley v. Sherborne*, Bridg. 35; *Mucklow v. Fuller*, Jac. 198.

⁶ *Williams v. Nixon*, 2 Beav. 475.

trustee;¹ or if a trustee acquiesces in his cotrustee's retaining the money in his hands unnecessarily;² or if he connives at a breach of trust by his cotrustee;³ or conceals such breach;⁴ or makes any misrepresentation respecting the investment of the fund;⁵ or if he does any act to put the money out of his own control and into the sole power of his cotrustee, as by joining in a conversion of the property and allowing his cotrustee to receive and retain the proceeds exclusively;⁶ or if he makes over the trust fund exclusively to his cotrustee;⁷ or executes a power of attorney to him;⁸ or signs a draft or order, or assigns a mortgage, enabling his cotrustee to deal with the investments exclusively;⁹ or if he suffers the trust fund to be invested in the sole name of his cotrustee;¹⁰ or to be paid into bank to his sole credit,¹¹ — in all these cases there is an actual or constructive breach of trust, which renders all the trustees liable for any loss; and

¹ *Booth v. Booth*, 1 Beav. 125; *Dix v. Burford*, 19 Beav. 409.

² *Lincoln v. Wright*, 4 Beav. 427; *James v. Frearson*, 1 N. C. C. 370; *Evans's Est.*, 2 Ash. 470; *Pim v. Downing*, 11 Serg. & R. 71; *Styles v. Guy*, 1 H. & Tw. 523; 1 Mac. & Gor. 422; 16 Sim. 230; *Scully v. Delany*, 2 Ir. Eq. 165; *Egbert v. Butter*, 21 Beav. 560; *West v. Jones*, 1 Sim. (N. S.) 205.

³ *Boardman v. Mosman*, 1 Bro. Ch. 68.

⁴ *Ibid.*

⁵ *Bates v. Scales*, 12 Ves. 402.

⁶ *Sadler v. Hobbs*, 2 Bro. Ch. 114; *Chambers v. Minchin*, 7 Ves. 198; *Hanbury v. Kirkland*, 3 Sim. 265; *Clough v. Bond*, 3 M. & Cr. 496; *Scurfield v. Howes*, 3 Bro. Ch. 90; *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Brice v. Stokes*, *id.* 319; *Underwood v. Stevens*, 1 Mer. 713; *Bradwell v. Catchpole*, 3 Swanst. 78, n.; *Williams v. Nixon*, 2 Beav. 472; *Broadhurst v. Balguy*, 1 N. C. C. 16; *Curtis v. Mason*, 12 L. J. (N. S.) Ch. 443.

⁷ *Keble v. Thompson*, 3 Bro. Ch. 111; *Langford v. Gascoyne*, 11 Ves. 333; *French v. Hobson*, 9 Ves. 103; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Moses v. Levi*, 3 Y. & C. 359.

⁸ *Harrison v. Graham*, 1 P. Wms. 241, n.; *Hewett v. Foster*, 6 Beav. 259; *Monell v. Monell*, 5 Johns. Ch. 283; *Pim v. Downing*, 11 Serg. & R. 66; *Duncommun's App.*, 17 Penn. St. 268.

⁹ *Sadler v. Hobbs*, 2 Bro. Ch. 114; *Broadhurst v. Balguy*, 1 Y. & C. C. C. 16.

¹⁰ *Walker v. Symonds*, 3 Swanst. 58.

¹¹ *Clough v. Bond*, 3 M. & Cr. 490.

so if a trustee does not collect a debt due to the estate from his cotrustee.¹ In all cases, if a trustee becomes aware of any fact tending to show that his cotrustee is committing a breach of trust, or if he learns any fact endangering the trust fund, he must communicate it to his cotrustees or make application to the court,² and take active measures to protect the fund, or he will be personally liable for its loss. If a trustee himself receives the trust fund or part of it, and pays it over to his cotrustee, who wastes it, he will be liable for it;³ and so if he permits his cotrustee to receive money, having notice that it will be misapplied, or if he is guilty of any negligence or want of reasonable care.⁴ (a)

§ 419 a. If the trust instrument gives the *cestui* a right to appoint one to whom the trustee shall convey, this power cannot be exercised by will, for the will takes effect only at the death of the *cestui*, and that very event terminates the relation of trust between the trustee and *cestui*.⁵ This reasoning seems very flimsy, and likely to produce injustice if applied to cases where the facts are different from those in the above case, where the title was held to have passed by the will itself, though not by the trustee's deed in pursuance of the will.

¹ Mucklow v. Fuller, Jack. 198; Candler v. Tillett, 22 Beav. 254.

² Wayman v. Jones, 4 Md. Ch. 506; Chertsey v. Market, 6 Price, 279; Powlet v. Herbert, 1 Ves. Jr. 297; Franco v. Franco, 3 Ves. 75; Walker v. Symonds, 3 Swanst. 71; Brice v. Stokes, 11 Ves. 319; Olive v. Court, 8 Price, 166; Att. Gen. v. Holland, 2 Y. & C. 699; Booth v. Booth, 1 Beav. 125; Williams v. Nixon, 2 Beav. 472; Blackwood v. Burrows, 2 Conn. & Laws, 477; Holcomb v. Holcomb, 2 Beas. 413; Crane v. Hearn, 26 N. J. Eq. 378.

³ Mumford v. Murray, 6 Johns. Ch. 1; Monell v. Monell, 5 Johns. Ch. 283; Clark v. Clark, 8 Paige, 153; Ringgold v. Ringgold, 1 H. & G. 11; Glenn v. McKim, 3 Gill, 366; Evans's Est., 2 Ash. 470; Graham v. Austin, 2 Grat. 273; Graham v. Davidson, 2 Dev. & B. Eq. 155.

⁴ Schenck v. Schenck, 1 Green, Ch. 174.

⁵ Bradstreet v. Kinsella, 76 Mo. 63.

(a) When one of several trustees has notice, they are all notified. Chapman v. Chapman, 91 Va. 397.

§ 420. In a few cases, it has been held that, if trustees join in executing a power of sale, and one receive the money, all must be held answerable, if it is lost by the one that receives it.¹ These decisions have been founded upon the rule, that all the trustees who join in any transaction must be responsible for carrying it through. But they ignore the other rule, that a power must be strictly executed by all the persons to whom it is given, and that if a trustee joins in the power, and signs receipts for conformity, but receives none of the money, omits no duty, and does no act tending to a breach of the trust, he will not be held for a loss occasioned by a breach of trust by the other trustees. The great preponderance of authority is, that a sale under a power is not different from the execution of a receipt for the trust moneys.² If, however, a proper investment of the money received under a sale is once made, the liability of a non-acting trustee ceases under all the cases.³ If a trustee renounces the trust, he, of course, cannot be liable for a breach of the trust by the other trustees, unless the trust fund is in some manner in his hands, and is misapplied by him.⁴ So the estate of a deceased trustee cannot be liable for a breach of trust by a surviving trustee, after the decease of a cotrustee.⁵ A distinction has been attempted between discretionary trusts and directory trusts as follows: it has been said, that, in discretionary trusts, that is, where the funds may be invested or employed according to the discre-

¹ *Spencer v. Spencer*, 11 Paige, 299; *Ringgold v. Ringgold*, 1 H. & G. 11; *Maccubbin v. Cromwell*, 7 G. & J. 157; *Deaderick v. Cantrell*, 10 Yerg. 263; *Wallace v. Thornton*, 2 Brocken. 434; *Hauser v. Lehman*, 2 Ired. Eq. 594.

² See *ante*, § 416, note; *Griffin v. Macauley*, 7 Grat. 476; *Atcheson v. Robertson*, 3 Rich. Eq. 132; *Kip v. Deniston*, 14 Johns. 23; *Jones's App.*, 8 Watts & S. 147; *Boyd v. Boyd*, 3 Grat. 114. But if a trustee not only join in the execution of the power, but in receiving the money, he must keep it in the joint names of the trustees until invested; and he cannot pay it over to his cotrustee without being responsible for it if lost. *Ringgold v. Ringgold*, 1 H. & G. 11; *Glenn v. McKim*, 3 Gill, 366.

³ *Glenn v. McKim*, 3 Gill, 366.

⁴ *Claggett v. Hall*, 9 G. & J. 80.

⁵ *Brazer v. Clark*, 5 Pick. 96; *Towne v. Ammidown*, 20 Pick. 535.

tion of the trustees, a non-acting trustee will not be responsible for a misapplication of the fund by a cotrustee, unless he is guilty of some fraud or negligence that amounts to a breach of trust, upon the principles before stated;¹ but where a will is peremptory that certain investments shall be made by the trustees, all the trustees will be liable if the directions of the will are not carried out.² But these directory trusts may be executed by a part of the trustees, and the others may join for *conformity*, without doing more than is absolutely necessary to accomplish the trust, and therefore these trusts fall within the rule, that a trustee who signs receipts for *conformity*, and does no more, is not liable for a breach of trust by his cotrustee.³ But if the will expressly provide for the joint action and responsibility of the executors or trustees, it will be binding upon all those who assume the trust, and render them all liable for any loss through the default of one.⁴

§ 420 *a*. Where there are two trustees, and the management of the trust is left to one, and the acting trustee commits a breach of trust, the passive trustee is not entitled to indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is solicitor for the trust, or has derived a personal benefit from his breach of trust.⁵

§ 421. Following the rule as to cotrustees, executors are generally liable only for their own acts, and not for the acts of their coexecutors.⁶ But while cotrustees may not be

¹ *Deaderick v. Cantrell*, 10 Yerg. 264 ; *Thomas v. Scruggs*, id. 400.

² *Ibid*.

³ *Ante*, § 416, note.

⁴ *Weigand's App.*, 28 Penn. St. 471 ; *Wood v. Wood*, 5 Paige, 596 ; *Contee v. Dawson*, 2 Bland, 264 ; *Burrill v. Sheil*, 2 Barb. 457.

⁵ *Bahin v. Hughes*, 31 Ch. D. 390.

⁶ *Hargthorpe v. Milforth*, Cro. Eliz. 318 ; *Anon. Dyer*, 210 a ; *Went. Ex.* 306 ; *Williams v. Nixon*, 2 Beav. 472 ; *Peters v. Beverly*, 10 Peters, 532 ; 1 How. 134 ; *Sutherland v. Brush*, 7 Johns. Ch. 17 ; *White v. Bullock*, 20 Barb. 91 ; *Douglas v. Satterlee*, 11 Johns. 16 ; *Banks v. Wilkes*, 3

liable for money which they did not receive, although they joined in the receipt, coexecutors are always liable if they join in the receipts. (a) The reason is this: trustees *must* join in many acts, they having for the most part a joint power, while executors have a several power, over the estate. Each executor has an independent right over the personal property of his testator: he may sell it, and receive the purchase-money, and give receipts in his own name. If, therefore, an executor joins his coexecutor in signing a receipt, he does an unmeaning act, unless he intended to render himself jointly answerable for the money; and so the court hold, that if an executor joins in giving a receipt for money he shall be answerable, whether he received any of it or permitted his coexecutor to receive the whole.¹ (b) So, if an executor joins in executing a power of sale, given

Sandf. Ch. 99; Moore v. Tandy, 3 Bibb, 97; Fennimore v. Fennimore, 2 Green, Ch. 292; Call v. Ewing, 1 Blackf. 301; Williams v. Maitland, 1 Ired. 92; Kerr v. Kirkpatrick, 8 Ired. Eq. 137; Clarke v. Blount, 2 Dev. Ch. 51; Clarke v. Jenkins, 3 Rich. Eq. 318; Knox v. Pickett, 4 Des. 190; Kerr v. Water, 19 Ga. 136; Charlton v. Durham, L. R. 4 Ch. 433; McKim v. Aulbach, 130 Mass. 481.

¹ Aplyn v. Brewer, Pr. Ch. 173; Murrill v. Cox, 2 Vern. 560; *Ex parte* Belchier, Amb. 219; Leigh v. Barry, 3 Atk. 584; Harrison v. Graham, 1 P. Wms. 241, cited Darwell v. Darwell, 2 Eq. Cas. Ab. 456; Gregory v. Gregory, 2 Y. & C. 316; Hall v. Carter, 8 Ga. 388; Monell v. Monell, 5 Johns. Ch. 283; Monahan v. Gibbons, 19 Johns. 427; Sterrett's App., 2 Penn. 219; Jones's App., 8 Watts & S. 143; Johnson v. Johnson, 2 Hill, Eq. 290; Clarke v. Jenkins, 3 Rich. Eq. 318.

(a) "At the present day, executors and administrators hold the assets of the estate in a fiduciary capacity. Their rights and liabilities, in respect of the fund in their hands, are very like those of trustees. But this way of regarding them is somewhat modern." Holmes, J., in an article in 9 Harv. L. Rev. p. 42, which reviews instances of this change in the law. "The executor originally was nothing but a feoffee to uses. The heir

was the man who paid his ancestor's debts and took his property. The executor did not step into the heir's shoes, and come fully to represent the person of the testator as to personal property and liabilities until after Bracton wrote his great treatise on the Laws of England." Ibid., in 12 Harv. L. Rev. 446.

(b) Fesmire's Estate, 134 Penn. St. 67; Fesmire v. Shannon, 143 id. 201.

in the will, he will be responsible for the appropriation of the proceeds, though his coexecutor received all the money.¹ An attempt has been made to break down these distinctions between executors and trustees, and to establish the rule, that no intention to be jointly answerable can be inferred from the mere fact of signing a receipt without receiving any part of the money either separately or jointly.² And it appears now to be well settled, that if the joint receipt is purely nugatory, and no funds pass upon it into the hands of either executor, a coexecutor will not be liable.³ So far the doctrine of Lord Northington in *Westerly v. Clarke* has been agreed to, though the case itself seemed to go further.⁴ Lord Harcourt, in *Churchill v. Hobson*,⁵ started another distinction, that executors who joined in the receipt were liable to creditors, though they did not receive the money, while they were not liable to legatees or heirs; but this distinction has no standing in a court of equity, whatever may be the rule at law, and is now overruled.⁶

§ 422. If an executor does any act to transfer the property into the exclusive control of a coexecutor, and thus enables

¹ *Ochiltree v. Wright*, 1 Dev. & B. Eq. 336; *Hauser v. Lehman*, 2 Ired. Eq. 594; *Mathews v. Mathews*, 1 McMul. Eq. 410; *Johnson v. Johnson*, 2 Hill, Eq. 277; *McMurray v. Montgomery*, 2 Swanst. 374; *Deaderick v. Cantrell*, 10 Yerg. 263.

² *Westerly v. Clarke*, 1 Ed. 537; 1 Dick. 329; *Candler v. Tillett*, 22 Beav. 257; *Harden v. Parsons*, 1 Ed. 147; *Churchill v. Hobson*, 1 P. Wms. 241, n.; *Stell's App.*, 10 Penn. St. 152; *McNair's App.*, 4 Rawle, 145; *Ochiltree v. Wright*, 1 Dev. & B. Eq. 336; *Doyle v. Blake*, 2 Sch. & Lef. 242; *McKim v. Aulbach*, 130 Mass. 481.

³ *Westerly v. Clarke*, 1 Ed. 537; *Scurfield v. Howes*, 3 Bro. Ch. 94; *Hovey v. Blakeman*, 4 Ves. 608; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 319; 3 Lead. Cas. Eq. 557, 558.

⁴ *Scurfield v. Howes*, 3 Bro. Ch. 94; *Hovey v. Blakeman*, 4 Ves. 608; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 325; 3 Lead. Cas. Eq. 725-759; *Walker v. Symonds*, 3 Swanst. 64; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Doyle v. Blake*, 2 id. 242.

⁵ 1 P. Wms. 241; *Gibbs v. Herring*, Pr. Ch. 49; *Harden v. Parsons*, 1 Eden, 147.

⁶ *Sadler v. Hobbs*, 2 Brown, Ch. 117; *Doyle v. Blake*, 2 Sch. & Lef. 239.

his coexecutor to misapply the same, he will be liable;¹ (a) as if he joins in drawing² or indorsing³ a bill or note, or delivers or assigns securities to his coexecutor to enable him to receive the money alone,⁴ or if he gives him a power of attorney,⁵ or does any other act that enables his coexecutor to misapply the money; and so it was held, "that, if by agreement between the executors, one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both."⁶ Probably the case would not now be followed, but it illustrates the principle.

§ 423. But if the act is such that it is absolutely necessary that the executors should all join in it, their liability will be put upon the same ground as the liability of trustees joining; as, if it is necessary that they should indorse a bill in order to collect it,⁷ or that they should join in transferring stock.⁸ But even if the act is indispensable, it is still the duty of the executor to see that it is consistent with a due execution of the trust,⁹ and he must not rely upon the

¹ *Townshend v. Barber*, 1 Dick. 356; *Moses v. Levi*, 3 Y. & C. 359; *Candler v. Tillett*, 22 Beav. 263; *Clough v. Dixon*, 3 Myl. & Cr. 497; *Dines v. Scott*, T. & R. 361; *Edmonds v. Crenshaw*, 14 Pet. 166; *Sparhawk v. Buell*, 9 Vt. 41; *Adair v. Brimmer*, 74 N. Y. 539.

² *Sadler v. Hobbs*, 2 Bro. Ch. 114.

³ *Hovey v. Blakeman*, 4 Ves. 608.

⁴ *Candler v. Tillett*, 22 Beav. 236.

⁵ *Doyle v. Blake*, 2 Sch. & Lef. 231; *Lees v. Sanderson*, 4 Sim. 28; *Kilbee v. Sneyd*, 2 Moll. 200.

⁶ *Gill v. Att. Gen.*, Hardw. 314; *Moses v. Levi*, 3 Y. & C. 359; *Lewis v. Nobbs*, L. R. 8 Ch. D. 591.

⁷ *Hovey v. Blakeman*, 4 Ves. 608.

⁸ *Chambers v. Minchin*, 7 Ves. 197; *Shipbrook v. Hinchinbrook*, 11 Ves. 254; 16 Ves. 479; *Terrell v. Mathews*, 1 Mac. & G. 434. n.; *Murrill v. Cox*, 2 Vern. 570; *Scurfield v. Howes*, 3 Bro. Ch. 94; *Moses v. Levi*, 3 Y. & C. 359.

⁹ *Ibid.*; *Underwood v. Stevens*, 1 Mer. 712; *Bick v. Motley*, 2 Myl. & K. 312; *Williams v. Nixon*, 2 Beav. 472; *Hewett v. Foster*, 6 Beav. 259.

(a) *In re Osborn*, 87 Cal. 1; *Walker v. Walker*, 88 Ky. 615.

representations or assertions of his coexecutor, as to its necessity. He must use due diligence and make due investigations to ascertain if the representations are true;¹ as where the debts should have been long paid in the ordinary course of administration a coexecutor applied to the other to join in a sale of stocks to pay the debts, and the executor inquired and learned that there were debts to be paid, but it afterwards appeared that the coexecutor had the money to pay the debts in his own hands; the executor who joined in conveying the stocks was held for the default of his coexecutor, on the ground of negligence in not knowing how the assets in the hands of the coexecutor were disposed of, and how it happened that the debts remained unpaid.²

§ 424. So an executor will be called upon to make good the loss of money that he allows to remain two years or any other unreasonable time in the hands of his coexecutor;³ but he will not be called upon to repay that part which he can show that his coexecutor actually expended in the execution of the trust.⁴ So, if an executor neglects for an unreasonable time to insist upon the payment of a debt to the estate due from his coexecutor, he will be liable to pay the debt himself.⁵

§ 425. The same rules that apply to the powers and liabilities of coexecutors apply also to the powers and liabilities of joint administrators. There is one *dictum* that the liability

¹ Ibid.

² Shipbrook v. Hinchinbrook, 11 Ves. 254; Bick v. Mathews, 3 Myl. & K. 312; Clark v. Clark, 8 Paige, 152.

³ Scurfield v. Howes, 3 Bro. Ch. 91; Styles v. Guy, 1 Mac. & G. 422; 1 H. & Tw. 523; Egbert v. Butter, 21 Beav. 560; Lincoln v. Wright, 4 Beav. 427.

⁴ Shipbrook v. Hinchinbrook, 11 Ves. 252; 16 Ves. 477; Williams v. Nixon, 2 Beav. 472; Kilbee v. Sneyd, 2 Moll. 213; Underwood v. Stevens, 1 Mer. 172; Brice v. Stokes, 11 Ves. 328; Hewett v. Foster, 6 Beav. 259.

⁵ Styles v. Guy, 1 Mac. & G. 422; 1 H. & Tw. 523; Egbert v. Butter, 21 Beav. 560; Scully v. Delany, 2 Ir. Eq. 165; Candler v. Tillet, 22 Beav. 257; Carter v. Cutting, 5 Munf. 223.

of joint administrators is like the liability of cotrustees,¹ but it is well settled that the liability of joint administrators and coexecutors is identical.²

§ 426. It must be borne in mind, that in the United States, administrators, executors, guardians, and a large class of trustees, are appointed by judges of probate, surrogates, ordinaries, or officers exercising a similar jurisdiction. All trustees appointed under wills, proved and recorded in probate courts, are appointed by decrees of the court in the same manner as executors. In many cases, a bond with sureties is required as a prerequisite to an appointment and qualification to act, unless such bond is expressly waived by the testator or the *cestui que trust*. This bond generally runs to the judge or some officer for the use and protection of those beneficially interested in the estate. If it is a joint bond, executed by all the joint administrators, guardians, coexecutors or cotrustees, it is in the nature of an agreement to be answerable for each other's acts and defaults. The remedy for a breach of trust in such cases is a suit upon the bond in the name of the proper person for the benefit of those interested, (a) against all the joint makers and sureties of the bond; and any breaches of trust, committed by either or all of the trustees, may be given in evidence, and a judgment against all will be rendered, although the breach of trust was committed by one alone.³ This joint liability of all the cotrustees under a joint bond results from the nature

¹ *Hudson v. Hudson*, 1 Atk. 460.

² *Willand v. Fenn*, 2 Ves. 267, cited; *Murray v. Blatchford*, 1 Wend. 583; *O'Neill v. Herbert*, 1 McM. Eq. 495.

³ *Ames v. Armstrong*, 106 Mass. 35; *Hill v. Davis*, 4 Mass. 137; *Brazer v. Clark*, 5 Pick. 96; *Towne v. Ammidown*, 20 Pick. 535; *Newcombe v. Williams*, 9 Met. 525; *Sparhawk v. Buell*, 9 Vt. 41; *Boyd v. Boyd*, 1 Watts, 368; *Bostick v. Elliott*, 3 Head, 507; *Braxton v. State*, 25 Ind. 82; *Jeffries v. Lawson*, 39 Miss. 791; *Gayden v. Gayden*, 1 McM. Eq. 435; *Hughlett v. Hughlett*, 5 Humph. 453; *Clarke v. State*, 6 G. & J. 288; *South v. Hay*, 3 Mon. 88; *Anderson v. Miller*, 6 J. J. Marsh. 568; *Morrow v. Peyton*, 8 Leigh, 54; *Babcock v. Hubbard*, 2 Conn. 539.

(a) See *Dexter v. Cotting*, 149 Mass. 92.

of the bond, and from the technical nature of an action at law for a breach of the bond by a breach of the trust. If, however, one of the coexecutors or cotrustees dies and a breach of trust is committed by the survivor after his death, the estate of the deceased executor cannot be made liable for the breach of the trust.¹ It will be seen at once, that very few of the rules heretofore stated in relation to the liabilities of executors or trustees for the acts and defaults of their coexecutors or cotrustees have any bearing upon the liability of cotrustees who have given a joint bond for the faithful execution of the trust. The statutes of many of the States, however, provide that separate bonds with sureties may be taken from each of the administrators, executors, guardians, or trustees, as the case may be. And where separate bonds are taken from each of the executors or trustees, the liability of the executor or trustee for the acts and defaults of his co-executor or cotrustee would be governed by the rules and principles hereinbefore stated.² But if they sign a joint bond, they are jointly liable.³

§ 427. Trustees hold a position of trust and confidence. The legal title of the trust property is in them, and generally its whole management and control is in their hands. At the same time the beneficiaries of the trust may be women, or children, or persons incompetent to protect their own interests. For these reasons, to protect the weak and helpless on the one hand, and to prevent trustees from using their position and influence for their own gain, and to prevent them from hazarding the trust property upon what they may think to be profitable speculations, on the other, they are not allowed to make any profit from their office. They cannot use the trust property, nor their relation to it, for their own personal advantage. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the

¹ *Brazer v. Clark*, 5 Pick. 96; *Towne v. Ammidown*, 20 Pick. 535.

² *McKim v. Aulbach*, 130 Mass. 481.

³ *Ames v. Armstrong*, 106 Mass. 18.

personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule, as between trustee and *cestui que trust*.¹ This rule is so stringent that Lord Eldon once sent a case to a master to inquire whether the privilege of sporting on the trust estate could be let for the benefit of the *cestui que trust*; if not, he thought the game should belong to the heir; the trustee might appoint a game-keeper for the preservation of game for the heir, but he ought not to keep up a lodge for his own pleasure.² So where a trustee retired from the office in consideration that his successor paid him a sum of money, it was held that the money so paid must be treated as a part of the trust estate, and that the trustee must account for it, as he could make no profit, directly or indirectly, from the trust property or from the position or office of trustee.³ If a trustee joins in betraying the trust for private gain, he will have to bear any loss that may fall on him by the dishonesty of his confederates. The law will not aid him against them. It will not unravel a tangled web of fraud for the benefit of one through whose agency the web was woven and who has himself become enmeshed therein.⁴ Trustees may be enjoined from carrying out a contract made for their own benefit.⁵ But where one holds a trust for the support of another, the trustee may supply goods from his store at a fair

¹ Burgess v. Wheate, 1 Ed. 226; Docker v. Somes, 2 Myl. & K. 664; O'Herlihy v. Hedges, 1 Sch. & Lef. 126; Bently v. Craven, 18 Beav. 75; Gubbins v. Creed, 2 Sch. & Lef. 218; *Ex parte* Andrews, 2 Rose, 412; Hamilton v. Wright, 9 Cl. & Fin. 111; Middleton v. Spicer, 1 Bro. Ch. 205; Sherrard v. Harborough, Amb. 165; *Re* Shrewsbury School, 1 Myl. & Cr. 647; Martin v. Martin, 12 Sim. 579; Cooke v. Cholmondeley, 3 Drew. 1; Hawkins v. Chappell, 1 Atk. 621; Johnson v. Baber, 22 Beav. 562; 6 De G., M. & G. 439; Parshall's App., 65 Penn. St. 233; Ellis v. Barker, L. R. 7 Ch. 104; Sloo v. Law, 3 Blatch. C. C. 457; Williams v. Stevens, L. R. 1 P. C. 352.

² Webb v. Shaftesbury, 7 Ves. 480; Hutchinson v. Morritt, 3 Y. & C. 47.

³ Sugden v. Crossland, 3 Sm. & Gif. 192.

⁴ Farley v. St. Paul M. & M. Rd.; 4 McCrary (U. S.), 142.

⁵ Sloo v. Law, 3 Blatch. C. C. 457.

price. This is not dealing with the trust for his private gain.¹

§ 428. A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase.² But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves.³ Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*.⁴ The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity.⁵ (a) So, if a trustee buys the trust property at private

¹ Cogbill v. Boyd, 77 Va. 450.

² Robinson v. Pett, 3 P. Wms. 251, n. (a); Pooley v. Quilter, 4 Drew. 184; 2 De G. & J. 327; Morret v. Paske, 2 Atk. 54; Dunch v. Kent, 1 Vern. 241; Darcy v. Hall, id. 49; Ex parte Lacey, 6 Ves. 628; Anon. 1 Salk. 155; Fosbrooke v. Balguy, 1 Myl. & K. 226; Carter v. Horne, 1 Eq. Cas. Ab. 7; Schoonmaker v. Van Wyke, 31 Barb. 457; Matter of Oakley, 2 Edw. 478; Herr's Est., 1 Grant's Cas. 272; Quackenbush v. Leonard, 9 Paige, 334; Slade v. Van Vechten, 11 Paige, 21; Barksdale v. Finney, 14 Grat. 338; King v. Cushman, 41 Ill. 31.

³ Barwell v. Barwell, 34 Beav. 371.

⁴ Vaughton v. Noble, 30 Beav. 34; Baxter v. Costin, 1 Busb. Eq. 262; Andrews v. Hobson, 23 Ala. 219; Mason v. Martin, 4 Md. 124; Green v. Winter, 1 Johns. Ch. 26; Spindler v. Atkinson, 3 Md. 409; Wiswall v. Stewart, 3 Ala. 433.

⁵ Ex parte Lacey, 6 Ves. 626; Scott v. Davis, 1 Myl. & Cr. 87; Coles v. Trecothick, 9 Ves. 234; Morse v. Royal, 12 Ves. 372; Dunlop v.

(a) Williamson v. Kohn, 66 F.R. 55; Avery v. Avery, 90 Ky. 613; *infra*, § 828, n.

sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits of the sale for himself.¹ (a)

§ 429. Trustees cannot make a profit from the trust funds committed to them, by using the money in any kind of trade or speculation, nor in their own business; nor can they put the funds into the trade or business of another, under a stipulation that they shall receive a *bonus* or other profit or advantage. In all such cases, the trustees must account for every dollar received from the use of the trust-money, and they will be absolutely responsible for it if it is lost in any such transactions. By this rule, trustees may be liable to great losses while they can receive no profit; and the rule is made thus stringent, that trustees may not be tempted from selfish motives to embark the trust fund upon the chances of trade and speculation.² If a trustee charge a bonus in his

Mitchell, 10 Ohio, 17; Harrington v. Brown, 5 Pick. 519; Bolton v. Gardner, 3 Paige, 273; Ames v. Downing, 1 Bradf. 321; Lyon v. Lyon, 8 Ired. Eq. 201; Pennock's App., 14 Penn. St. 446; Bruch v. Lantz, 2 Rawle, 392; Stuart v. Kissam, 2 Barb. 493; Jones v. Smith, 33 Miss. 215; Soller v. Chandler, 26 Miss. 154; Herne v. Meeres, 1 Vern. 465; Smith v. Isaac, 12 Mo. 106; *ante*, § 195.

¹ Beeson v. Beeson, 9 Barr, 279; Patton v. Thompson, 2 Jones, Eq. 285; Mason v. Martin, 4 Md. 124; Spindler v. Atkinson, 3 Md. 409; Davoue v. Fanning, 2 Johns. Ch. 252; Iddings v. Bruer, 4 Sandf. Ch. 222; Hendricks v. Robinson, 2 Johns. Ch. 283; Evertson v. Tappan, 5 id. 497; Smith v. Lansing, 22 N. Y. 530; Ames v. Downing, 1 Bradf. 321; Andrews v. Hobson, 23 Ala. 219; Charles v. Dubois, 29 Ala. 367; Wiswall v. Stewart, 32 Ala. 433; Bellamy v. Bellamy, 6 Fla. 62; Schoonmaker v. Van Wyke, 31 Barb. 457.

² Docker v. Somes, 2 Myl. & K. 664; Willett v. Blanford, 1 Hare, 253; Cummins v. Cummins, 6 Ir. Eq. 723; Wedderburn v. Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; 22 Beav. 84; Townend v. Townend, 1 Gif. 201; Parker v. Bloxam, 20 Beav. 295; Manning v. Manning, 1 Johns. Ch. 527; Brown v. Ricketts, 4 id. 303; *In re Thorp*, Davies, 290; William v. Stevens, L. R. 1 P. C. 352; Blauvelt v. Ackerman, 20 N. J. Eq.; Dur-

(a) De Chambrun v. Cox, 60 F. R. v. Northrop, 30 Fla. 612; Mullen v. 471; Mills v. Mills, 63 F. R. 511; Doyle, 147 Penn. St. 512; Cushman Darling v. Potts, 118 Mo. 506; Cole v. Bonfield, 139 Ill. 219. v. Stokes, 113 N. C. 270; Anderson

account for his skill and services in conducting the business of the trust, it will be set aside.¹

§ 430. All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation.² Thus partners stand in a fiduciary relation to each other, and if a partner, instead of winding up the partnership affairs, when for any reason he ought to do so, continues to use the partnership property in business, and makes a profit thereon, he must account for it.³ But in making up the accounts, courts will make a just allowance for time, skill, and other elements of success in conducting the business.⁴ If a trader has trust funds in his hands, not in a fiduciary character, but through a breach of trust by a trustee, he is liable only for interest.⁵ Agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule.⁶

§ 431. So if persons, standing in such a relation to an estate, obtain advantages in respect to it, those who succeed

ling *v. Hammer*, id. 220 ; *Pluman v. Slocum*, 41 N. Y. 53 ; *Frank's App.*, 5 Penn. St. 190.

¹ *Barrett v. Hartly*, L. R. 2 Eq. 789.

² *Hawley v. Cramer*, 4 Cow. 717 ; *Richardson v. Spencer*, 18 B. Mon. 450 ; *Thorp v. McCullum*, 1 Gil. (Ill.) 615 ; *Van Epps v. Van Epps*, 9 Paige, 237 ; *Ackerman v. Emot*, 4 Barb. 626.

³ *Bentley v. Craven*, 18 Beav. 75 ; *Parsons v. Hayward*, 31 Beav. 199 ; *Crawshay v. Collins*, 15 Ves. 226 ; *Brown v. De Tastet*, Jac. 284 ; *Wedderburn v. Wedderburn*, 2 Keen, 722 ; 4 Myl. & Cr. 41 ; 22 Beav. 84. A partner who receives the partnership property on a resale from the purchaser at public auction, by a secret arrangement between them, is bound to account as if no sale had been made, although his copartner was a bidder at the auction sale. *Jones v. Dexter*, 130 Mass. 380.

⁴ *Docker v. Somes*, 2 Myl. & K. 662 ; *Willett v. Blanford*, 1 Hare, 253 ; *Brown v. De Tastet*, Jac. 284.

⁵ *Strowd v. Gwyer*, 28 Beav. 130 ; *Townend v. Townend*, 1 Gif. 210 ; *Simpson v. Chapman*, 4 De G., M. & G. 154 ; *Macdonald v. Richardson*, 1 Gif. 81 ; *Brown v. De Tastet*, Jac. 284 ; *Chambers v. Howell*, 11 Beav. 6 ; *Ex parte Watson*, 2 V. & B. 414.

⁶ *Morret v. Paske*, 2 Atk. 52 ; *Powell v. Glover*, 3 P. Wms. 251 ; *Great*

to the estate shall have the advantages which are thus obtained.¹ As where a mortgagee had purchased the right of dower of the widow of a deceased mortgagor, the heir of the mortgagor, upon a bill to redeem, was held to have the right to take the purchase of the dower at the price which the mortgagee had paid.² So an heir cannot hold an incumbrance for more than he gave for it, against the creditors of the ancestor's estate,³ and it is conceived that the same rule applies to a devisee.⁴ But if the heir or devisee is himself an incumbrancer at the death of the ancestor, he may buy in a prior, but not a subsequent, incumbrance, and hold it for the whole amount due. The court considers him, in buying such a prior incumbrance, not as heir or devisee, but as an incumbrancer or stranger; and so if, as such prior incumbrancer, he obtains a prior incumbrance by the bounty or gift of another, he shall hold such bounty or gift for the benefit of his own incumbrance, and there is no reason why he should hold it for the benefit of the creditors of the ancestor.⁵ So the heir or devisee may hold a prior incumbrance for full value, though bought for less, against a subsequent incumbrancer.⁶ So, if one of several joint purchasers of an estate buy in an incumbrance for less than its face, he shall hold it for his copurchasers at the same price he paid.⁷ And the opinion has been expressed, that a tenant for life holds the same relation toward the remainder-man; and if such tenant buy in an incumbrance upon the estate for less than

Luxembourg Ry. Co. v. Magnay, 23 Beav. 640; 25 Beav. 586; *Chaplin v. Young*, 33 Beav. 414; *Bowes v. Toronto*, 11 Moore, P. C. C. 463; *Docker v. Somes*, 2 Myl. & K. 665.

¹ *Baldwin v. Bannister*, cited 3 P. Wms. 251; *Dobson v. Land*, 8 Hare, 220; *Arnold v. Garner*, 2 Phill. 231; *Mathison v. Clarke*, 3 Drew. 3.

² *Ibid.*

³ *Lancaster v. Evors*, 10 Beav. 154; 1 Phill. 354; *Morret v. Paske*, 2 Atk. 54; *Long v. Clopton*, 1 Vern. 464; *Brathwaite v. Brathwaite*, *id.* 334; *Darcy v. Hall*, *id.* 49.

⁴ *Long v. Clopton*, 1 Vern. 464; *Davis v. Barrett*, 14 Beav. 542.

⁵ *Davis v. Barrett*, 14 Beav. 542; *Darcy v. Hall*, 1 Vern. 49; *Anon.* 1 Salk. 155.

⁶ *Davis v. Barrett*, 14 Beav. 542.

⁷ *Carter v. Horne*, 1 Eq. Cas. Ab. 7.

its face, he cannot claim from the remainder-man more than he gave.¹

§ 432. The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States, trustees are entitled to reasonable compensation. But both in England and the United States, a trustee can receive no indirect profit from the estate by reason of his connection with it. Thus a trustee cannot be appointed *receiver* with a salary,² nor would he be appointed without compensation except under peculiar circumstances; for it is his duty to superintend and watch over the receiver.³ The same reasons do not apply for excluding a dry trustee.⁴ If trustees are factors,⁵ or brokers,⁶ or commission agents,⁷ or auctioneers,⁸ or bankers,⁹ or attorneys, or solicitors,¹⁰ they can make no charges against the trust estate for services rendered by them in their professional capacity to the estate of which they are trustees. They may employ the services of such agents, if necessary, and pay for them from the estate; but if they undertake to act in such capacities themselves for the estate, they can receive no compensation. This rule is so strict, that if the trustee has a partner, and employs such partner,

¹ Hill *v.* Brown, Dr. 433.

² Sutton *v.* Jones, 15 Ves. 584; Morison *v.* Morison, 4 Myl. & Cr. 215; Sykes *v.* Hastings, 11 Ves. 363; — *v.* Jolland, 8 Ves. 72; Anon. 3 Ves. 515.

³ Sykes *v.* Hastings, 11 Ves. 363.

⁴ Sutton *v.* Jones, 15 Ves. 587.

⁵ Scattergood *v.* Harrison, Mos. 128.

⁶ Arnold *v.* Garner, 2 Phill. 231.

⁷ Sheriff *v.* Aske, 4 Russ. 33.

⁸ Mathison *v.* Clarke, 3 Drew. 3; Kirkman *v.* Booth, 11 Beav. 273.

⁹ Crosskill *v.* Bower, 1 Dr. & Sm. 319.

¹⁰ Pollard *v.* Doyle, 1 Dr. & Sm. 319; Moore *v.* Frowd, 3 Myl. & Cr. 46; Frazer *v.* Palmer, 4 Y. & C. 515; York *v.* Brown, 1 Col. C. C. 260; Broughton *v.* Broughton, 5 De G., M. & G. 160; *In re* Sherwood, 3 Beav. 338; Douglass *v.* Archbutt, 2 De G. & J. 148; Harbin *v.* Darby, 28 Beav. 325; Morgan *v.* Homans, 49 N. Y. 667; Gomley *v.* Wood, 9 Ir. Eq. 418; Binsse *v.* Paige, 1 Keyes, 87; 1 N. Y. Decis. 138.

no charge can be made by the firm;¹ but if the trustee is excluded from all participation in the compensation, the partner of the trustee may be paid like any other person for similar services.² In one case where several trustees were made defendants, one of them, being a solicitor, conducted the defence, and was allowed his full costs, it not appearing that the costs were increased by such conduct.³ This case is put upon the ground that the services were rendered under the eye of the court, and there could be no danger of collusion; but the case is not approved in England, and has not been followed.⁴ In the United States, a trustee has been refused compensation as solicitor, for professional services rendered by himself for himself as trustee, on the ground that no man can make a contract with himself.⁵ (a)

§ 433. Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust*.⁶ Nor can he deny his title.⁷ (b) If a trustee desires to

¹ *Collin v. Carey*, 2 Beav. 128; *Lincoln v. Winsor*, 9 Hare, 158; *Christophers v. White*, 10 Beav. 523; *Lyon v. Baker*, 5 De G. & Sm. 622; *Manson v. Baillie*, 2 Macq. (H. L.) 80.

² *Clack v. Carlon*, 7 Jur. (N. S.) 411; *Burge v. Burton*, 2 Hare, 373.

³ *Cradock v. Piper*, 1 McN. & G. 664; 1 Hall & T. 617, overruling *Bainbrigge v. Blair*, 8 Beav. 588.

⁴ *Lyon v. Baker*, 5 De G. & Sm. 622.

⁵ *Mayer v. Galluchet*, 6 Rich. Eq. 2; *Jenkins v. Fickling*, 4 Des. 470; *Edmonds v. Crenshaw*, Harp. 232.

⁶ *Att. Gen. v. Monro*, 2 De G. & Sm. 163; *Stone v. Godfrey*, 5 De G., M. & G. 76; *Frith v. Curtland*, 2 Hem. & M. 417; *Pomfret v. Winsor*, 2 Ves. 476; *Kennedy v. Daley*, 1 Sch. & Lef. 381; *Ex parte Andrews*, 2 Rose, 412; *Conry v. Caulfield*, 2 B. & B. 272; *Newsome v. Flowers*, 30 Beav. 461; *Shields v. Atkins*, 3 Atk. 560; *Langley v. Fisher*, 9 Beav. 90; *Reece v. Frye*, 1 De G. & Sm. 279; *Benjamin v. Gill*, 45 Ga. 110.

⁷ *Von Hurter v. Spergeman*, 2 Green, Ch. 185.

(a) "When it is once admitted not his duty to render." Holmes, that a trustee may be paid for ordinary services, it is hard not to admit also that there may be circumstances under which he may be allowed an additional sum for extraordinary services which it was

J., in *Turnbull v. Pomeroy*, 140 Mass. 117, 118; see also *Perkins's Appeal*, 108 Penn. St. 314; *infra*, § 918.

(b) *Associate Alumni v. General Theol. Seminary*, 49 N. Y. S. 745.

set up a title to the trust property in himself, he should refuse to accept the trust. But if a claim is made upon him by a third person, adverse to the *cestui que trust*, he may decline to deliver over the property to his *cestui que trust* until the title is determined, or he is indemnified or secured against the consequences,¹ or he may pay the fund into court,² and if he neglects to do so, and thus makes a suit necessary, he will recover only such costs as he would have been entitled to if he had paid the money into court.³ A trustee must assume the validity of the trust under which he acts, until it is actually impeached, although he may have some suspicion that there may have been fraud or collusion in the appointment and settlement.⁴ (a) So, if a trustee obtains a knowledge of facts that would defeat the title of his *cestui que trust*, and give the property over to another, he is not justified in morals in communicating such facts to such other person. His duty is to manage the property for his *cestui que trust*, and not to keep his conscience, or betray his title or interests;⁵ and he can make no admissions prejudicial to the rights of his *cestui que trust*,⁶ nor can he use his influence to defeat the purposes of the trust as declared by the creator of it.⁷

¹ Neale v. Davies, 5 De G., M. & G. 258.

² Gunnell v. Whitear, L. R. 10 Eq. 664.

³ Ibid.; Weller v. Fitzhugh, 22 L. T. (N. S.) 567.

⁴ Beddoes v. Pugh, 26 Beav. 407; Reid v. Mullins, 48 Mo. 344.

⁵ Lewin, 234.

⁶ Thomas v. Bowman, 30 Ill. 34; 29 Ill. 426.

⁷ Ellis v. Barker, L. R. 7 Ch. 104.

(a) A party to a contract, who seeks to be relieved therefrom, and relies upon its illegality or want of consideration, may be estopped from setting up such a defence, and a trustee who has accepted and entered upon the administration of the trust, cannot allege the invalidity of his appointment as a reason for not accounting for the trust property. Harbin v. Bell, 54 Ala. 389; Saunders v. Richards, 35 Fla. 28, 42. In Thomson v. Eastwood, 2 A. C. 215, 233, Lord Cairns, L. C., held a trustee, not proved to be chargeable with personal fraud, liable for denying, unconscionably and upon untenable grounds, his beneficiary's title to trust-money, and thus postponing full payment.

§ 434. In England, a trustee, being in possession of real estate in trust, may profit from his trust if the *cestui que trust* dies without heirs; for, as the trustee is tenant in possession, there is no such failure of a tenant as to cause an escheat; and the trustee thenceforth holds the lands for his own use, there being no *cestui que trust* to call him to an account.¹ This is a benefit to the trustee; but it arises rather from an absence of right in others, than from an affirmative right in himself. But if he is not in possession, or if he has need of the assistance of a court of equity to enforce his rights, the court will not act;² though it is said, that having the legal title, which a court of law must recognize, he can obtain all the rights which a court of law must give.³ But if the *cestui que trust* devise the estate to another upon trusts that fail, the trustee must pass over the estate to the devisee, for the reason that the trustee can have no advantage from trusts that so fail, and he has no equity against the devisee to keep the estate.⁴

§ 435. Upon this rule of law in England, several questions were started in the case of *Burgess v. Wheate*,⁵ which are rather curious than practical in this country; as, for instance, if a purchaser should pay the money in full for land, and die without heirs, before he obtained a conveyance, could the vendor keep both land and purchase-money?⁶ Again, if a mortgagor in fee should die without heirs, could a mortgagee in fee keep the whole estate, for the reason that there was no person having a right to redeem?⁷ Of course the

¹ *Burgess v. Wheate*, 1 Eden, 177, 186, 216, 256; *Taylor v. Haygarth*, 14 Sim. 8; *Daval v. New River Co.*, 3 De G. & Sm. 394; *Cox v. Parker*, 22 Beav. 168; *Barrow v. Wadkin*, 24 Beav. 9; *Att. Gen. v. Sands*, Hard. 496.

² *Burgess v. Wheate*, 1 Eden, 212; *Onslow v. Wallis*, 1 McN. & G. 506; *Williams v. Lonsdale*, 3 Ves. Jr. 752.

³ *King v. Coggan*, 6 East, 431; 2 Smith, 417; *King v. Wilson*, 10 B. & C. 80.

⁴ *Onslow v. Wallis*, 1 McN. & G. 506; *Jones v. Goodchild*, 3 P. Wms. 33.

⁵ 1 Eden, 177.

⁶ *Ibid.* 212.

⁷ *Ibid.* 210.

equity of redemption would be assets for the payment of the debts of the mortgagor.¹ But if there were no debts, could the mortgagee keep a large estate for a small debt?² Another question was raised, whether a trust in such cases might not result to the grantor.³ No answers have been given to these questions by decided cases, and as they were put more than a century ago, it is not probable that a case will arise requiring their judicial determination.

§ 436. In the United States, if a *cestui que trust* should die without heirs, the trustee could not hold for his own beneficial use; but he would hold for the State as *ultima hæres* where all other heirs fail.⁴

§ 437. Where a *cestui que trust* of chattel dies without heirs, the trustee can take no benefit; for the beneficial use in such chattel will go as *bona vacantia* to the crown or State. So, if the *cestui que trust* makes a will and appoints an executor, but makes no further disposition of his personalty, the executor will take for the State; for the executor can take no beneficial interest unless the will expressly gives it to him.⁵

§ 437 a.⁶ Payment of a trust debt by crediting the trustee's individual account is not good.⁷ A trustee may in good faith compromise a doubtful debt due the trust estate, and a fraud committed by him upon others is admissible to show his zeal for the interests of the estate.⁸ But a compromise

¹ Beale v. Symonds, 16 Beav. 406; Downe v. Morris, 3 Hare, 394.

² 1 Eden, 236, 256.

³ 1 Eden, 185.

⁴ McCaw v. Galbraith, 7 Rich. L. 75; Matthews v. Ward, 10 G. & J. 443; Darrah v. McNair, 1 Ashm. 236; Ringgold v. Malott, 1 Harr. & John. 299; 4 Kent, 425; 1 Cruise, Dig. 484; Crane v. Reeder, 21 Md. 25.

⁵ Middleton v. Spicer, 1 Bro. Ch. 201; Taylor v. Haygarth, 14 Sim. 8; Russell v. Clowes, 2 Col. C. C. 648; Powell v. Merritt, 1 Sm. & Gif. 381; Cradock v. Owen, 2 Sm. & Gif. 241; Read v. Steadham, 26 Beav. 495; Cane v. Roberts, 8 Sim. 214.

⁶ See § 815 a, 815 b.

⁷ Maynard v. Cleveland, 76 Ga. 52.

⁸ Id. 68 et seq.

of a debt due from the trust by which an advantage is gained, as where a legatee accepted \$1100 for a \$3000 legacy, inures to the benefit of the trust estate, and the trustee cannot transfer the whole gain to *one* of the *cestuis*.¹ A trustee to sue for and recover certain property may make a fair and judicious compromise by which the title is secured to the *cestui*.² Church trustees cannot, by their acts, create any lien on the trust property unless they have express authority for so doing.³ A trustee can be held personally for materials ordered by him for the trust estate, and on contracts made by him in its behalf, unless there be a special agreement to look only to the trust, and this even though the trustee acted under order of the court, this being merely a security to the trustee that he shall be indemnified out of the trust funds.⁴ (a)

¹ *Mitchell v. Colburn*, 61 Md. 244.

² *Caldwell v. Brown*, 66 Md. 293.

³ *Trustees First M. E. Church v. Atlanta*, 76 Ga. 181.

⁴ *Gill v. Carmine*, 55 Md. 339; *Hackman v. MaGuire*, 20 Mo. App. 286; *People v. Abbott*, 107 N. Y. 225; *Kedian v. Hoyt*, 33 Hun, 145.

(a) See 15 Am. L. Rev. 449; *Bank (Ohio)*, 51 N. E. 876. See 1 Ames on Trusts (2d ed.), 423, *supra*, § 346. Trustees are liable for their torts committed in discharging their duties as trustees, and not the trust estate. *Norling v. Allee*, 10 N. Y. S. 97; 13 id. 791; *Odd Fellows Hall Ass'n v. McAllister*, 153 Mass. 292; *Shepard v. Craemer*, 160 Mass. 496; 1 Ames on Trusts (2d ed.), 494, 499, n. So are executors. *Parker v. Barlow*, 93 Ga. 700; *Tucker v. Nebeker*, 2 App. D. C. 326. In *Keating v. Stevenson*, 47 N. Y. S. 847, it was intimated that, when the trustees are sued as such, for negligence causing personal injury, they cannot be held to answer personally in the same suit by amendment. See also *Ferrier v. Trépannier*, 24 Can Sup. 86.

But the mere fact of want of authority in a trustee to bind the estate will not make him personally liable in cases of executory contract where the facts show that no such liability was intended by either of the parties.¹ (a) A trustee with absolute control can give a license for his life to a railway company to use the land for a roadbed.² A trustee cannot go beyond the purposes of the trust deed and bind the estate.³

§ 437 b. Though "trustee" be added to the signature of a note or bond it may be mere *descriptio personæ*, and the obligation individual.⁴ And, on the other hand, although the signature of a receipt be merely that of the trustee as an individual, the receipt may be really given as trustee and bind the *cestuis*.⁵ A note, though not signed as trustee, will, as between the *cestui* and the trustee, be the obligation of the former if the debt was properly incurred for its benefit.⁶

¹ Michael v. Jones, 84 Mo. 578.

² Tutt v. R. R. Co., 16 S. C. 365.

³ Pracht & Co. v. Lange, 81 Va. 711.

⁴ Cruselle v. Chastain, 76 Ga. 840; Bowen v. Penny, id. 743.

⁵ Thomassen v. Van Wyngaarden, 65 Iowa, 689.

⁶ Bushong v. Taylor, 82 Mo. 660.

(a) A trustee's authority to bind the estate by express agreements is limited to such as the law itself implies. Durkin v. Langley, 167 Mass. 577, 578.

In certain States he is by statute, as, *e. g.*, by the California Civil Code, § 2267, made general agent for the estate, in which case his contracts

are judged by his own authority to perform and have performed the acts contracted for, and his powers are construed in favor of the beneficiary. See *In re Courtier*, 34 Ch. D. 136; Sprague v. Edwards, 48 Cal. 239; Tyler v. Granger, id. 259; Bushong v. Taylor, 82 Mo. 660.

CHAPTER XV.

POSSESSION — CUSTODY — CONVERSION — INVESTMENT OF TRUST
PROPERTY, AND INTEREST THAT TRUSTEES MAY BE MADE TO
PAY.

- § 438. Duty of trustee to reduce the trust property to possession.
- § 439. Time within which possession should be obtained.
- § 440. Diligence necessary in acquiring possession.
- § 441. The care necessary in the custody of trust property.
- § 442. In what manner certain property should be kept.
- § 443. Where the property may be deposited.
- §§ 444, 445. How money must be deposited in bank.
- § 446. Within what time trustee should wind up testator's establishment.
- § 447. Trustee must not mix trust property with his own.
- § 448. When a trustee is to convert trust property.
- § 449. General rule as to conversion.
- § 450. When a court presumes an intention that property is to be converted.
- § 451. When the court presumes that the property is to be enjoyed by *cestui que trust in specie*.
- § 452. Of investment.
- § 453. As to investment in personal securities.
- § 454. As to the employment of trust property in trade, business, or speculation.
- § 455. Rule as to investments in England.
- § 456. Rule in the United States.
- §§ 457, 458. Rule as to real securities.
- § 459. Of investments in the different States.
- §§ 460, 461. Construction, where the instruments of trust direct how investments may be made.
- § 462. Within what time investments must be made.
- § 463. Trustees must not mingle their own money in investments.
- § 464. Must not use the trust-money in business.
- § 465. Original investments and investments left by the testator.
- § 466. Changing investments.
- § 467. Acquiescence of *cestui que trust* in improper investments.
- § 468. Interest that trustees must pay upon trust funds or any dereliction of duty.
- § 469. When he is directed to invest in a particular manner.
- § 470. When he improperly changes an investment.
- § 471. When compound interest will be imposed, and when other rules will be applied.
- § 472. Rule where an accumulation is directed.

§ 438. THE first duty of a trustee, after his appointment and qualification to act, is to secure the possession of the

trust property and to protect it from loss and injury. Until possession is properly taken by the trustee the grantor is entitled to the profits of the estate.¹ If the trust property is an equitable interest or estate, he must give notice to the holder of the legal title; and if he cannot have the legal title transferred to himself, he must take such steps that no incumbrances can be put upon it by the settlor or assignor. If the trust fund consists in part of notes, bonds, policies of insurance, and other similar *choses in action*, notice should be given to the promisors, obligors, or makers of the instruments. This is the general rule in England and in many of the United States.² (a) In some States, however, it is held that

¹ Frayser v. Rd. Co., 81 Va. 388.

² Jacob v. Lucas, 1 Beav. 436; Wright v. Dorchester, 3 Russ. 49, n.; Timson v. Ramsbottom, 2 Keen, 35; Forster v. Blackstone, 1 Myl. & K. 297; Roofer v. Harrison, 2 K. & J. 86; Loveredge v. Cooper, 3 Russ. 30; Dearle v. Hall, id. 1; Meux v. Bell, 1 Hare, 73; Stocks v. Dobson, 4 De G., M. & G. 11; Voyle v. Hughes, 2 Sm. & Gif. 18; Ryall v. Rowles, 1 Ves. 348; 1 Atk. 165; Dow v. Dawson, 1 Ves. 331; 3 Lead. Cas. Eq. 612; Jones v. Gibbons, 9 Ves. 410; Thompson v. Spiers, 13 Sim. 469; Waldron v. Sloper, 1 Drew. 193; *Ex parte* Boulton, 1 De G. & J. 163; Pierce v. Brady, 23 Beav. 64; Martin v. Sedgwick, 9 Beav. 333; Evans v. Bicknell, 6 Ves. 174; Dunster v. Glengall, 3 Ir. Eq. 47; Forster v. Cockerell, 9 Bligh (n. s.), 332; 3 Cl. & Fin. 456; Feltham v. Clark, 1 De G. & Sm. 307; *In re* Atkinson, 2 De G., M. & G. 140; Mangles v. Dixon, 18 Eng. L. & Eq. 82; Brashear v. West, 7 Pet. 608; Stewart v. Kirkland, 19 Ala. 162; Cummings v. Fullam, 13 Vt. 134; Northampton Bank v. Balliet, 8 Watts & S. 311; Bean v. Simpson, 4 Shep. 49; Phillips v. Bank of Lewistown, 18 Penn. St. 394; Laughlin v. Fairbanks, 8 Mo. 367; Campbell v. Day, 16 Vt. 358; Barney v. Douglass, 19 Vt. 98; Ward v. Morrison, 25 Vt. 593; Loomis v. Loomis, 2 Vt. 201; Adams v. Leavens, 20 Conn. 73; Van Buskirk v. Ins. Co., 14 Conn. 145; Foster v. Mix, 20 Conn. 395; Bishop v. Halcomb, 10 Conn. 444; Woodbridge v. Perkins, 3 Day, 364; Judah v. Judd, 5 Day, 534; Murdock v. Finney, 21 Mo. 138; Cladfield v. Cox, 1 Sneed, 330; Fisher v. Knox, 13 Penn. St. 622; Judson v. Corcoran, 17 How. 614. But see Beavan v. Oxford, 6 De G., M. & G. 507; Keke-wich v. Manning, 1 De G., M. & G. 176; Clack v. Holland, 24 L. J. 19; Barr's Trusts, 4 K. & J. 219; Scott v. Hastings, id. 633; Bridge v. Beadon, L. R. 3 Eq. 664; *In re* Brown's Trusts, L. R. 5 Eq. 88; Lloyd v. Banks, L. R. 4 Eq. 222; 3 Ch. 488.

(a) See Stephens v. Green, [1895] 113; 1 Ames on Trusts (2d ed.), 2 Ch. 148; *Re* Patrick, 39 W. R. 326.

an assignment of a *chose in action* is complete in itself when the assignor and assignee have completed the transfer, and that notice to the debtor is not necessary in order to make the assignment valid as against third persons, or attaching creditors, or subsequent assignees without notice.¹ But it seems to be agreed in all the cases, that, if the debtor without notice and in *good faith* pays the debt to the assignor, it will be a good payment, and discharge him from further liability;² but if he should pay after notice he would still be liable to the assignee.³ Under all circumstances, it is safer to give notice to the debtor, whether the courts of a State hold notice necessary or not. If the assignor receive the money of the debtor after the assignment, he will hold the money in trust for the assignee.⁴ These general rules concerning notice do not apply to equities in real estate.⁵ Trustees should also insist upon possession of all the notes, bonds, policies, and other obligations for the payment of money being delivered to them; for if negligent in this respect, and suits and costs arise, they might be made responsible personally.⁶ So, if there are debts or securities already due

¹ Sharpless v. Welch, 4 Dall. 279; Bholen v. Cleveland, 1 Mason, 174; Dix v. Cobb, 4 Mass. 508; Wood v. Partridge, 11 Mass. 488; Warren v. Copelin, 4 Met. 594; Littlefield v. Smith, 17 Me. 327; Corser v. Craig, 1 Wash. C. C. 24; United States v. Vaughn, 3 Binn. 394; Muir v. Schenk, 3 Hill, 228; Talbot v. Cook, 7 Mon. 438; Maybin v. Kirby, 4 Rich. Eq. 105; Stevens v. Stevens, 1 Ashm. 590; Beckwith v. Union Bank, 5 Seld. 211; Conway v. Cutting, 50 N. H. 408; Garland v. Harrington, 51 N. H. 409.

² Reed v. Marble, 10 Paige, 509; Mangles v. Dixon, 18 Eng. L. & Eq. 82; 1 Mac. & G. 446; 3 H. L. Cas. 739, and cases before cited; Stocks v. Dobson, 4 De G., M. & G. 11.

³ Brashear v. West, 7 Pet. 608, and cases before cited; Judson v. Corcoran, 17 How. 614.

⁴ Ellis v. Amason, 2 Dev. Eq. 273; Fortesque v. Barnett, 3 Myl. & K. 36.

⁵ Wilmot v. Pike, 5 Hare, 14; Etty v. Bridges, 2 Y. & Col. 486; *Ex parte* Boulton, 1 De G. & J. 163; Webster v. Webster, 31 Beav. 393; Stevens v. Venables, 30 id. 625; Barr's Trusts, 4 K. & J. 219; Van Rensselaer v. Stafford, Hopk. Ch. 569; 9 Cow. 316; Poillon v. Martin, 1 Sandf. Ch. 569.

⁶ Fortesque v. Barnett, 3 Myl. & K. 36; Meux v. Bell, 1 Hare, 82;

and payable to the trust estate, the trustees must proceed to collect them. If any loss happens to the estate from any delay, they would be responsible,¹ and they may accept payment even before the debts are due.² Where it is important for the trustees to give notice of an assignment to them, notice to one of several obligors is notice to all: so notice to one of several of a society of underwriters is sufficient; and if the obligors compose a corporation, there must be notice to the directors or trustees of the corporation.³ So, if notice to trustees is necessary in any case, notice to one is sufficient.⁴

§ 439. There is no fixed time within which *executors* are to get in the *choses in action* of the testator. They must use due diligence; and what is due diligence depends upon the existing facts in every case, and a large discretion must necessarily be vested in the executor.⁵ If there is property that cannot be kept without great expense, it should be sold forthwith. If the testator's establishment is expensive, it should be broken up within a reasonable time; and, under special circumstances, two months were held to be reasonable.⁶ If there are shares or stocks in corporations, the ex-

Evans *v.* Bicknell, 6 Ves. 174; Knye *v.* Moore, 1 S. & S. 65; Lloyd *v.* Banks, L. R. 4 Eq. 222; 3 Ch. 488.

¹ Caffrey *v.* Darbey, 6 Ves. 488; McGachen *v.* Dew, 15 Beav. 84; Tebbs *v.* Carpenter, 1 Madd. 298; Waring *v.* Waring, 3 Ir. Eq. 335; Platel *v.* Craddock, C. P. Coop. 481; Wiles *v.* Gresham, 2 Drew. 258; Grove *v.* Price, 26 Beav. 103; Rowley *v.* Adams, 2 H. L. Cas. 725; Macken *v.* Hogan, 14 Ir. Eq. 220; Mucklow *v.* Fuller, Jac. 198; Powell *v.* Evans, 5 Ves. 839; Lowson *v.* Copeland, 2 Bro. Ch. 156; Caney *v.* Bond, 6 Beav. 486; Cross *v.* Petree, 10 B. Mon. 413; Wolfe *v.* Washburn, 6 Cow. 261; Waring *v.* Darnall, 10 G. & J. 127; Hester *v.* Wilkinson, 6 Humph. 215; Garner *v.* Moore, 3 Drew. 277; Neff's App., 57 Penn. St. 91.

² Mills *v.* Osborne, 7 Sim. 30.

³ Timson *v.* Ramsbottom, 2 Keen, 35; Meux *v.* Bell, 1 Hare, 88; *Re* Styán, 1 Phill. 155; Smith *v.* Smith, 2 Cr. & Mee. 31; Duncan *v.* Chamberlayne, 11 Sim. 123.

⁴ Greenhill *v.* Willis, 4 De G., F. & J. 147.

⁵ Waring *v.* Darnall, 10 G. & J. 127; Hughes *v.* Empson, 22 Beav. 188.

⁶ Field *v.* Pecket, 29 Beav. 576.

ecutors must exercise a sound discretion to sell in the most advantageous manner, and at the most advantageous time. In the case of some Crystal Palace shares owned by a testator, a sale within a year was held to be the exercise of a reasonable discretion, although it was claimed that they ought to have been sold within two months.¹ So, where a large part of an estate consisted of Mexican bonds, which the testator directed to be converted "with all convenient speed," it was held that these words added nothing to the implied duty of every executor to convert such property with all reasonable speed; that a conversion in the course of the second year was proper and reasonable; that if executors were bound to sell at once without reference to the circumstances, there would often be a great sacrifice of property, and therefore that executors were bound to exercise a *reasonable discretion*, according to the circumstances of each case.² But generally stock should be sold within the year allowed for the settling of a testator's estate, and a delay beyond this time may render the executors or trustees liable for the loss, although they act in good faith, and although some of the trustees became of age only a short time before the sale.³ If, however, it is clear that the trustees have a discretion to sell or not according to their judgment, the case will be governed by the intention and not by the general rule.⁴

§ 440. Personal securities change from day to day; and as the death of the testator puts an end to his discretion in regard to them, unless he has exercised it in his will, the executor or trustee will become personally liable, if he does

¹ Hughes v. Empson, 22 Beav. 138; Bate v. Hooper, 5 De G., M. & G. 338; Wilkinson v. Duncan, 26 L. J. (N. S.) Ch. 495.

² Buxton v. Buxton, 1 M. & C. 80; Prendergast v. Lushington, 5 Hare, 171; Hester v. Wilkinson, 6 Humph. 215; Waring v. Darnall, 10 G. & J. 127.

³ Sculthorpe v. Tiffer, L. R. 13 Eq. 238; Grayburn v. Clarkson, L. R. 3 Ch. 605.

⁴ Mackie v. Mackie, 5 Hare, 70; Wrey v. Smith, 14 Sim. 202; Sparling v. Parker, 9 Beav. 521.

not get in the money within a reasonable time.¹ He must not allow the assets to remain out on personal security,² (a) though it was a loan or investment by the testator himself.³ It is not enough for the executor to apply for payment through an attorney: he must follow the collection actively by legal proceedings,⁴ unless he can show that such proceedings would have been futile and vain.⁵ An executor must take the same steps when his *coexecutor* is a debtor to the estate, even if the testator has been in the habit of depositing or lending money to the coexecutor as to a banker.⁶ Executors are not justified in dealing with a testator's money as he dealt with it himself, nor may they trust all the persons that he trusted. Nor will a direction in the will "to call in securities not approved by them" excuse executors from not calling in personal securities; for such direction refers to the different kinds of securities sanctioned by law

¹ *Bailey v. Young*, 4 Y. & Col. Ch. 226; *Will's App.*, 22 Penn. St. 330; *Mucklow v. Fuller*, Jac. 198; *Tebbs v. Carpenter*, 1 Madd. 297.

² *Lowson v. Copeland*, 2 Bro. Ch. 156; *Caney v. Bond*, 6 Beav. 486; *Att. Gen. v. Higham*, 2 Y. & Col. Ch. 634; *Hemphill's App.*, 18 Penn. St. 303.

³ *Powell v. Evans*, 5 Ves. 839; *Bullock v. Wheatley*, 1 Col. C. C. 130; *Tebbs v. Carpenter*, 1 Madd. 298; *Clough v. Bond*, 3 Myl. & Cr. 496; *Hemphill's App.*, 18 Penn. St. 303; *Pray's App.*, 34 id. 100; *Barton's App.*, 1 Pars. Eq. 24, is overruled; *Kimball v. Reading*, 11 Foster, 352. In England, bank stock must be converted. *Mills v. Mills*, 7 Sim. 509; *Howe v. Dartmouth*, 7 Ves. 150; *Price v. Anderson*, 15 Sim. 473.

⁴ *Lowson v. Copeland*, 2 Bro. Ch. 156; *Horton v. Brocklehurst*, 29 Beav. 511; *Paddon v. Richardson*, 7 De G., M. & G. 563; *Wolfe v. Washburn*, 6 Cow. 261.

⁵ *Clack v. Holland*, 19 Beav. 262; *Hobday v. Peters*, 28 id. 603; *Alexander v. Alexander*, 12 Ir. Eq. 1; *Maitland v. Bateman*, 16 Sim. 233, and note; *Walker v. Symonds*, 3 Swanst. 71; *East v. East*, 5 Hare, 343; *Ratcliff v. Wynch*, 17 Beav. 217; *Ball v. Ball*, 11 Ir. Eq. 370; *Styles v. Guy*, 16 Sim. 232; *Billing v. Brogden*, 38 Ch. D. 546.

⁶ *Styles v. Guy*, 1 Mac. & G. 428; 1 Hall & Tw. 523; *Egbert v. Butter*, 21 Beav. 560; *Candler v. Tillett*, 22 Beav. 257; *Mucklow v. Fuller*, Jac. 198.

(a) Unless so directed by the *Harris*, 84 N. Y. 89, reversing s. c. creator of the trust. *Denike v.* 23 Hun, 213.

and the court, and not to all investments outside the sanctions of the law.¹ If the executors are to get in the money "whenever they think proper and expedient," they will be liable for the fund if they allow it to remain uncollected out of kindness or regard for the tenant for life, and not upon an impartial judgment for the best interest of all the parties.² If the outstanding debt is secured by a real mortgage, it ought not to be called in, if it is safe, until it is wanted in the course of the administration.³ But pains should be taken to ascertain whether the security is safe.⁴ If the mortgage security is not adequate, the executor or trustee must insist upon payment, even where the *cestui que trust* is to consent to every change of investment, and he refuses to consent; for nothing will justify conduct that endangers the fund.⁵ But if the fund is safe on a security sanctioned by the court and selected by the testator, it might be a breach of trust to call it in, and allow it to remain unproductive, or to invest it anew.⁶ (a) But if trustees are ordered by the court to call in securities, and they neglect to do so, they will be liable for any loss that occurs.⁷ So, if trustees compromise a debt due from a bankrupt estate, they must show that the bankrupt would have obtained his discharge, and that it was impossible to get the whole debt, or they will be liable for the loss.⁸ If the trustee himself owes the estate, he must treat his indebtedness as assets collected, and if he becomes bankrupt, he must prove the debt against himself, or he will be liable, even if he gets his discharge.⁹ But in

¹ *Styles v. Guy*, 1 Mac. & G. 428; *Scully v. Delany*, 2 Ir. Eq. 165.

² *Luther v. Bianconi*, 10 Ir. Ch. 194.

³ *Orr v. Newton*, 2 Cox, 274; *Howe v. Dartmouth*, 7 Ves. 150; *Robinson v. Robinson*, 1 De G., M. & G. 252.

⁴ *Ames v. Parkinson*, 7 Beav. 384.

⁵ *Harrison v. Thexton*, 4 Jur. (N. S.) 550.

⁶ *Orr v. Newton*, 2 Cox, 276.

⁷ *Davenport v. Stafford*, 14 Beav. 338.

⁸ *Wiles v. Gresham*, 2 Dr. 258; 5 De G., M. & G. 770. Lord Justice Turner expressed a doubt, whether the trustees should have been charged, without further inquiry. *Bacot v. Hayward*, 5 S. C. 441.

⁹ *Orrett v. Corser*, 21 Beav. 52; *Prindle v. Holcombe*, 45 Conn. 111;

(a) See *Re Hurst*, 65 L. T. 665.

the United States bankrupts are not discharged from any liabilities which they are under in a fiduciary capacity.

§ 441. It was observed in *Harden v. Parsons*,¹ that no man can require, or with reason expect, that a trustee should manage another's property with the same care and discretion as his own. But this is neither sound morality nor good law. A trustee must use the same care for the safety of the trust fund, and for the interests of the *cestui que trust*, that he uses for his own property and interests.² And even this will not be sufficient if he is careless in his own concerns; for a trustee must in all events use such care as *a man of ordinary prudence uses in his own business of a similar nature*.³ Thus, where a trustee had £200 of his own money, and £40 of trust-money, in his house, and he was robbed by his servant, he was not held responsible.⁴ And where a trustee deposited articles with his solicitor, to be passed over to a party entitled to them, and the articles were stolen, the trustee was not held responsible.⁵ But if a trustee employs an agent, and the agent steals or appropriates the property intrusted to him, the trustee will be held responsible; that is, the trustee is not responsible for the crimes of stran-

Ipswich Manuf. Co. v. Story, 5 Met. 310; *Chenery v. Davis*, 16 Gray, 89; *Hazelton v. Valentine*, 113 Mass. 472; *Pettee v. Peppard*, 120 Mass. 523. The acceptance of the trust requires him to treat an indebtedness for which he was previously responsible as assets collected. *Stevens v. Gaylord*, 11 Mass. 269; *Ips. Manuf. Co. v. Story*, 18 Pal. 236; 1 Allen, 531, 10 Cush. 176; 120 Mass. 523.

¹ 1 Eden, 148.

² *Morley v. Morley*, 2 Ch. Cas. 2; *Jones v. Lewis*, 2 Ves. 241; *Massey v. Banner*, 1 J. & W. 247; *Att. Gen. v. Dixie*, 13 Ves. 534; *Ex parte Belchier*, Amb. 220; *Ex parte Griffin*, 2 G. & J. 114; *Taylor v. Benham*, 5 How. 233; *King v. Talbott*, 50 Barb. 453; 40 N. Y. 86; *Miller v. Proctor*, 20 Ohio St. 444; *Neff's App.*, 57 Penn. St. 91; *King v. King*, 37 Ga. 205; *Campbell v. Campbell*, 38 Ga. 304; *Roosevelt v. Roosevelt*, 6 Abb. (N. Y.) N. Cas. 447; *Gould v. Chappell*, 42 Md. 466; *Carpenter v. Carpenter*, 12 R. I. 544; *Davis v. Harmon*, 21 Grat. 194.

³ *Woodruff v. Snedecor*, 68 Ala. 442.

⁴ *Morley v. Morley*, 2 Ch. Cas. 2.

⁵ *Jones v. Lewis*, 2 Ves. 240; *Foster v. Davis*, 46 Mo. 268.

gers, but he is responsible for the criminal acts of agents employed by himself about the trust fund,¹ (a) and for any loss that may fall upon the estate by the forgery of a signature upon which he pays money.²

§ 442. Several trustees, residing in different places, cannot all have the custody of the same articles; therefore it is said that articles of plate, which pass by delivery, and stocks and bonds, payable to the bearer, with coupons to be cut off for the interest, should be deposited at a responsible banker's.³

§ 443. A trustee may deposit money temporarily in some responsible bank or banking-house;⁴ and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss, as where the bank failed in consequence of war;⁵ but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his *own credit*, and not to the separate account of the trust estate,⁶ even though he had no other

¹ *Bostock v. Floyer*, L. R. 1 Eq. 28; *Hapgood v. Perkins*, L. R. 11 Eq. 74.

² *Eaves v. Hickson*, 30 Beav. 136.

³ *Mendes v. Guedalla*, 2 John & H. 259.

⁴ *Rowth v. Howell*, 3 Ves. Jr. 565; *Jones v. Lewis*, 2 Ves. 241; *Adams v. Claxton*, 6 Ves. 226; *Ex parte Belchier*, Amb. 219; *Att. Gen. v. Randall*, 21 Vin. Ab. 534; *Massey v. Banner*, 1 J. & W. 248; *Horsley v. Chaloner*, 2 Ves. 85; *France v. Woods*, Tambl. 172; *Dorchester v. Effingham*, id. 279; *Freme v. Woods*, id. 172; *Wilks v. Groome*, 3 Dr. 584; *Johnston v. Newton*, 11 Hare, 160; *Swinfen v. Swinfen*, 29 Beav. 211.

⁵ *Douglas v. Stephenson's Ex'r*, 75 Va. 749.

⁶ *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Madd. 73; *Macdonnell v. Harding*, 7 Sim. 178; *Mathews v. Brise*, 6 Beav. 239; *Massey v. Banner*, 1 J. & W. 241; see remarks on this case in *Pennell v. Deffell*, 4 De G., M. & G. 386, 392; *School Dis. Greenfield v. First National Bank*, 102 Mass. 174; *Mason v. Whitehorn*, 2 Cold. 242.

(a) In *Jobson v. Palmer*, [1893] 1 Ch. 71, it was held that a trustee, even when remunerated for his services, is not liable for his servant's theft of trust property, when the employment of a servant was necessary, and the trustee has used due care in selecting him. See *supra*, § 246, n.

funds in bank, and told the officers at the time of deposit that the funds were held by him in trust.¹ (a) So if he allows another person to draw upon the fund and misapply the money;² so if he deposits the money in such manner that it is not under his own exclusive control, as where money is deposited in bank so that it cannot be drawn without the concurrence of other persons, the trustee will be liable for the failure of the bank, on the principle that it is the duty of the trustee to withdraw the money from the bank upon the slightest indication of danger or loss, and he cannot perform this duty promptly if he is clogged by the necessity of procuring the concurrent action of other persons.³ So he will be liable if he keeps money in bank an unreasonable length of time, or where it is his duty to invest the fund in safe securities,⁴ or to pay it over to newly appointed trustees,⁵ or into court;⁶ or if, having no occasion to keep a balance on hand for the purposes of the trust, he lends the money to the bank on interest upon personal security, that being a security not sanctioned by the court.⁷

§ 444. Trustees may leave money in the custody of third persons when it is necessary in the course of business, as where money is left in the hands of an auctioneer as agent of both parties on a sale or purchase;⁸ and during the nego-

¹ William's Adm'r v. Williams, 55 Wis. 300.

² Ingle v. Partridge, 32 Beav. 661; 34 id. 411.

³ Salway v. Salway, *alias* White v. Baugh, 2 R. & M. 215; 9 Bligh, 181; 3 Cl. & Fin. 44; overruling same case, 4 Russ. 60.

⁴ Moyle v. Moyle, 2 R. & M. 710; Johnston v. Newton, 11 Hare, 169.

⁵ Lunham v. Blundell, 4 Jur. (N. S.) 3.

⁶ Wilkinson v. Bewick, 4 Jur. (N. S.) 1010.

⁷ Darke v. Martyn, 1 Beav. 525.

⁸ Edmonds v. Peake, 7 Beav. 239.

(a) See Arguello's Estate (Cal.), *id.* 61; Munnerlyn v. Augusta S. Bank, 88 Ga. 333; Key v. Hughes, 31 Pac. 937; Booth v. Wilkinson, 78 Wis. 652; O'Connor v. Decker, 95 Wis. 202; Baer's Appeal, 127 Penn. St. 360; Milmo's Succession, 47 La. Ann. 126; Barrett's Succession, 43 32 W. Va. 184; Moore v. Eure, 101 N. C. 11; Atterberry v. McDuffee, 31 Mo. App. 603; 1 Ames on Trusts (2d ed.), 481-483, notes.

tiation of an investment, the trustees may buy exchequer bills;¹ but if they leave the exchequer bills undistinguished in the hands of a banker or broker, they will be liable for the loss of the money.² But if trustees deposit money in bank to their own credit;³ or if they leave it for an unreasonable time, as a year after the testator's death and after all debts and legacies are paid;⁴ or if they place their papers and receipts in the hands of their solicitor, so that he can receive their money and misapply it;⁵ or if the money is so paid into bank that it may be drawn out upon the check of one trustee and misapplied;⁶ or if they neglect to sell property when it ought to have been sold,⁷ or suffer money to remain upon personal security,⁸ or upon an unauthorized security;⁹ or if the money is left improperly or unadvisedly in the hands of a coexecutor or cotrustee, so that he has an opportunity to misapply it, — all the trustees will be responsible for any loss that may occur to the trust fund.¹⁰ So trustees are liable for the attorneys and solicitors whom they employ; as where they employ a solicitor to examine the title to a proposed mortgage, and they are misled by him in such manner that a loss occurs to the estate, they are liable to make it good.¹¹

¹ *Mathews v. Brise*, 6 Beav. 239.

² *Ibid.*

³ *Massey v. Banner*, 1 J. & W. 241; *Wren v. Kirton*, 11 Ves. 377; *Mason v. Whitehorn*, 2 Cold. 242.

⁴ *Ibid.*

⁵ *Ghost v. Waller*, 9 Beav. 497; *Rowland v. Witherden*, 3 Mac. & G. 568.

⁶ *Clough v. Bond*, 3 Myl. & Cr. 490; *Clough v. Dixon*, 8 Sim. 594.

⁷ *Phillips v. Phillips*, Freem. Ch. 11.

⁸ *Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Madd. 290.

⁹ *Hancom v. Allen*, 2 Dick. 498 and n.; *Howe v. Dartmouth*, 7 Ves. 137.

¹⁰ *Langford v. Gascoyne*, 11 Ves. 333; *Shipbrook v. Hinchinbrook*, id. 252; 16 Ves. 478; *Underwood v. Stevens*, 2 Mer. 712; *Hardy v. Metropolitan Land Co.*, L. R. 7 Ch. 429.

¹¹ *Hagood v. Perkins*, L. R. 11 Eq. 74; *Bostock v. Floyer*, L. R. 1 Eq. 26.

§ 445. In one case it was said, that an executor would not be liable if he had placed money in bank under the control of a coexecutor. The money was entered on joint account, but the individual checks of the coexecutors could draw it out. This was held to be the ordinary and reasonable course of business.¹ If, however, there is any fraud, collusion, or wilful default, or gross neglect, or if the executor has any reason to interfere, and does not put a stop to the mismanagement of his coexecutor, he will be held liable.² The case of *Kilbee v. Sneyd*, however, is so doubtful on this point, and contrary to authority, that it would be unsafe to act upon it.³

§ 446. Trustees and executors have a reasonable time to wind up a testator's estate, and make investments; and they may, without responsibility, keep the money in a reliable bank for one year after the death of the testator;⁴ but if they draw the money out of bank, and make any irregular investment, or lend it to another bank on interest, they will be responsible for the loss of the money, even if the will directs that the trustees shall not be responsible for losses by a banker; the construction of such direction being that the trustees shall not be liable for loss of money deposited with a banker in the ordinary manner.⁵

§ 447. The trustee must not mingle the trust fund with his own. If he does, the *cestui que trust* may follow the trust property, and claim every part of the blended property which the trustee cannot identify as his own.⁶

¹ *Kilbee v. Sneyd*, 2 Moll. 186.

² *Ibid.* 203, 213.

³ *Clough v. Dickson*, 8 Sim. 594; 3 Myl. & Cr. 490; *Gibbons v. Taylor*, 22 Beav. 344; *Ingle v. Partridge*, 32 Beav. 661; 34 Beav. 411.

⁴ *Johnston v. Newton*, 11 Hare, 160; *Swinfen v. Swinfen*, 29 Beav. 211; *Wilks v. Groome*, 3 Dr. 584.

⁵ *Rehden v. Wesley*, 29 Beav. 213.

⁶ *Lupton v. White*, 15 Ves. 432, 440; *Chedworth v. Edwards*, 8 Ves. 46; *White v. Lincoln*, id. 363; *Fellowes v. Mitchell*, 1 P. Wms. 83; *Gray v. Haig*, 20 Beav. 219; *Leeds v. Amherst*, id. 239; *Mason v. Morley*, 34

§ 448. There may be express trusts for conversion; that is, to sell the trust fund, as it exists at the time of the testator's decease, and convert the same into some other kind of property or investment; (a) and there may be an express trust to allow the *cestuis que trust* the use and enjoyment of the *specific* property devised. Both of these forms of trust must be strictly executed, and generally no question arises upon them. But a question sometimes arises from the situation and character of the property, and the relations of the *cestuis que trust* to it, whether the trustee is to convert the property into another form, or allow the *cestuis que trust* to

Beav. 471, 475; *Cook v. Addison*, L. R. 7 Eq. 470; *Morrison v. Kinstra*, 55 Miss. 71.

(a) Conversion may be immediate; or it may take place upon the death of the creator of the trust, as when he makes a deed of property subject to a life-estate for himself. See *Att. Gen. v. Dodd*, [1894] 2 Q. B. 150; *Paisley v. Holzshu*, 83 Md. 325; *Crane v. Bolles*, 49 N. J. Eq. 373; *Thomman's Estate*, 161 Penn. St. 444; *Smith v. Loewenstein*, 50 Ohio St. 346; *In re Holder* (R. I.), 41 Atl. 576; *Benbow v. Moore*, 114 N. C. 263; *Dodge v. Williams*, 46 Wis. 70; *Penfield v. Tower*, 1 N. Dak. 216. In Pennsylvania, a testator's express direction in his will that his executor sell all his real estate at the end of twenty years works a conversion thereof as of the time of his death. *Handley v. Palmer*, 91 F. R. 948; *Williamson's Estate*, 153 Penn. St. 508.

"The doctrine of equitable conversion is simply an application of the fundamental principle that equity regards that as done which ought to be done. . . . Conversion is effected by a sale. Equitable conversion is effected by a power

to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money." *Per Baldwin, J.*, in *Clarke's Appeal*, 70 Conn. 195, 215, 217.

The conversion always relates back to the earliest possible moment, as to the date of the contract giving an option, and it applies to an intestacy, even when the option to purchase is exercisable only after the grantor's death. *Laves v. Bennett*, 1 Cox, 167; *In re Isaacs*, [1894] 3 Ch. 506; *Williams v. Haddock*, 145 N. Y. 144. But no conversion is effected by an instrument which is invalid, or which fails of its purpose. *Moore v. Robbins*, 53 N. J. Eq. 137. When, however, there has been a partial failure of the trusts created by will, and a partial conversion has been made, the heir may take the property, by way of resulting trust, in the state into which it was converted by the will. *In re Richerson*, [1892] 1 Ch. 379.

enjoy it *in specie*: that is, the court is left to infer or imply, from the construction of the instrument, the character of the property and the relations of the *cestuis que trust*, whether it was the intention of the testator that the property should be converted, or whether the beneficiaries should take the use of it specifically, according to the terms in which it is given. All such cases must be determined by their own facts and the construction of the instrument under which the trust exists.¹ (a)

§ 449. A court of equity has authority to decree the conversion of a trust fund from personal to real estate, (b) or,

¹ Hidden v. Hidden, 103 Mass. 59.

(a) There is no conversion merely of a request or direction therefor, or of a discretionary power to sell. See Goodier v. Edmunds, [1893] 3 Ch. 455; *In re Pyle*, [1895] 1 Ch. 724; Basset v. St. Levan, 71 L. T. 718; *Re Bingham*, 127 N. Y. 296; Chapin, petitioner, 148 Mass. 588; Carney v. Kain, 40 W. Va. 758; R. I. Hospital Trust Co. v. Harris (R. I.), 39 Atl. 750; Machemer's Estate, 140 Penn. St. 544; Darlington v. Darlington, 160 id. 65; Ingersoll's Estate, 167 id. 536; Solli-day's Estate, 175 id. 114; Ness v. Davidson, 49 Minn. 469; Cobb's Estate, 36 N. Y. S. 448; Allen v. Stevens, 49 id. 431; *In re Hosford*, 50 id. 550; Wheless v. Wheless, 92 Tenn. 293; Ford v. Ford, 70 Wis. 19; McHugh v. McCole, 97 Wis. 166. A direction, when explicit and positive, or a trust for sale, when absolute and necessary, will, however, work a conversion. *Ibid.*; Goodier v. Edmunds, *supra*; Becker's Estate, 150 Penn. St. 524; Fahnestock v. Fahnestock, 152 id. 56; *Re Gantert*, 136 N. Y. 106; Underwood v. Curtis, 127 N. Y.

523; Roy v. Monroe, 47 N. J. Eq. 356; Gould v. Taylor Orphan Asylum, 46 Wis. 106; Ramsey v. Hanlon, 33 F. R. 425; Merritt v. Merritt, 53 N. Y. S. 127.

The courts of a testator's domicile are to determine, as to land within their jurisdiction, the question whether an equitable conversion was intended by his will. Clarke's Appeal, 70 Conn. 195.

(b) When personal estate is directed by the will to be applied in purchasing real estate, it is impressed with a trust for that purpose, is treated as real estate, and passes under a devise of land. Ackroyd v. Smithson, 1 Bro. C. C. 503; Cleveland's Settled Estates, [1893] 3 Ch. 244; see McFadden v. Hefley, 28 S. C. 317; Household S. M. Co. v. Vaughan, 17 N. Y. St. Rep'r, 332; see 1 Ames on Trusts (2d ed.), 491, n. When, however, money is charged on land for the testator's widow, and she declines to take under the will, and has dower, the money remains personal estate. Becker's Estate, 150 Penn. St. 524.

vice versa, where such conversion is not contrary to the will of the donor expressly or impliedly, and is for the interest of the *cestui*.¹ The general rule is, that where the testator gives his personal property, or the residue of his personal property, or the interest of his personal property,² in trust, or directly to several persons in succession,³ and the property is of such a nature that it grows less valuable by time, as where it is leaseholds or annuities, or where the property is wasted or consumed in the use of it, the court implies an intention that such property shall be converted into a fixed and permanent form, so that the beneficiaries may take the use and income of it in succession. (a) Accordingly, in England, such property is converted into the investments allowed by law; and in the United States it must be converted into safe investments, according to the rules in force in the State where the trust is to be administered; and if the trustees fail to do so in a reasonable time, they will be guilty of a breach of trust.⁴

§ 450. The court presumes an intention that perishable property shall be converted, where several persons are to enjoy it in succession; not so much from the actual fact of such an intention, as from its being a convenient means of adjusting the rights of those who are to enjoy the property in succession.⁵ This presumption is made, unless a contrary intention is indicated upon the face of the will. The later authorities give effect to slighter indications than the older

¹ *Ex parte Jordan*, 4 Del. Ch. 615.

² *Howe v. Dartmouth*, 7 Ves. 137; *Cranch v. Cranch* (cited *id.* 142, 147; *Litchfield v. Baker*, 2 Beav. 481; *Crowley v. Crowley*, 7 Sim. 427; *Sutherland v. Cook*, 1 Col. C. C. 498; *Johnson v. Johnson*, 2 Col. C. C. 411; *Fearns v. Young*, 9 Ves. 549; *Benn v. Dixon*, 10 Sim. 636; *Oakes v. Strachey*, 13 Sim. 414.

³ *House v. Way*, 12 Jur. 959.

⁴ *Bate v. Hooper*, 5 De G., M. & G. 338; see *post*, Chap. XVIII.

⁵ *Cape v. Bent*, 5 Hare, 35; *Pickering v. Pickering*, 4 Myl. & Cr. 303; *Hinves v. Hinves*, 2 Hare, 611; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; see *Cotton v. Cotton*, 14 Jur. 950.

(a) *Pyott's Estate*, 160 Penn. St. 441.

cases.¹ The object of the rule is to secure a fair adjustment of the rights of all the *cestuis que trust* in succession; for if the property would greatly depreciate in value in the hands of the first taker, the remainder-man might fail to receive the benefit intended to be given to him; the court, therefore, orders the perishable property to be converted into a permanent fund, unless a contrary intention is indicated in the will. So, if property, not liable to waste, but bearing a high rate of interest, and subject to great risks, is given to one person for life, and to another in remainder, the beneficiary in remainder may call for a conversion of the stocks or bonds into a less hazardous and more permanent investment, that their interests may be better protected;² but the court will not call in real securities without directing an inquiry whether it is necessary for the safety or benefit of all parties.³ On the other hand, the court applies the same principles to the protection of the first taker or tenant for life; and so, if there are reversionary interests that may not fall in and become beneficial to the tenant for life, but may come into the possession of the remainder-man, the court may order the reversions to be sold, and the purchase-money to be invested, so that the tenant for life may have the income for life.⁴ And if the trustees have a discretion as to the time of sale, which the court cannot control, and they sell when the reversion falls in, the court will give the tenant for life the difference between the actual price for which the reversion sold, and its estimated value one year after the testator's death.⁵ (a)

¹ *Morgan v. Morgan*, 14 Beav. 82; *Craig v. Wheeler*, 29 L. J. Ch. 374; *Mackie v. Mackie*, 5 Hare, 77; *Wightwick v. Lord*, 6 H. L. Cas. 217; *Blann v. Bell*, 5 De G. & Sm. 658; 2 De G., M. & G. 775; *Burton v. Mount*, 2 De G. & Sm. 383; *Howe v. Howe*, 14 Jur. 359; 2 Spence, Eq. Jur. 42, 554.

² *Thornton v. Ellis*, 15 Beav. 193; *Blann v. Bell*, 5 De G. & Sm. 658; 2 De G., M. & G. 775; *Wightwick v. Lord*, 6 H. L. Cas. 217.

³ *Howe v. Dartmouth*, 7 Ves. 150.

⁴ *Ibid.*; *Fearn v. Young*, 9 Ves. 549; *Dimes v. Scott*, 4 Russ. 200.

⁵ *Wilkinson v. Duncan*, 23 Beav. 469.

(a) When there is no undue de-verting land into invested money lay on the part of trustees in con- for the benefit of the tenant for life,

§ 451. On the other hand, an intention may be implied from the form or terms of the gift, that the property is to be enjoyed by the *cestuis que trust in specie*; as, if there is a *specific gift* of leaseholds or of stocks, the specific legatee will take the rents and dividends of the specified property.¹ A general direction to pay rents to the tenant for life, after the mention of leaseholds, is a specific devise;² but it is still a matter of doubt upon the authorities, whether such a direction, unconnected with any mention of the leaseholds, is a specific devise or not.³ A mere direction to pay dividends is not a specific devise of the stocks.⁴ But a bequest of the "interest, dividends, or income of all moneys or stock, and of all other property yielding income at the testator's death," has been held to be specific, and the trustees could not

¹ *Vincent v. Newcombe*, Younge, 599; *Lord v. Godfrey*, 4 Madd. 455; *Pickering v. Pickering*, 4 Myl. & Cr. 299; *Hubbard v. Young*, 10 Beav. 205; *Harris v. Poyner*, 1 Dr. 181; *Mills v. Mills*, 7 Sim. 501; *Dunbar v. Woodcock*, 10 Leigh, 628; *Harrison v. Foster*, 9 Ala. 955; *Hale v. Burrodale*, 1 Eq. Ca. Ab. 461; *Bracken v. Beatty*, 1 Rep. in Ch. 110; *Evans v. Iglehart*, 6 G. & J. 171; *Alcock v. Sloper*, 2 Myl. & K. 702; *Pickering v. Pickering*, 2 Beav. 57.

² *Blann v. Bell*, 2 De G., M. & G. 775; *Crowe v. Crisford*, 17 Beav. 507; *Hood v. Clapham*, 19 Beav. 90; *Marshall v. Brenner*, 2 Sm. & Gif. 237; *Elmore's Trusts*, 6 Jur. (N. S.) 1325.

³ *Goodenough v. Tremamondo*, 2 Beav. 512; *Hunt v. Scott*, 1 De G. & Sm. 219; *Wearing v. Wearing*, 23 Beav. 99; *Pickup v. Atkinson*, 4 Hare, 624; *Craig v. Wheeler*, 29 L. J. Ch. 374; *Vachell v. Roberts*, 32 Beav. 140; *Harvey v. Harvey*, 5 Beav. 134; *Att. Gen. v. Potter*, id. 164.

⁴ *Neville v. Fortescue*, 16 Sim. 333; *Blann v. Bell*, 2 De G., M. & G. 775; *Sutherland v. Cook*, 1 Col. C. C. 503; *Hood v. Clapham*, 19 Beav. 90.

the tenant for life is entitled to the rents accrued between the time when the trust for conversion takes effect and the time when the conversion is actually effected. *Hope v. D'Hedouville*, [1893] 2 Ch. 361. A power of distress or a direction to pay rents do not sufficiently show an intention that leaseholds are to be enjoyed in specie, but these are properly treated as converted at the

end of a year from the testator's death. *In re Game*, [1897] 1 Ch. 881. An implied trust for sale may work a conversion. See *In re Wintle*, [1896] 2 Ch. 711. A discretion given to trustees as to the time of sale shows an intention that the property is not to be immediately converted. *In re Pitcairn*, [1896] 2 Ch. 199.

convert.¹ (a) If the devise is specific, the direction to vary the securities will not affect the rights of a specific legatee, for such direction is only for the protection of the trust fund.² A debt due to a testator is not devised specifically, although it is embraced in the residue of an estate specifically devised, as it is in no sense in the nature of an investment, and is therefore to be converted.³ And if a testator use any expression implying that leaseholds or stocks or other property are not to be converted, as if he names a time for the sale of them, as at or after the death of the tenant for life, the trustees will have no power to convert the property until the time arrives.⁴ But where a testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, and at her decease to be disposed of as therein directed, it was held that the trustees must convert, as there was no indication that she should enjoy any of the property *in specie*.⁵ (b)

¹ Boys v. Boys, 28 Beav. 436.

² Lord v. Godfrey, 4 Madd. 455; Llewellyn's Trusts, 29 Beav. 171; Morgan v. Morgan, 14 Beav. 72.

³ Holgate v. Jennings, 24 Beav. 630. There is some doubt upon the principles of this case.

⁴ Collins v. Collins, 2 Myl. & K. 703; Vaughan v. Buck, 1 Phill. 78; Lichfield v. Baker, 13 Beav. 451; Harris v. Poyner, 1 Dr. 180; Chambers v. Chambers, 15 Sim. 190; Daniel v. Warren, 2 Y. & Col. Ch. 290; Rowe v. Rowe, 29 Beav. 276; Alcock v. Sloper, 2 Myl. & K. 699; Hind v. Selby, 22 Beav. 373; Bowden v. Bowden, 17 Sim. 65; Burton v. Mount, 2 De G. & Sm. 383; Skirving v. Williams, 24 Beav. 275; Hinves v. Hinves, 3 Hare, 609; Harvey v. Harvey, 5 Beav. 134; Bethune v. Kennedy, 1 Myl. & Cr. 114; Hunt v. Scott, 1 De G. & Sm. 219; Pickering v. Pickering, 2 Beav. 31; 4 Myl. & Cr. 289; Prendergast v. Prendergast, 3 H. L. Cas. 195; Hood v. Clapham, 19 Beav. 90; Neville v. Fortescue, 16 Sim. 333; Howe v. Howe, 14 Jur. 359.

⁵ Benn v. Dixon, 1 Phill. 76; Thornton v. Ellis, 15 Beav. 193; Morgan v. Morgan, 14 Beav. 92; Blann v. Bell, 2 De G., M. & G. 775; Hood v. Clapham, 19 Beav. 90; Lichfield v. Baker, 13 Beav. 481.

(a) See Johnson v. Goss, 128 Mass. 433; Metcalf v. Framingham Parish, id. 370; Trustees v. Tufts, 151 Mass. 76; Smith v. Lansing, 53 N. Y. S. 633. Specific legacies, not dependent upon a trust in the will which violates the rule against perpetuities, are not invalidated thereby. Lawrence v. Smith, 163 Ill. 149.

(b) See Hovey v. Dary, 154 Mass.

§ 452. After a trustee has reduced the trust fund to possession, and has secured the proper custody, and after he has converted so much of the property as was necessary to sell for money, his next duty is to invest the proceeds. It is one of the most important of the duties of trustees to invest the trust fund in such manner that it shall be safe, and yield a reasonable rate of income to the *cestui que trust*. If there are directions in the instrument of trust as to the time, manner, and kind of investment, the trustees must follow the direction and power so given them. The creator of a trust may specify the kind of investment, and what security may be taken, or he may dispense with all security.¹ In the absence of such directions and powers, the trustees must be governed by the general rules of the court, or by the statutes and laws of the State in which the trust is to be executed. If there are no directions in the instrument, nor rules of court, nor statutory provisions in relation to investments, they must be governed by a sound discretion and *good faith*.²

¹ *Denike v. Harris*, 84 N. Y. 89.

² As a general rule, investments by executors and testamentary trustees, which take the funds beyond the jurisdiction of the court, will not

7; *Bowditch v. Ayrault*, 138 N. Y. 222; *Smith v. Smith*, 174 Ill. 52; *Lackey's Estate*, 149 Penn. St. 7; *Irwin v. Patchen*, 164 id. 51; *Rudy's Estate*, 185 id. 359. A conversion is implied when a will blends real and personal property as a common fund, which is bequeathed as money. *Marshall's Estate*, 147 Penn. St. 77. So of a direction to "invest at interest." *Davenport v. Kirkland*, 156 Ill. 169; see *Fahnestock v. Fahnestock*, 152 Penn. St. 56; *Allen v. Watts*, 98 Ala. 384; *Brown v. Miller* (W. Va.), 31 S. E. 956.

In England partnership realty is treated as converted into personalty for all purposes; in this country, it usually continues realty, except so far as it is to be regarded as con-

verted to adjust partnership equities, and when necessary for that purpose, the intent to convert is presumed. See *Darrow v. Calkins*, 154 N. Y. 503; *Harris v. Harris*, 153 Mass. 439; *Oliver v. Oliver* (Ky.), 49 S. W. 473.

When executors have sold land under a general power in the will, the proceeds may be used to pay the testator's debts. *Bolton v. Myers*, 146 N. Y. 257; 31 N. Y. S. 588. But when a conversion of an infant's realty is effected *in invitum*, as by eminent domain proceedings, the proceeds are to be treated as realty until he is of age, and go to his heirs in case of his death. *Wetherill v. Hough*, 52 N. J. Eq. 683; *In re Rochester*, 136 N. Y. 83.

They must not have speculation in view, but rather a permanent investment, considering both the probable income and the probable safety of the capital.¹ A trustee should clearly indicate the investments he makes on behalf of the trust. If he invests apparently in his private capacity and after loss claims it was a trust transaction, he opens himself to suspicion of maladministration.² A trustee ought not as a rule to invest in second mortgages.³ Trustees ought to invest in government or State securities, or in bonds and mortgages on unincumbered real estate. The rule is not inflexible, but subject to the higher rule that the trustees are always to employ such care and diligence in the trust business as careful men of discretion and intelligence employ in their own affairs.⁴ In Rhode Island, neither statute nor rule of court fixes any special class of investments for trust funds, and trustees are therefore only required to be prudent, having regard to the income and the permanence and safety of the investment.⁵ Any loss occasioned by his negligence he must bear.⁶ It is the duty of trustees having funds for investment to *keep* them invested, and if they retain trust-moneys uninvested beyond a reasonable time, six months being usually allowed, they are *prima facie* liable for interest.⁷ Voluntary investments must not be made by a trustee beyond the jurisdiction of the court having charge of the trust, except in case of necessity for the saving of the fund. If he does so, the investment is at his peril of loss.⁸ Where a trustee invested in a confederate bond which perished on be sustained, and the trustee makes such investments at the peril of being held responsible for the safety of investment. This rule is not inflexible, but the circumstances must be very unusual to justify the exception to it. *Cruiston v. Olcott*, 84 N. Y. 339.

¹ *Emery v. Batchelder*, 78 Me. 233.

² *State v. Roeper*, 82 Mo. 57.

³ *Com'rs of Somerville v. Johnson*, 36 N. J. Eq. 211; *Tuttle v. Gilmore*, id. 617.

⁴ *Mills v. Hoffman*, 26 Hun, 594.

⁵ *Peckham v. Newton*, 15 R. I. 321.

⁶ *Cogbill v. Boyd*, 77 Va. 450.

⁷ *Lent v. Howard*, 89 N. Y. 169.

⁸ *Ormiston v. Olcott*, 84 N. Y. 339.

his hands, he was held not liable, having acted in good faith and with due discretion according to the lights of the time of investing.¹ The test of liability always is whether or no the trustees have acted as prudent men would have acted in the management of their own property.²

§ 453. There is one rule that is universally applicable to investments by trustees, and that rule is, that trustees cannot invest trust-moneys in personal securities. If trustees have a discretion as to the kind of investments, it is not a sound discretion to invest in personal securities.³ Lord Hardwicke said, that "a promissory note is evidence of a debt, but no security for it."⁴ Baron Hothman observed, that "lending on personal credit for the purpose of a larger interest was a species of gaming."⁵ Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it *ought to be rung in the ears* of every one who acted in the character of trustee."⁶

¹ Waller v. Catlett, 83 Va. 200.

² Godfrey v. Faulkner, 23 Ch. D. 483.

³ Walker v. Symonds, 3 Swanst. 62; Darke v. Martyn, 1 Beav. 525; Terry v. Terry, Pr. Ch. 273; Adye v. Feuilliteau, 1 Cox, 24; Vigrass v. Binfield, 3 Madd. 62; Harden v. Parsons, 1 Eden, 149, note (a); Anon. Loftt, 492; Keble v. Thompson, 3 Bro. Ch. 112; Wilkes v. Steward, G. Coop. 6; Clough v. Bond, 3 Myl. & Cr. 496; Pocock v. Reddington, 5 Ves. 799; Collis v. Collis, 2 Sim. 365; Blackwood v. Borrowes, 2 Conn. & Laws. 477; Watts v. Girdleston, 6 Beav. 188; Graves v. Strahan, 8 De G., M. & G. 291; Fowler v. Reynal, 3 Mac. & G. 500; Smith v. Smith, 4 Johns. Ch. 281; Nyce's Est., 5 Watts & S. 245; Soyer's App., 5 Penn. St. 377; Willes's App., 22 id. 330; Gray v. Fox, Saxton, Ch. 259; Harding v. Larned, 4 Allen, 426; Clark v. Garfield, 8 Allen, 427; Moore v. Hamilton, 4 Fla. 112; Spear v. Spear, 9 Rich. Eq. 184; Barney v. Saunders, 16 How. 545, 546. But see Knowlton v. Brady, 17 N. H. 458. Taking notes for a loan without security is negligence, and renders the trustee responsible if the debtor becomes insolvent. Judge of Probate v. Mathes, 60 N. H. 433.

⁴ Walker v. Symonds, 3 Swanst. 81, note (a), citing Ryder v. Bickerton.

⁵ Adye v. Feuilliteau, 1 Cox, 25.

⁶ Holmes v. Dring, 2 Cox. 1; Wynne v. Warren, 2 Heisk. 118; Dunn v. Dunn, 1 S. C. 350. A trustee, investing in personal securities, continues

It makes no difference that there are several joint promisors;¹ nor that the loan is to a person to whom the testator loaned money on his personal promise;² nor will personal sureties justify the loan.³ There must be express authority in the instrument of trust to authorize a loan on personal promises.⁴ Loose, general expressions, leaving the nature of the investments to the trustees, will not justify such loans.⁵ (a) All the terms and conditions of a loan, to be

responsible for them after a transfer to his successor, until they are paid or legally invested. For those that are paid he is relieved from responsibility, although the money may never be received by the trust estate. *In re Foster's Will*, 15 Hun (N. Y.), 387.

¹ *Ibid.*; *Clark v. Garfield*, 8 Allen, 427.

² *Styles v. Guy*, 1 Mac. & G. 423.

³ *Watts v. Girdleston*, 6 Beav. 188.

⁴ *Forbes v. Ross*, 2 Bro. Ch. 430; 2 Cox, 113; *Child v. Child*, 20 Beav. 50.

⁵ *Pocock v. Reddington*, 5 Ves. 799; *Wilkes v. Stewart*, G. Coop. 6; *Mills v. Osborne*, 7 Sim. 30; *Wynne v. Warren*, 2 Heisk. 118.

(a) See 52 & 53 Vict. c. 32, § 3; *Hume v. Lopes*, [1892] A. C. 112; *In re National, &c., Building Society*, 43 Ch. D. 431; *In re Manchester Royal Infirmary*, *id.* 420; *Elve v. Boyton*, [1891] 1 Ch. 500; *In re Owthwaite*, [1891] 3 Ch. 494; *In re Smith*, [1896] 2 Ch. 590; *Peckham v. Newton*, 15 R. I. 321; *Hunt, Appellant*, 141 Mass. 515; *Dickinson, Appellant*, 152 Mass. 184; *Herrick's Estate*, 12 N. Y. S. 105; 14 *id.* 947; *Blauvelt's Estate*, 20 *id.* 119; *Nobles v. Hogg*, 36 S. C. 322; *Howard v. Quattlebaum*, 46 S. C. 95; *Simmons v. Oliver*, 74 Wis. 633; *Durrett v. Com'th*, 90 Ky. 312; *Hite v. Hite*, 93 Ky. 257; *Calloway v. Calloway* (Ky.), 36 S. W. 241; *Brewster v. Demarest*, 48 N. J. Eq. 559; *Dufford v. Smith*, 46 *id.* 216; *Lacoste v. Splivalo*, 64 Cal. 35; 40 Am. Dec. 513-516. A trustee can-

not properly invest the trust funds in speculative real-estate bonds, or in second-mortgage railroad bonds, or in any speculative railroad stocks or bonds, though paying dividends, especially when the railroad is outside the jurisdiction of the courts which pass upon his accounts. *Clark v. Anderson*, 13 Bush, 111; *Gilbert v. Kolb*, 85 Md. 627; *Barker's Estate*, 159 Penn. St. 518; *Dickinson, Appellant*, 152 Mass. 184; *White v. Sherman*, 168 Ill. 589; *McCullough v. McCullough*, 44 N. J. Eq. 313, and note; *Minneapolis Trust Co. v. Menage* (Minn.), 76 N. W. 195.

When a trustee invests in bonds, and pays a premium therefor, he is to make such deduction from the interest as will suffice to make the principal intact when the bonds mature. *New York Life Ins. Co. v.*

made on personal security, must be strictly complied with; as, if a loan is authorized to a husband, upon the written consent of the wife, such consent must be had in the required form;¹ and a subsequent assent will not save the trustees from responsibility.² An authority to loan on personal security will not justify the trustees in lending to one of themselves;³ nor will it justify them in lending to a relation, for the purpose of accommodating him.⁴ (a)

§ 454. So, in the absence of express authority, the employment of trust funds in trade or speculation, or in a manufacturing establishment, will be a gross breach of trust.⁵ (b)

¹ *Cocker v. Quayle*, 1 R. & M. 535; *Pickard v. Anderson*, L. R. 13 Eq. 608; *Forbes v. Ross*, 2 Bro. Ch. 430.

² *Bateman v. Davis*, 3 Madd. 98.

³ *Forbes v. Ross*, 2 Bro. Ch. 430; 2 Cox, 113; — *v. Walker*, 5 Russ. 7; *Stickney v. Sewell*, 1 Myl. & Cr. 814; *Francis v. Francis*, 5 De G., M. & G. 108; *De Jarnette v. De Jarnette*, 41 Ala. 708.

⁴ *Ibid.*; *Langston v. Ollivant*, G. Coop. 33; *Cock v. Goodfellow*, 10 Mod. 489; *Fitzgerald v. Pringle*, 2 Moll. 534.

⁵ *Munch v. Cockerell*, 5 Myl. & Cr. 178; *Kyle v. Barnett*, 17 Ala. 306; *Flagg v. Ely*, 1 Edm. (N. Y.) 206; *King v. Talbott*, 40 N. Y. 96; 50 Barb. 453; *Tucker v. State*, 72 Ind. 242. And parol request by testator to trustee to carry on the business for the benefit of his family is inadmissible to prove authority. *Raynes v. Raynes*, 51 N. H. 201.

Kane, 45 N. Y. S. 543; *In re Hoyt*, 50 id. 623; *New York Life Ins. Co. v. Baker*, 56 id. 618. "If the investment be in securities purchased

at a premium, only such part of the proceeds therefrom can be counted as income as shall leave the fund unimpaired at the maturity of the investment. Consideration should be had for any contingencies in the investment market that are reasonably probable within the life of the life beneficiary." *New York Life Ins. Co. v. Sands*, 53 N. Y. S. 320.

The trustee is not liable personally for loss of the premium paid

on bonds if they are unexpectedly called in. *Cridland's Estate*, 132 Penn. St. 479.

(a) Trustees having a power, with the consent of the tenant for life, to lend on personal securities, may lend on such securities to the tenant for life himself. *In re Laing's Settlement*, [1899] 1 Ch. 593, *contra* *verting* *Levin on Trusts* (10th ed.), 335.

(b) See *Butler v. Butler*, 164 Ill. 171; *Young's Estate*, 97 Iowa. 218; *In re Clary*, 112 Cal. 292; *Wolfort v. Reilly*, 133 Mo. 463; *St. Paul Trust Co. v. Kittson*, 62 Minn.

However advantageous such an investment may appear, the trustee investing the funds in such undertakings will be compelled to make good all losses, and to account for and pay over all profits.¹ The law discourages all such use of trust funds, by rendering it certain that the trustee shall make no profit from such investments, and that he shall be responsible for all losses. And if a trustee stands by, and sees his cotrustee employ the funds in that manner, he will be equally liable.² The same rule applies if the trustees simply continue the trade or business of the testator.³ It is their duty to close up the trade, withdraw the fund, and invest it in proper securities at the earliest convenient moment; and the same rule applies although the trustees may have been the business agents or partners of the testator.⁴ Nor will a power "to place out at interest, or other way of improvement," authorize the employment of the money in a trading concern.⁵ In one case the direction was to "employ" the money, and it was thought that it savored of trade, and might be employed in that manner;⁶ but it would not be safe

¹ *French v. Hobson*, 9 Ves. 103; *Brown v. De Tastet*, Jac. 284; *Cook v. Collingridge*, id. 607; *Crawshay v. Collins*, 15 Ves. 218; 2 Russ. 325; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Docker v. Somes*, 2 Myl. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & Cr. 41; *Martin v. Rayborn*, 42 Ala. 648.

² *Booth v. Booth*, 1 Beav. 125; *Ex parte Heaton*, Buck. 386; *Bates v. Underhill*, 3 Redf. (N. Y.) 365.

³ *Ibid.*; *Kirkman v. Booth*, 11 Beav. 273. In some cases, an executor is bound to complete the contracts of the testator. *Collinson v. Lister*, 20 Beav. 356.

⁴ *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & Cr. 41.

⁵ *Cock v. Goodfellow*, 10 Mod. 489.

⁶ *Dickinson v. Player*, C. P. Coop. 178 (1837, 1838).

408; *Warren v. Union Bank of Rochester*, 157 N. Y. 259. A trustee who uses the trust-money in his own business, or in speculation, is an insurer of the fund and of its productiveness. *Bangor v. Beal*, 85 Maine, 129; *Re Myers*, 131 N. Y. 409; *Ward v. Tinkham*, 65 Mich. 695.

When loss results from an unauthorized investment, the trustee will be required to make it good as against an infant beneficiary, although the securities cannot be returned to him. *Head v. Gould*, [1898] 2 Ch. 250.

for trustees to rely upon that case as an authority, even if their trust instrument contains a similar direction. If the settlor authorize his trustees to continue the fund in a trading firm, it will be a breach of trust, if the trustees allow the fund to remain after a change in the firm, as by the death or withdrawal of one of the partners.¹ If the trustees are directed to continue the testator's trade, they can invest none of his general assets in the business. They are confined to the fund already embarked in the trade.² If the trustees act in good faith in continuing the testator's business under such directions in a will, they will not be liable for any loss;³ but they must act in good faith and without collusion or interested motives. So trustees are not bound to continue the capital in such trade, and they ought not to do so against their judgment.⁴ But if all the *cestuis que trust* are *sui juris*, and capable of acting for themselves, and they desire an executor, administrator, or trustee to continue the business of the testator a few months, in order to preserve it for his son, and the executor acts in accordance with their request, and uses his best skill and judgment in the conduct of the trade, he will be allowed for the loss in his accounts.⁵

§ 455. In England, trustees cannot invest the trust fund in the stock or shares of any bank or private or trading corporation; for the capital depends upon the management of the directors, and is subject to losses.⁶ It is apparent, that a manufacturing or trading corporation may lose its whole capital in the prosecution of its business strictly within the terms of its charter.⁷ Lord Eldon said of bank stock, that

¹ Cummins v. Cummins, 3 Jo. & Lat. 64; 8 Ir. Eq. 723.

² McNeille v. Acton, 4 De G., M. & G. 563; 17 Jur. 104. And the court will keep separate the trade property, and apply it exclusively to the purposes of the trade. Owen v. Delamere, 15 Eq. Cas. 139; *Ex parte* Richardson, 3 Madd. 138; *Ex parte* Garland, 10 Ves. 120.

³ Paddon v. Richardson, 7 De G., M. & G. 563.

⁴ Murray v. Glasse, 23 L. J. Ch. 124.

⁵ Poole v. Munday, 103 Mass. 174.

⁶ Haynes v. Redington, 1 Jo. & Lat. 589; 7 Ir. Eq. 405; Clough v. Bond, 3 Myl. & Cr. 496; Powell v. Cleaver, 7 Ves. 142, n.

⁷ Trafford v. Boehm, 3 Atk. 440; Mills v. Mills, 7 Sim. 501; Hancorn

"it is as safe, I trust and believe, as any government security; but it is not government security, and therefore this court does not lay out or leave property in bank stock, and what this court will decree it expects from trustees and executors."¹ By Lord St. Leonards' Act, 22 & 23 Vict. 35, trustees, not forbidden by the instrument of trust, are authorized to invest in Bank of England or Ireland or East India stock. This act was held not to authorize an investment in these stocks of trust funds settled before the passage of the act.² By 23 & 24 Vict. c. 38, the original act was made retrospective, and the courts of chancery were authorized to issue general orders, from time to time, as to the investment of funds subject to its jurisdiction, either in three per cent consolidated or reduced, or new bank annuities, or in such other stocks, funds, or securities as the court shall think fit; and trustees, having power to invest trust funds in government securities, or upon railway stocks, funds, or securities, may invest in the stocks, funds, or securities which may be designated by the general order of the court. In pursuance of the statute, a general order was issued in 1861, as follows: "Cash under the control of the court may be invested in bank stock, East India stock, exchequer bills, and £2 10s. annuities, and upon freehold and copyhold estates, respectively in England and Wales, as well as in consolidated £3 per cent annuities, reduced £3 per cent annuities, and new £3 per cent annuities." There are also provisions in the act by which trustees may apply to the court for leave to change their investments into those now allowed by the act and the court; but the act does not apply where the fund is settled specifically and there is no power of varying the

v. Allen, 2 Dick. 499, n.; 7 Bro. P. C. 375; *Emelie v. Emelie*, id. 259; *Peat v. Crane*, 2 Dick. 499, n.; *Clough v. Bond*, 3 Myl. & Cr. 496.

¹ *Howe v. Dartmouth*, 7 Ves. 150; *Band v. Fardell*, 7 De G., M. & G. 633; *King v. Talbott*, 40 N. Y. 86.

² *Re Miles's Will*, 5 Jur. (N. S.) 1266; *Dodson v. Sammell*, 6 Jur. (N. S.) 137; 1 Dr. & Sm. 575. The Vice-Chancellor held the other way in *Page v. Bennett*, 2 Gif. 117; *Simson's Trusts*, 1 John. & H. 89; *Mortimer v. Picton*, 4 De G., J. & S. 166, 179.

securities.¹ Courts may give directions as to investments by trustees by decrees in particular suits, or by the promulgation of general orders or rules of court.² (a) It is said that the public policy in England of compelling trustees to invest trust funds in government funds originated largely in the necessities of the government, and the public advantage of creating a market and demand for government securities.³

§ 456. The English rule, in relation to investments of trust funds in bank stock and shares in trading and manufacturing corporations, prevails in New York and Pennsylvania.⁴ It is agreed, that trustees cannot invest trust funds in trade, nor directly in manufacturing, nor in business generally, nor in personal securities, unless there is an authority contained in the instrument of trust. The reasoning is, that trustees cannot use the trust fund in carrying on a private manufacturing establishment, nor in the business of private bankers, nor in underwriting, nor in trade and commerce, and that there is no difference in principle between carrying on such enterprises themselves with the trust fund, or lending it to other individuals to do so on their personal security, and buying shares or stocks in such business corporations carried on by other private individuals, or by the trustees themselves, as officers or agents. Perhaps these are the only States in which the strict English rule is holden. In Maryland, investments in bank stock, gas stock, etc., are good.⁵ In Massachusetts, it is held that trustees may invest in bank stocks, and in the shares of manufacturing and insurance

¹ Ward's Settlement, 2 John. & H. 191; *Ex parte* Great No. Ry. Co., L. R. 9 Eq. 274; *In re* Wilkinson, id. 343.

² *Wheeler v. Perry*, 18 N. H. 307.

³ *Brown v. Wright*, 39 Ga. 96.

⁴ *Ackerman v. Emott*, 4 Barb. 626; *Hemphill's App.*, 18 Penn. St. 303; *Worrall's App.*, 22 id. 44; *Morris v. Wallace*, 3 id. 319; *Nyce's Est.*, 5 Watts & S. 254.

⁵ *McCoy v. Horwitz*, 62 Md. 183.

(a) *Stouffer v. Clagett* (Md.), 32 Miss. 213; *Drake v. Crane*, 127 Mo. Atl. 284; *Merritt v. Merritt*, 48 N. 85; 1 Ames on Trusts (2d ed.), J. Eq. 1; *West v. Robertson*, 67 491, n.

corporations,¹ or in the notes of individuals secured by such stocks and shares as collateral security,² or in certificates of deposit issued by a National Bank.³ The court justifies this rule in an elaborate opinion, affirming that such stocks are subject to no greater fluctuations than government securities; that they are as safe as real securities, which may depreciate in value, or the title fail; that claims against such corporations can be enforced at law,⁴ while government funds can only be enforced by supplicating the sovereign power; and that government securities have hitherto been so limited in amount that it was impossible for the trust funds of the country to be invested in that manner. The last reason no longer exists. There are now national, state, county, town, and city bonds in sufficient amounts to absorb all trust funds seeking investment, and it is not to be denied that such investments are more permanent and safe. It may be admitted, that great public emergencies and national dangers have an unfavorable effect upon the value of public securities; but such emergencies and dangers have the same effect upon the stocks of private corporations. In addition to these depressing influences, the capital of such companies runs the risks and chances of trade, business, and speculation. Calamities that depress public credit seldom occur, while the risks of trade are constant. It would seem to be the wiser course to withdraw the funds, settled for the support of women, children, and other parties who cannot exercise an active discretion in the protection of their interests, as much as possible from the chances of business. It

¹ *Harvard Coll. v. Amory*, 9 Pick. 446.

² *Lovell v. Minot*, 20 Pick. 116; *Brown v. French*, 125 Mass. 410.

³ *Hunt, Appellant*, 141 Mass. 515, 523.

⁴ It is said that loans by the city of Boston always command a higher premium in the market than the loans of the Commonwealth. The difference in part is said to be that the city of Boston can be sued upon its contracts, and a judgment against it can be satisfied by seizing, upon an execution, any property of any citizen within the municipal limits; while no suit can be maintained against the State, but everything depends upon the good faith and honor of the legislature in supplying the means of payment.

may be said, that settlors may always do this by directing in what manner the funds settled by them shall be invested. But it would seem to be wiser for the court to establish the safest rule in the absence of special directions, and leave it to the settlor, if he prefers, to direct a less safe investment.¹

¹ A large number of cases have been adjudged in the late confederate States, involving the legality of investments by trustees in the bonds and securities of the confederacy. No new principles have been so established that it is necessary to alter the text; but for convenience the principal cases are noted in this place. Under § 34 of the act of Nov. 9, 1861, of Alabama, which authorized trustees to invest in confederate bonds, or to receive payment in confederate notes, it was held that trustees were justified in making such investments previous to the re-establishment of the authority of the United States. *Watson v. Stone*, 40 Ala. 451; *Dockey v. McDowell*, 41 Ala. 476. But a guardian was held liable to account for the cash in full, who received payment in confederate notes after the re-establishment of such authority. Where a trustee procured an *ex parte* order to invest in confederate bonds, he was held liable for the loss. *Snelling v. McCreary*, 14 Rich. Eq. 291. Where a trustee received payment of a debt due to the trust fund, in the currency in common use, and reinvested it in securities which became worthless by the result of the war, he was not held liable for the loss. *Campbell v. Miller*, 38 Ga. 304. To the same effect is *Brown v. Wright*, 39 Ga. 96, which contains an able statement of the policy of the English government in directing trust funds to be invested in public securities.

In Virginia, commissioners who collected money by order of the court in confederate notes, and held a balance subject to contested liens until it became worthless, were held not liable for the loss. *Davis v. Harman*, 21 Grat. 200. And substantially the same rule was held in *Dixon v. McCue*, 21 Grat. 374. In *Morgan v. Otey*, 21 Grat. 619, it was held that payments should be made in the currency of the day. See *Kraken v. Shields*, 20 Grat. 377. In *Walker v. Page*, 21 Grat. 637, it was held that a sale of infant's lands for confederate money was valid at the time it was made, and that further development of events did not vitiate it. In *Myers v. Zetelle*, 21 Grat. 733, it was held that an agent or trustee who in *good faith* sold property, and invested the proceeds in confederate securities, at a time when no other investments were open to him, was protected from loss. And see *Bird v. Bird*, 21 Grat. 711; *Beery v. Irick*, 22 Grat. 614; *Campbell v. Campbell*, *id.* 619; *Colrane v. Worrel*, 30 Grat. 434.

In *State v. Simpson*, 65 N. C. 497, it was held that a guardian who collected in money which was well secured to his ward, and invested the same in confederate bonds, was guilty of *laches*, and was liable for the loss. See *Alexander v. Summey*, 66 N. C. 578. An agent or trustee is

§ 457. The power to lend on mortgage was doubted or denied, until Lord St. Leonard's act, unless there was an express power in the instrument of trust, or a decree of the court. Lord Harcourt, Lord Hardwicke, and Lord Alvanley appeared to have thought that a trustee or executor might invest the money in *well-secured real estates*.¹ But Lord Thurlow said, that in *latter* times the court had considered it improper to invest any part of a lunatic's estate upon private security.² Sir John Leach refused to allow an infant's money to be invested in that manner, and expressed surprise that any precedent could be found to the contrary.³ In a late case, the trustees invested in mortgages at the request

authorized to receive payment of debts in the currency received by prudent business men for similar purposes. *Baird v. Hall*, 67 N. C. 230. See *Wooten v. Sherrard*, 68 N. C. 334.

In *Creighton v. Pringle*, 3 S. C. 78, a trustee was held guilty of a breach of trust in investing in confederate bonds. *Cureton v. Watson*, 3 S. C. 451. But see *Hinton v. Kennedy*, *id.* 459.

If a trustee, acting in *good faith*, receive funds in bank-notes which are depreciated, he will be protected if such notes were the only money attainable. *Barker v. McAuley*, 4 Heisk. 424.

When a trustee kept the identical money received by him, he was allowed to turn it over to the person entitled to receive it, without loss to himself; but if he has not kept it, he will be charged with the nominal sums collected by him. *Saunders v. Gregory*, 3 Heisk. 507.

In Texas, trustees could not receive confederate money in discharge of obligations to them. *Turner v. Turner*, 36 Tex. 41. And see *Scott v. Atchison*, *id.* 76; *Kleberg v. Bond*, 31 Tex. 611; *Woods v. Toombs*, 36 Tex. 85; *Turpin v. Sanson*, *id.* 142; *McGar v. Nixon*, *id.* 289; *Lacey v. Clements*, *id.* 661.

In the Supreme Court of the United States payment to an agent or trustee in anything but lawful money of the United States, or bank notes of the current value of their face, is held invalid. *Ward v. Smith*, 7 Wall. 451; *Horn v. Lockhart*, 17 Wall. 570; *McBurney v. Carson*, 99 U. S. 567.

¹ *Brown v. Litton*, 1 P. Wms. 141; *Lyse v. Kingdon*, 1 Coll. 188; *Knight v. Plymouth*, 1 Dick. 126; *Pocock v. Reddington*, 5 Ves. 800.

² *Ex parte Calthorpe*, 1 Cox, 182; *Ex parte Ellice*, Jac. 234.

³ *Norbury v. Norbury*, 4 Madd. 191; *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Fust*, 1 C. P. Coop. (t. Cott.) 157, n. (e); *Ex parte Franklin*, 1 De G. & Sm. 531; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgway*, 1 Hog. 309.

of the tenant for life, and to procure a higher rate of interest, and they were held liable for the loss; but the case did not go to the full extent of deciding that trustees could not invest on *real securities*, for the reason that they had consulted the interests of the tenant for life, at the expense of those of the remainder-man, but the court did not favor mortgages.¹ If trustees are directed to invest in public funds, of course they cannot invest in mortgages.² Previous to the acts before mentioned,³ courts did not sanction mortgages;⁴ but the practice is now relaxed, and a loan upon freeholds of inheritance to the extent of two-thirds of their value may be allowed.⁵ But the rule of two-thirds is not inflexible. It may be improper to loan even two-thirds of the present value; as, where the value depends upon the chances of trade or business, and where the property consists of houses liable to deterioration.⁶ (a) So it may not be a breach of trust under

¹ *Raby v. Ridehalgh*, 7 De G., M. & G. 108.

² *Pride v. Fooks*, 2 Beav. 430; *Waring v. Waring*, 3 Ir. Ch. 331.

³ *Ante*, § 455.

⁴ *Barry v. Marriott*, 2 De G. & Sm. 491; *Ex parte Franklyn*, 1 De G. & Sm. 531.

⁵ *Stickney v. Sewell*, 1 Myl. & Cr. 8; *Norris v. Wright*, 14 Beav. 307; *Macleod v. Annesly*, 16 Beav. 600.

⁶ *Ibid.*; *Phillipson v. Gatty*, 7 Hare, 16; *Drosier v. Brereton*, 15 Beav. 221; *Stretton v. Ashmall*, 3 Dr. 9; 3 De G. 26; L. J. Ch. 277; *Farrar v. Barraclough*, 2 Sm. & Gif. 231.

(a) See *Rae v. Meek*, 14 A.C. 558; *In Re Somerset*, [1894] 1 Ch. 231; 68 L. T. 613, *Kekewich, J.*, referring to *Speight v. Gaunt*, 9 A. C. 1, and *Learoyd v. Whiteley*, 12 id. 727, said in substance: When there is no actual breach of trust, trustees are simply judged by the rule that they are to exercise ordinary care and prudence in the discharge of their duties. Their liability, as regards any particular transaction, is not increased by reason of the fact that one of their number is skilled in the business with which the transaction is concerned. As re-

certain circumstances to loan more than two-thirds.¹ Trustees ought not to lend on a second mortgage, though it might not be a breach of trust in all cases to do so;² and so they ought to have a power of sale inserted in the deed, although it might not be a breach of trust to neglect it.³

§ 458. There can be no doubt that mortgages on real estate are considered proper investments in the United States, and perhaps they are the only investments which are not objectionable in some one of the States. In the absence of public funds to an amount hitherto sufficient to absorb the money to be invested by trustees, different rules have been established in the several States, but mortgages upon estates of inheritance, taken with proper caution as to the amount and the title, have been named in all the States as proper and safe investments; so that the question in the United States is whether the security is in fact what it is called, security upon real estate. A loan to a company owning coal lands and a canal, to a much greater value than its debts, the interest on the loan being a preferred claim upon the income, was held to be substantially on real estate;⁴ but an investment in the stock of a similar company, which stock was not preferred, was held to be a breach of trust.⁵ An investment in railway bonds, secured

¹ *Jones v. Lewis*, 3 De G. & Sm. 471. This case was reversed on appeal. See *Lewin on Trusts*, 263 (5th ed.).

² *Norris v. Wright*, 14 Beav. 291; *Drosier v. Brereton*, 15 Beav. 221; *Robinson v. Robinson*, 11 Beav. 371; 1 De G., M. & G. 247; *Waring v. Waring*, 3 Ir. Eq. 337; *Lockhart v. Reilly*, 1 De G. & J. 476; *Nance v. Nance*, 1 S. C. 209.

³ *Farrar v. Barraclough*, 2 Sm. & Gif. 231.

⁴ *Twaddell's App.*, 5 Penn. St. 15.

⁵ *Worrall's App.*, 21 Penn. St. 508.

gards investments on mortgages, it is the duty of the trustees to decide, and to exercise their own judgment, as to the sufficiency of the securities, even though a surveyor, solicitor, or other trusted agent, has expressed to them his opinion on the subject.

There is no absolute rule respecting the choice of securities falling within the strict limits of authorized investments, or the amount proper to be advanced against any particular security. See also *In re Westerfield*, 53 N. Y. S. 25.

by a mortgage of the road-bed, franchise, and other property, is not real security, though real estate is covered by the mortgage; for the method of enforcing such a bond is very different from the ordinary manner of foreclosing a mortgage, and whether such a bond can be enforced at all depends upon the concurrent will of so many bondholders, that, at best, it is only nominal real estate.¹ London Dock stock and sewer bonds are not real security.² It is not a breach of trust to leave funds in turnpike bonds, secured by a mortgage of the tolls and real estate of the company, as they had been invested by the testator.³ Under the right of the trustees to invest trust funds in real securities, they cannot convert the funds into real estate by taking the legal title absolutely to themselves in trust; and if they do so, the *cestui que trust* may elect to take the land, or the trust-money and interest;⁴ though a direction to invest in *productive real estate* was held to justify the purchase of dwelling-houses, or the purchase of a right of dower in order to render the property more productive.⁵ If a testator has already invested in mortgages, a trustee may make such further advances of money as are necessary to secure the first investment. No general rule can be stated; but the trustee in

¹ *Mant v. Leith*, 15 Beav. 524; *Allen v. Gaillard*, 3 S. C. 279. It is not sufficient for a trustee to say, in defence of an investment, that it is on real security. There are other things to be considered, the nature of the property and other matters. The property, though sufficient, may be involved in litigation. *Per* Master of Rolls in *Mant v. Leith*.

² *Robinson v. Robinson*, 11 Beav. 371.

³ *Robinson v. Robinson*, 21 L. J. Ch. 111; 1 De G., M. & G. 247; *Milner v. Proctor*, 20 Ohio St. 444.

⁴ *Mathews v. Heyward*, 2 S. C. 239; *Ouseley v. Anstruther*, 10 Beav. 456; *Royer's App.*, 11 Pa. St. 36; *Kaufman v. Crawford*, 9 Watts & S. 131; *Bonsall's App.*, 1 Rawle, 273; *Bellington's App.*, 3 Rawle, 55; *Ringgold v. Ringgold*, 1 H. & G. 11; *Morton v. Adams*, 1 Strob. Eq. 72; *Heth v. Richmond, &c. Co.*, 4 Grat. 482; *Eckford v. De Kay*, 8 Paige, 89; *Winchelsea v. Nordcliffe*, 1 Vern. 134. And if a mortgage is given back, the mortgagor, if he have notice of the misapplication of the trust fund, cannot enforce his mortgage until the fund has first been replaced. *Mathews v. Heyward*, 2 S. C. 239.

⁵ *Parsons v. Winslow*, 16 Mass. 368.

such case must make a careful investigation and exercise a sound discretion, or his advances will not be allowed in case of a loss.¹ And so a guardian, in case of a grave emergency, may buy in land for the minor to save a certain loss;² so an administrator may buy in the land of a debtor to his estate to save the debt.³ Such an investment is a mere temporary expedient, and is to be treated as personal estate.⁴ A loan of trust funds on real mortgage does not change the character of the funds, nor constitute an investment in real estate.⁵ The court may order an investment of accumulations, or of the principal fund temporarily in real estate, with a declaration that it shall continue personalty;⁶ and so a court may order an investment in real estate generally, where no other way is pointed out in the trust instrument.⁷ Where a trustee or guardian is obliged to take land subject to a mortgage, the trustee becomes personally liable to pay off the mortgage, to protect the interest of the *cestui que trust*. In such case, the guardian or trustee may have the possession of the estate or the management of the trust fund, in order to secure himself for the advancement so made.⁸ But there must be an urgent necessity to justify such a proceeding. If a trustee is authorized to invest in real estate, stock, or securities, he cannot mortgage the trust fund in order to raise money to invest in such manner, nor invest in machinery for the use of the *cestui que trust*.⁹ In all cases the trustee ought to exercise high diligence in ascertaining the valuation, situation, condition, and productiveness of the real estate or other property upon which it is proposed to make a loan of the trust-money; for he will be

¹ Collinson v. Lister, 20 Beav. 356.

² Bonsall's App., 1 Rawle, 273; Royer's App., 11 Penn. St. 36.

³ Bellington's App., 3 Rawle, 55.

⁴ Oeslager v. Fisher, 2 Penn. St. 467.

⁵ Milhous v. Dunham, 78 Ala. 48.

⁶ Webb v. Shaftesbury, 6 Madd. 100.

⁷ Ex parte Calmes, 1 Hill, Eq. 112.

⁸ Woodward's App., 38 Penn. St. 322.

⁹ Rider v. Sisson, 7 R. I. 341.

liable for the loss if he is guilty of any negligence in this respect.¹

§ 459. In a few States, there are statutes authorizing trustees to invest in a particular manner, and excusing them from responsibility if their investments are made in good faith in the prescribed securities. (a) Thus in Pennsylvania,² an executor, guardian, or trustee may apply to the Orphans' Court, and the court may direct an investment in the stocks or public debt of the United States, of the State, or of the city of Philadelphia, or in real securities, or in the stock of the incorporated districts of Philadelphia County, of Pittsburgh and Alleghany, and the water-works of Kensington, Philadelphia County. But it has been held that trustees are not confined to these funds; that the acts are for their benefit; that they can elect other kinds of investment, but will be responsible for losses.³ In New York, there does not appear to be any legislation on the subject; but trustees are bound by the rules of the court to invest in real securities, or government bonds, or in the State loan, or in loans of the New York Life Insurance and Trust Company.⁴ In New Jersey, a statute authorized an investment to be made upon an application to the court, but does not establish any particular funds. (b) In *Gray v. Fox*, the court lay down the rule that investments must be made in government stocks,

¹ *Budge v. Gummon*, L. R. 7 Ch. 721; *Smethurst v. Hastings*, 30 Ch. D. 490; *Olive v. Westerman*, 34 Ch. D. 70; *Whiteley v. Learoyd*, 33 Ch. D. 347.

² Acts 1832, 1838, 1850, 1852.

³ *Barton's Est.*, 1 Pars. Eq. 24; *Worrall's App.*, 9 Barr, 108; *Twaddell's App.*, 5 Penn. St. 15.

⁴ *Ackerman v. Emott*, 4 Barb. 626; and see *Smith v. Smith*, 4 Johns. Ch. 281, 445; *King v. Talbott*, 40 N. Y. 86, 97. This case contains a full discussion of the law in New York. *Hun v. Cary*, 82 N. Y. 65.

(a) See these statutes collected in *Loring's Trustee Handbook*, 100; Eq. 416. In North Carolina, see 1 Ames on Trusts (2d ed.), 486, n.; *Watson v. Holden*, 115 N. C. 36. and 9 L. R. A. 279, 280, n.

or in real security.¹ In Maryland, there is neither statute nor rule of court to guide the trustees. The courts do not approve of changes in investments, unless express power is given in the instrument of trust; as where a testator gave certain stocks in trust without direction to vary the security, and the trustee disposed of the stocks and invested the money in other securities, he was ordered to replace the entire sum in the same stocks, although the number of shares were increased by the change.² In Maine, New Hampshire, Vermont, Michigan, and Missouri, the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out.³ If trustees invest according to the direction of the courts, they are not responsible for any loss. In Georgia, if trustees invest in the stocks, bonds, or other securities, issued by their own State, or in such other securities as shall be ordered by the court, they will be exempt from loss.⁴ In Mississippi, an investment in bank stocks is allowed.⁵ In States where there are no statutes nor rules of court regulating investments, trustees are bound to act in good faith and with a sound discretion in investing trust-money; and if they so act they are not responsible for any loss that may happen,⁶ but to invest in mere personal securities is not a sound discre-

¹ *Gray v. Fox*, Saxton, 259; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Corliss v. Corliss*, id.

² *Murray v. Feinour*, 2 Md. Ch. 418; *Evans v. Iglehart*, 6 Gill & J. 192; *Gray v. Lynch*, 8 Gill, 405; *Hammond v. Hammond*, 2 Bland, 306.

³ *Knowlton v. Brady*, 17 N. H. 458. It is impossible to cite the statutes of all the States. Practising attorneys will of course know the legislation of their own States.

⁴ Ga. Rev. Code, § 320; *Brown v. Wright*, 39 Ga. 96.

⁵ *Smyth v. Burns*, 25 Miss. 422. These rules and regulations are established for the protection of trustees: so long as they in good faith confine their investments to those allowed by law, they are protected from loss. *Stanley's App.*, 8 Penn. St. 432; *Twaddell's App.*, 9 id. 108; *Seidler's Est.*, 5 Phila. 85; *Barton's Est.*, 1 Pars. Eq. 24; *Johnson's App.*, 43 Penn. St. 431; *Morris v. Wallace*, 3 id. 319; *McCahan's App.*, 7 id. 56; *Hemphill's App.*, 18 id. 303; *Rush's Est.*, 12 id. 378; *Nyce's Est.*, 5 Watts & S. 254.

⁶ *Clark v. Garfield*, 8 Allen, 427.

tion anywhere.¹ Nor is it a sound discretion for trustees to subscribe trust funds to new enterprises, as for the stock of new manufacturing, insurance, or railroad corporations, when the undertaking must, in the nature of things, be experimental; and it will not excuse the trustee that he subscribes his own money to such enterprises, as it is permitted to him to speculate with his own money if he sees fit.²

§ 460. The instrument of trust frequently contains directions respecting the investment of the trust funds. If the directions are so general that they do not point to any particular class or classes of investments, the trustees must invest in those securities that are sanctioned by the court; as, if the trust is to invest in "good and sufficient security," the court will sanction no security not allowed by its rules and orders.³ (a) If the trustee is to invest at his "discretion," he cannot invest in personal securities.⁴ (b) The powers and

¹ *Ante*, § 453.

² *Kimball v. Reading*, 31 N. H. 352; *Ihmsen's App.*, 43 Penn. St. 471.

³ *Booth v. Booth*, 1 Beav. 125; *Trafford v. Boehm*, 3 Atk. 440; *De Manneville v. Crompton*, 1 V. & B. 259; *Wilkes v. Steward*, Coop. 6; *Ryder v. Bickerton*, 3 Swanst. 80, n.; *Nance v. Nance*, 1 S. C. 209; *Womack v. Austin*, *id.* 421.

⁴ *Ibid.*; *Pocock v. Reddington*, 5 Ves. 794; *Wormley v. Wormley*, 8 Wheat. 421; 1 Brock. 339; *Langston v. Ollivant*, Coop. 33.

(a) See *Bartol's Estate*, 182 Penn. St. 407; *Seldner v. McCreery*, 75 Md. 287; *Clark v. Clark*, 50 N. Y. S. 1041.

(b) A power given by will to trustees of the residuary estate to invest "in such stocks, funds, and securities as they shall think fit," means "shall honestly think fit." *In re Smith*, [1896] 1 Ch. 71; *Murphy v. Doyle*, 29 L. R. Ir. 333.

Under the English Judicial Trustees Act of 1896 (59 & 60 Vict. c. 35), § 3, a trustee who seeks relief from liability for loss on invest-

ments has the burden of proof to show that he acted, not only honestly, but also in a reasonable way. *Re Stuart*, 46 W. R. 41; *Re Barker*, *id.* 296.

A trustee who is given discretion as to the management and investment of the trust estate, or to continue a testator's investments or business, is still bound to observe the established rules as to the investment of trust funds. *Mattocks v. Moulton*, 84 Maine, 545; *Caspari v. Cutcheon*, 110 Mich. 86; *In re Tucker*, [1894] 1 Ch. 724; *In re Earl*,

directions given in the instrument must be strictly followed;¹ thus a power to invest in bank stocks or lots of land will not authorize an investment in the loan of the United States.² A power to loan on *real securities* does not justify a loan upon railroad bonds secured by mortgage of the road;³ nor does a power to loan upon mortgage authorize an investment in railroad mortgage bonds.⁴ A power to invest in "good and sufficient securities in Virginia and Maryland," authorizes a loan upon town securities.⁵ A direction to invest "in any public stocks or securities bearing an interest," embraces a coal and navigation company, that being within the popular meaning of the testator.⁶ If there is a direction to invest trust funds in real securities in a foreign jurisdiction, the court will allow the investment;⁷ but if no such power is given, such investment will not be allowed.⁸ Where trustees were authorized in their discretion to invest in a dwelling-house for the daughter of the testator, and she was married and went to reside in a foreign jurisdiction, it was held, that they might invest in a dwelling-house at the place of her residence, although it was in a foreign jurisdiction.⁹

¹ *Wood v. Wood*, 5 Paige, 596; *Burrill v. Sheil*, 2 Barb. 457; *Womack v. Austin*, 1 S. C. 421; *Sanders v. Rogers*, id. 452; *Ihmsen's App.*, 43 Penn. St. 471.

² *Banister v. McKenzie*, 6 Munf. 447.

³ *Mortimore v. Mortimore*, 4 De G. & J. 472; *Mant v. Leith*, 15 Beav. 525; *Harris v. Harris*, 29 Beav. 107; *King v. Talbott*, 50 Barb. 453; 40 N. Y. 86; *Allen v. Gaillard*, 1 S. C. 279; *Bromley v. Kelly*, 39 L. J. Ch. 274.

⁴ *Ibid.*

⁵ *McCall v. Peachy*, 3 Munf. 288. But if such securities are greatly depreciated, it would be a breach of trust to invest in them. *Trustees, &c. v. Clay*, 2 B. Mon. 386.

⁶ *Rush's Est.*, 12 Penn. St. 375. See *Hemphill's App.*, 18 Penn. St. 303.

⁷ *Burrill v. Sheil*, 2 Barb. 457.

⁸ *Rush's App.*, 12 Penn. St. 375.

⁹ *Amory v. Green*, 13 Allen, 413.

39 W. R. 107; *In re Kavanagh*, 27 61 Conn. 87; *Jones v. Jones*, 86 Va. L. R. Ir. 495; *Stewart v. Parnell*, 845.

147 Penn. St. 523; *Clark v. Beers*,

But where they were authorized to invest in bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country, they were not allowed to invest in railway bonds, though guaranteed by a foreign government.¹ As before stated, all these powers are strictly construed; as, if the trustees are authorized to loan £3000 on personal securities, and they lend £5000, it is a breach of trust;² and if the power is to loan on bond, they cannot loan on a promissory note.³ If the trustees may loan the trust fund to the husband, with the consent of the wife, they cannot allow the loan to continue if the husband becomes bankrupt; and they will be guilty of a breach of trust, if they do not use due diligence in calling in the loan, or in collecting such dividends as may be coming. An entire change of circumstances may change their duty, although the wife may still desire that her husband should have the use of the money.⁴ Generally, where the trustees are required to invest the fund in a particular manner, with the approbation of any person, such requirement becomes imperative upon the request of such person.⁵ (a) So, if any formalities are prescribed as to the investment, they must be strictly complied with; as, where the written consent of a wife is a prerequisite to a loan to her husband, a verbal consent will not relieve the trustees from the consequences of a breach of trust, if they act on such verbal consent.⁶ A subsequent consent is not sufficient

¹ *In re Langdale's Settlement, Trust*, L. R. 10 Eq. 39.

² *Payne v. Collier*, 1 Ves. Jr. 170.

³ *Greenwood v. Wakeford*, 1 Beav. 576.

⁴ *Wiles v. Gresham*, 2 Drew. 258; 24 L. J. Ch. 264; *Langston v. Ollivant*, Coop. 33; and see *Boss v. Goodsall*, 1 N. C. C. 617; *Burt v. Ingram*, *Lewin on Trusts*, 339 (4th ed.).

⁵ *Cadogan v. Essex*, 2 Dr. 227; *McIntire v. Zanesville*, 17 Ohio St. 352.

⁶ *Cocker v. Quayle*, 1 R. & M. 535; *Hopkins v. Myall*, 2 R. & M. 86; *Kellaway v. Johnson*, 5 Beav. 319.

(a) A discretionary power to appoint to invest, confided to named trustees, is a personal power, and does not pass to the trustees' successors, when a contrary intention does not appear. *Lowe v. Convention*, 83 Md. 409; *Blakely, Petitioner*, 19 R. I. 324.

where a previous consent was contemplated;¹ nor is it enough for a wife to join the husband in a petition for an order that a loan be made to him.² If the trustees go beyond the prescribed limits, neither good faith nor care nor diligence, if they can accompany a departure from the direction of the instrument of trust, will protect them if a loss occurs.³ If it is impossible for them to invest according to the directions, they must invest in the securities prescribed by the law or by the court, or in the safest class of securities.⁴

§ 461. A direction to invest in good freehold security must be strictly complied with;⁵ an authority to invest in ground rents authorizes an investment in redeemable ground rents, that being the kind of ground rent in the place where the investment is to be made;⁶ a power to invest in good private security does not authorize the trustees to use the funds themselves.⁷ Where stock is settled on a husband and wife for life, with remainder to the children, with a power to vary the securities for greater interest, the trustees cannot purchase an annuity for one of the tenants for life.⁸ If, however, the existing securities are unsafe, and it is proper to call in the money and reinvest it, trustees may make a temporary investment in safe funds until an investment can be advantageously made in the securities directed by the testator.⁹ If the direction is to invest in land or any other

¹ *Bateman v. Davis*, 3 Madd. 98; *Adams v. Broke*, 1 N. C. C. 627.

² *Norris v. Wright*, 14 Beav. 291; *Fitzgerald v. Pringle*, 2 Moll. 534; *Dunne v. Dunne*, 1 S. C. 350.

³ *Ackerman v. Emott*, 4 Barb. 626; *Spring's App.*, 71 Penn. St. 11; *Ringgold v. Ringgold*, 1 H. & G. 25; *Cloud v. Bond*, 3 Myl. & Cr. 490.

⁴ *McIntire v. Zanesville*, 17 Ohio, 352.

⁵ *Wyatt v. Wallace*, 8 Jur. 117; 1 Coop. 155, n.

⁶ *Ex parte Huff*, 2 Barr, 227.

⁷ *Westover v. Chapman*, 1 Col. C. C. 177; *Forbes v. Ross*, 2 Bro. Ch. 430; 2 Cox, 113; *ante*, § 453.

⁸ *Fitzgerald v. Pringle*, 2 Moll. 534.

⁹ *Sowerby v. Clayton*, 3 Hare, 430; 8 Jur. 597; *Mathews v. Brice*, 6 Beav. 329; *Ex parte Chaplin*, 3 Y. & C. 397; *Knott v. Cottee*, 6 Beav. 77; *Brownley v. Kelly*, 39 L. J. Ch. 272.

security, it will be implied that the settlor intended the investment to be made in land if it could be done advantageously, and the alternative part of the direction is to be followed only in case an investment cannot be made in land; and this construction will be followed unless there is some other controlling consideration in the instrument.¹ And if trustees are authorized to lend on mortgage to *three persons*, they cannot lend to *two* of them, although they get the entire interest in the estate; nor can they lend to the *three* without the mortgage at the time, although they get the security in two years after. It is no excuse to say that the delay did not occasion the loss. The conclusive answer is, that they committed a breach of trust in not obeying the power, and they must make good the loss.² And so trustees cannot let money on a mortgage to one of themselves.³ Under a power to loan on mortgage they may continue existing mortgages, if safe.⁴

§ 462. A trustee must invest the trust funds in his hands, in the manner directed, within a *reasonable time*, although no direction is given in the deed or will as to the time or manner of investment. If he neglects for an unreasonable time to make the investment, he may be charged with interest; and if any loss or damage occurs to the *cestui que trust* from the delay, the trustee must make it up.⁵ (a) What

¹ Earlom v. Saunders, Amb. 340; Cookson v. Reay, 5 Beav. 32; Cowley v. Hartstonge, 1 Dow, 361; Hereford v. Ravenhill, 5 Beav. 51; Fowler v. Reynal, 3 Mac. & G. 500; 2 De G. & Sm. 749.

² Earlom v. Saunders, Amb. 340; Cookson v. Reay, 5 Beav. 32; Cowley v. Hartstonge, 1 Dow, 361; Hereford v. Ravenhill, 5 Beav. 51; Fowler v. Reynal, 3 Mac. & G. 500; 2 De G. & Sm. 749.

³ Stickney v. Sewell, 1 Myl. & Cr. 8; — v. Walker, 5 Russ. 7; Fletcher v. Green, 33 Beav. 426; Francis v. Francis, 5 De G., M. & G. 108; Crosskill v. Bower, 32 Beav. 86; De Jarnette v. De Jarnette, 41 Ala. 708.

⁴ Angerstein v. Martin, T. & R. 239; Ames v. Parkinson, 7 Beav. 379.

⁵ Lyse v. Kingdom, 1 Coll. 181; Bates v. Scales, 12 Ves. 402; Ryder v. Bickerton, 3 Swanst. 80; Trafford v. Boehm, 3 Atk. 440; Lomax v.

(a) See Merkel's Estate, 131 tate, 135 id. 585; Whitecar's Estate, Penn. St. 584; Stambaugh's Estate, 147 id. 368; Noble's Estate,

is a reasonable time depends upon circumstances. When the trustees were directed to invest in the purchase of land with *all convenient speed*, a year was held to be a reasonable time.¹ But where the trustees are directed to invest in *freehold securities*, they will not be charged with interest until it has been shown that they could have invested according to the direction; for it is not always practicable to procure such securities.² So a year from the testator's death was considered a reasonable time within which to make an investment in United States stock.³ On the other hand, the Supreme Court of the United States allowed three months as a reasonable time within which to invest capital sums of a trust fund paid in to a banker, and charged the trustee for the sum lost by the failure of the banker after that time.⁴ In other cases, six months have been allowed as a reasonable time within which to invest trust funds; and trustees have been charged with interest when they kept the money uninvested for a longer time.⁵ But where the trustees make no effort to invest the money, they may be charged with interest from a period earlier than six months.⁶ Where a trustee or

Pendleton, 3 Call, 538; Garniss v. Gardner, 1 Edw. Ch. 128; Schieffelin v. Stewart, 1 Johns. Ch. 620; Chase v. Lockerman, 11 G. & J. 185; Armstrong v. Miller, 6 Ham. 118; Handly v. Snodgrass, 9 Leigh, 484; Aston's Est., 5 Whart. 228; *In re* Thorp, Davies, 290; Shipp v. Hettrick, 63 N. C. 329; Owen v. Peebles, 42 Ala. 338.

¹ Parry v. Warrington, 6 Madd. 155; Johnson v. Newton, 11 Hare, 160.

² Wyatt v. Wallis, 1 Coop. 154, n.; 8 Jur. 117.

³ Cogswell v. Cogswell, 2 Edw. Ch. 231. This was in analogy to the payment of legacies, which may be done in one year; a trustee with ready money ought to invest with more promptness.

⁴ Barney v. Saunders, 16 How. 543.

⁵ Dunscomb v. Dunscomb, 1 Johns. Ch. 508; Manning v. Manning, id. 527; Merrick's Est., 2 Ash. 485; Worrall's App., 23 Penn. St. 44; Armstrong v. Walkup, 12 Grat. 608; Hooper v. Savage, 1 Munf. 119; Frey v. Frey, 2 C. E. Green, 72.

⁶ Ringgold v. Ringgold, 1 H. & G. 11; Witmer's App., 87 Penn.

43 Pitts. L. J. 365; Hetfield v. De Estate, 18 Oregon, 168; 1 Ames on
baud, 54 N. J. Eq. 371; Holladay's Trusts (2d ed.), 489, n.

executor is directed to invest a legacy *immediately in stock*, and he retains the sum for the period of one year or more, or for an unreasonable time, and the price of the stock rises, he will be ordered to purchase as much stock as could have been purchased at the time the fund ought to have been invested.¹ Where trustees were directed to invest in the funds, and they paid the money into a banker's with directions to invest in bank annuities, which the banker neglected to do, and the trustees made no inquiry for five months, they were held, after the failure of the banker, for the money or the stock at the option of the *cestui que trust*.² Trustees and guardians are held to a stricter rule in relation to investments than executors acting as trustees, for trustees and guardians generally take an estate ready to be invested; and trustees will be held to a stricter rule in relation to capital sums, than in relation to current income from interest, dividends, rents, and other smaller sums; thus in *Barney v. Saunders*,³ before cited, three months were held a reasonable time within which trustees ought to have invested capital sums paid into the banker's, and they were held responsible for the loss of capital after that time by the failure of the banker, while they were not held liable to replace small sums paid into the same banker's from the rents, interest, and dividends upon the same estate. An executor will not in general be charged with interest for not investing before the expiration of a year from the testator's death.⁴

St. 120. Two months not an unreasonable allowance of time for reinvestment.

¹ *Byrchall v. Bradford*, 6 Madd. 235; *Pride v. Fooks*, 2 Beav. 430; *Watts v. Girdlestone*, 6 Beav. 188; *Clough v. Bond*, 3 Myl. & Cr. 496; *Robinson v. Robinson*, 1 De G., M. & G. 256; *Phillipson v. Gatty*, 7 Hare, 516.

² *Challen v. Shippam*, 4 Hare, 555.

³ *Barney v. Saunders*, 16 How. 545; *Lomax v. Pendleton*, 3 Call. 538.

⁴ But where it is the duty of executors within a reasonable time to separate a legacy from the estate, and to invest it to accumulate, or for the support and maintenance of the legatee, neglect to do so makes them chargeable with legal interest; and they will not be allowed to limit their liability by showing the rate of interest received upon the general fund,

A year is a reasonable time within which an executor may call in the testator's estate and pay off his liabilities; and it is necessary, during that time, that the executor should keep the money on hand. In most States an executor is allowed that time by statute; and he is exempt from suit by creditors during that year. After that time, if an executor keeps money in his hands without any apparent reason, except for the purpose of using it, it becomes a breach of trust or negligence; and the court may charge him with interest, or with the principal sum if lost.¹ So an executor will be charged with interest during the year, if he receives interest by loaning or using the money.²

§ 463. Trustees ought not to mix trust-money with other moneys, and take a joint mortgage for the whole, for this would be to complicate the trust with the rights of strangers; nor should a mortgage in such case be taken in the name of a common trustee, for that would be a delegation of the rights of the trustee;³ but where the trust fund was very small, it was held to be proper for a trustee to put some of his own money with it in order to loan it to the best advantage on a mortgage.⁴ Trustees must personally see to it, that the security is forthcoming upon parting with the money;⁵ as, where they allowed their solicitors to receive the money upon

nor be excused by the fact that it was for the interest of the residuary legatee to have the funds kept together. *Fowler v. Colt*, 25 N. J. Eq. 202.

¹ *Forbes v. Ross*, 2 Cox, 115; *Flanagan v. Nolan*, 1 Moll. 85; *Moyle v. Moyle*, 2 R. & M. 710; *Johnson v. Newton*, 11 Hare, 160; *Hughes v. Empson*, 22 Beav. 181; *Johnston v. Prendergast*, 28 Beav. 480; *Williamson v. Williamson*, 6 Paige, 300; *Dillard v. Tomlinson*, 1 Munf. 183; *Carter v. Cutting*, 5 Munf. 224; *Minuse v. Cox*, 5 Johns. Ch. 441; *Cogswell v. Cogswell*, 2 Edw. Ch. 231.

² *Lund v. Lund*, 41 N. H. 359; *Stearns v. Brown*, 1 Pick. 530; *Wyman v. Hubbard*, 13 Mass. 232; *Griswold v. Chandler*, 5 N. H. 499; *Mathes v. Bennett*, 21 N. H. 199; *Wendell v. French*, 19 N. H. 205; *Chambers v. Kerns*, 6 Jones, Eq. 280.

³ *Lewin on Trusts*, 268.

⁴ *Graves's App.*, 50 Penn. St. 189.

⁵ *Cogbill v. Boyd*, 77 Va. 450.

representations that the mortgage was ready, and there was no mortgage, and the solicitors misapplied the money, the trustees were held to make up the loss.¹ When the money is paid in to a banker or broker for investment, the trustees must see that the investment is made at once, and the securities taken in the proper form, or they will be liable for any loss that may happen;² or where money is suffered to remain in the hands of third persons unnecessarily, and a loss happens, the trustees must make it up.³ So, if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank.⁴ But as between the trustee, his representatives, and the *cestui que trust*, the *cestui que trust* may follow the money into the hands of the banker. If it is a simple account, not complicated by mixture with deposits of the trustee's own moneys and withdrawals, it is a simple debt which the *cestui que trust* may claim to be held and applied to the trust; but the deposit of the trustee's own money, and the withdrawal of part by checks, will not defeat the right of the *cestui que trust*. The rule to be applied in such case is stated in *Pennell v. Deffell* as follows: the checks are to be applied to the earliest items of deposit, whether of the trust fund or of the trustee's own money, and such earliest items will be reduced *pro tanto*. If anything of the trust fund remains in the hands of the banker under

¹ *Rowland v. Witherden*, 3 Mac. & G. 568; *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 N. & C. Ch. 16; *Ghost v. Waller*, 9 Beav. 497; 13 Beav. 336.

² *Challen v. Shippam*, 4 Hare, 555; *Byrne v. Norcott*, 13 Beav. 336.

³ *Barney v. Saunders*, 16 How. 543; *Anon. Lofft*, 492; *Fletcher v. Walker*, 3 Madd. 73; *Moyle v. Moyle*, 2 R. & M. 701; *Macdonnell v. Harding*, 7 Sim. 178; *Massey v. Banner*, 4 Madd. 419; 1 J. & W. 241; *Lowry v. Fulton*, 9 Sim. 115; *Mathews v. Brice*, 6 Beav. 239; *Munch v. Cockerell*, 9 Sim. 115; *Johnson v. Newton*, 11 Hare, 160.

⁴ *Ibid.*; *Wren v. Kirton*, 11 Ves. 377; *Pennell v. Deffell*, 4 De G., M. & G. 392; *Ex parte Hilliard*, 1 Ves. Jr. 89; *Rocke v. Hart*, 11 Ves. 61; *Freeman v. Fairlee*, 3 Mer. 39; *Jenkins v. Walter*, 8 G. & J. 218; *Luken's App.*, 7 Watts & S. 48; *Stanley's App.*, 8 Penn. St. 131; *Royer's App.*, 11 id. 36.

this rule, it will be applied to the purposes of the trust.¹ This is a rule for the protection of the *cestui que trust* in case of the failure or bankruptcy of the trustee. But it does not affect the general rule before stated, that where a trustee deposits the trust-money in his own name, or mixes the money with his own, he must pay interest for it, and be responsible for the principal, in case of the failure of the banker or of any other loss.²

§ 464. Trustees cannot use trust-moneys in their business, nor embark it in any trade or speculation;³ nor can they disguise the employment of the money in their business, under the pretence of a loan to one of themselves,⁴ nor to a partnership of which they are members;⁵ (a) nor can the

¹ Pennell v. Deffell, 4 De G., M. & G. 392; Frith v. Cortland, 2 Hem. & M. 417; 34 L. J. Ch. 301; Kip v. Bank of N. Y., 10 Johns. 65; Kennedy v. Strong, id. 289; School, &c. v. Kirwin, 25 Ill. 73; McAllister v. Commonwealth, 30 Penn. St. 536; Morrison v. Kinstra, 55 Miss. 71.

² Mumford v. Murray, 6 Johns. Ch. 1; Kellett v. Rathbun, 4 Paige 102; Jacot v. Emmett, 11 Paige, 142; De Peyster v. Clarkson, 2 Wend. 77; Garniss v. Gardner, 1 Edw. Ch. 128; Spear v. Tinkham, 2 Barb. Ch. 211; Merrick's Est., 2 Ash. 485; Dyott's Est., 2 Watts & S. 565; Beverleys v. Miller, 6 Munf. 99; Diffenderffer v. Winder, 3 G. & J. 341; Peyton v. Smith, 2 Dev. & B. Eq. 325; Jameson v. Shelly, 2 Humph. 198; Kerr v. Laird, 27 Miss. 544; *In re Thorp*, Davies, 290.

³ Tebbs v. Carpenter, 1 Madd. 304; Lee v. Lee, 2 Vern. 548; Adye v. Feuilliteau, 1 Cox, 24; Piety v. Stace, 4 Ves. 622; Docker v. Somes, 2 Myl. & K. 655; Palmer v. Mitchel, id. 672, n.; Miller v. Beverleys, 4 Hem. & M. 415; *In re Thorp*, Davies, 290; Manning v. Manning, 1 Johns. Ch. 527; Brown v. Ricketts, 4 Johns. Ch. 303. At one time it was held that executors might employ money in their trade, especially if they were solvent, and if the assets were generally, and not specifically, bequeathed. Grovesnor v. Cartwright, 2 Ch. Cas. 212; Lynch v. Cappey, id. 35; Brown v. Litton, 1 P Wms. 140; Ratcliffe v. Graves, 2 Ch. Cas. 152; Bromfield v. Wytherley, Pr. Ch. 505; Adams v. Gale, 2 Atk. 106; Child v. Gibson, id. 603; but Mr. Lewin says that Lord North overruled above forty cases, and a twenty years' practice, in Ratcliffe v. Graves, 1 Vern. 196; Newton v. Bennett, 1 Bro. Ch. 361; Adye v. Feuilliteau, 1 Cox, 25; Lewin on Trusts, 255, 276.

⁴ Townend v. Townend, 1 Gif. 201.

⁵ Kyle v. Barnett, 17 Ala. 306.

(a) See 30 Am. L. Reg. (N. S.) 569.

money be loaned on security to be reloaned back to the trustee, or by the trustee at a profit.¹ If a trustee makes such use of the money, he will be responsible for all loss, and he may be compelled to pay the highest rate of interest; or the *cestui que trust* may follow the money, and insist upon all the profits made by such use; and if the trustee is a trader or business man, he will be presumed to use and employ the money in his business if he deposits it in bank in his own name; for such business men must generally keep some money in bank for the purposes of their credit, and such trust-money answers the purpose as if it was their own.² If the trust fund is employed in business, the whole increase will belong to the fund; but if the trustee is also one of the beneficiaries, he will be entitled to his share, and it will go to his representatives upon his death.³ Where an executor bought stock in his own name with the trust fund, and the stock rose in price, it was held that he was liable for the market-price of the stock at the time of the decree. If the investment is profitable, the *cestuis que trust* are entitled to the profits; if disastrous, they are entitled to interest on the money; and if the investment has been made with funds of the estate mingled with funds of the executor in various stocks, and the funds of the estate cannot be traced and identified in any particular stocks, the *cestuis que trust* are entitled to select the most profitable stocks.⁴

§ 465. There is said to be a distinction between an original investment improperly made by trustees, and an investment made by the testator himself, and simply continued by a trustee;⁵ (a) but it is a distinction that cannot be safely

¹ Ratcliffe v. Graves, 2 Ch. Cas. 152; 1 Vern. 196.

² Treves v. Townshend, 1 Bro. Ch. 284; Moons v. De Bernales. 1 Russ. 301; *In re* Hilliard, 1 Ves. Jr. 90; Sutton v. Sharp, 1 Russ. 146; Roake v. Hart, 11 Ves. 61; Brown v. Southhouse, 3 Bro. Ch. 107; Lamb's App., 58 Penn. St. 142.

³ Hook v. Dyer, 47 Mo. 214.

⁴ Norris's App., 71 Penn. St. 106.

⁵ Powell v. Evans, 5 Ves. 841; Clough v. Bond, 3 Myl. & Cr. 496.

(a) See *In re* Chapman, [1896] 2 Shinn's Estate, 166 Penn. St. 121; Ch. 763; *Re* Roth, 74 L. T. 50; Johns v. Herbert, 2 App. D. C. 485;

acted upon. If a testator gives any directions in his will to continue his investments already made, trustees must of course follow such directions; and if they follow them in good faith, they will not be liable for any losses, unless they are negligent in failing to change an investment, when it ought to be changed to save it; (a) for it cannot be supposed that the direction of a testator to continue a certain investment relieves the trustees from the ordinary duty of watching such investment, and of calling it in when there is imminent danger of its loss by a change of circumstances. If no directions are given in a will as to the conversion and investment of the trust property, trustees to be safe should take care to invest the property in the securities pointed out by the law. It is true that a testator during his life may deal with his property according to his pleasure, and investments made by him are some evidence that he had confidence in that class of investments; but, in the absence of

Harvard Coll. *v.* Amory, 9 Pick. 446; Thompson *v.* Brown, 4 Johns. Ch. 628; Knight *v.* Plymouth, 3 Atk. 480; 1 Dick. 120; Rowth *v.* Howell, 3 Ves. 565; Wilkinson *v.* Stafford, 1 Ves. Jr. 41; Vez *v.* Emery, 5 Ves. 144; Barton's Est., 1 Pars. Eq. 24; Murray *v.* Feinour, 2 Md. Ch. 418; Brown *v.* Campbell, Hopkins, 233; Smith *v.* Smith, 4 Johns. Ch. 283. See 11 Amer. Law Reg. 208 (N. S.), April, 1874; Pierce *v.* Bowker, 130 Mass. 262, where a trustee in good faith continued an investment in railroad stock originally made by his testator, until, gradually falling in value, it became worthless.

Buerhaus *v.* De Saussure, 41 S. C. 457; Porter's Estate, 25 N. Y. S. 822. In such case, the trustee is bound to use good judgment and diligence, but he is not an insurer against depreciation. *In re Hurst*, 67 L. T. 96. "full income" should be paid to the life-tenant, it was held to be the testator's intention that the life-tenant's income should not be diminished to make up the excess or premium.

(a) See *In re Sharp*, 45 Ch. D. 286; Pinney *v.* Newton, 66 Conn. 141; Stong's Estate, 160 Penn. St. 13; Sheffield *v.* Parker, 158 Mass. 330; Griggs *v.* Veghte, 47 N. J. Eq. 179; Grinnell *v.* Baker, 17 R. I. 41; Eldredge *v.* Greene, id. 17. In McLouth *v.* Hunt, 154 N. Y. 179, where the investments in question, which were chiefly in government bonds, were made by the testator, and had, at her death, a market value in excess of their face value, and the will directed that the

directions in the will, it is more reasonable to suppose that a testator intended that his trustees should act according to law. Consequently, in States where the investments which trustees may make are pointed out by law, the fact that the testator has invested his property in certain stocks, or loaned it on personal security, will not authorize trustees to continue such investments beyond a reasonable time for conversion and investment in regular securities.¹ But in States where there are no fixed funds or securities in which trustees shall invest, the fact that a testator has invested his property in particular stocks, shares of corporations, mortgages, or other securities, thus indicating his confidence in such investments, will go far to justify the trustees in continuing them.² So trustees, in the usual course of dealing, may take notes on short time for small sums of rent due their estate, that having been the usual course of dealing with the tenants by the testator.³ Taking all the cases together, it would appear to be a settled principle that trustees are not justified, in the absence of express or implied directions in the will, in continuing an investment permanently, made by the testator, which they would not be justified themselves in making. The principle probably has this qualification, that if a trustee continue such investment in good faith, and a loss happens, he would be held to replace the original sum only, without interest.⁴

§ 466. Except upon emergency, to protect the fund from depreciation, or to convert wasting securities to those of a permanent character, or investments in securities that are not authorized by law into such as are allowed, trustees may not sell or vary specific securities given in trust, nor securities left by a testator in which he has himself invested

¹ *Hemphill's App.*, 18 Penn. St. 303; *Pray's App.*, 34 id. 100, overrules the case of *Barton's Est.*, 1 Pars. Eq. 24; *Kimball v. Reading*, 11 Foster, 352.

² *Harvard Coll. v. Amory*, 9 Pick. 446.

³ *Smith v. Smith*, 4 Johns. Ch. 283.

⁴ *Lowson v. Copeland*, 2 Bro. Ch. 157; *Tebbs v. Carpenter*, 1 Madd. 298.

the funds.¹(a) Nor can they change the character of the investments from realty to personalty, or *vice versa*, without special authority.² And if, without authority, trustees change investments properly made for others improper or unauthorized by law, they may be required to replace the securities sold, and also to invest any profits which may have accrued in the same securities;³ or the *cestui que trust* may elect to take the money with interest upon it.⁴ And

¹ Angell *v.* Dawson, 2 Y. & C. 316; Flyer *v.* Flyer, 3 Beav. 550; Neville *v.* Fortescue, 16 Sim. 333; Boys *v.* Boys, 28 Beav. 436; Murray *v.* Feinour, 2 Md. Ch. 418; Ward *v.* Ketchen, 30 N. J. Eq. 31; Crackelt *v.* Bethune, 1 Jac. & W. 566; Witter *v.* Witter, 3 P. Wms. 100; Hammond *v.* Hammond, 2 Bland, 306. But where the trustee has performed, without authority, an act which, at the time it was done, was obviously for the benefit of all concerned, and which upon proper application would have been ordered, his act will be ratified, and held of the same validity as if previously ordered. Gray *v.* Lynch, 8 Gill, 405. Where trustees under a will exceeded their power by buying real estate with trust funds, and continued to buy and sell, at first with a profit, but ultimately with a loss of a large part of the fund, no lack of good faith being found, they were held liable for the amount of the trust fund before the first purchase of real estate only, with interest from the time the beneficiary should have received the income. Baker *v.* Disbrow, 3 Redf. (N. Y.) 348.

² Post, § 602, *et seq.*; Quick *v.* Fisher, 9 N. J. Eq. 802.

³ Powlett *v.* Herbert, 1 Ves. Jr. 297; Evans *v.* Inglehart, 6 Gill & J. 192. In such cases of unauthorized varying the securities the trustee takes upon himself the burden of proving entire *bona fides*, and that there was reasonable ground to believe that the fund would be benefited; and if this can be shown the courts will sustain his action. Washington *v.* Emery, 4 Jones (N. C.), 32; Cornwise *v.* Bourgum, 2 Ga. Dec. 15.

⁴ Forrest *v.* Elwes, 4 Ves. 497; Fowler *v.* Reynall, 2 De G. & Sm. 749; 3 Mac. & G. 500.

(a) See Clark *v.* Trelawney, 60 L. T. 620; *Re* Walker, 62 id. 449; Spencer *v.* Weber, 49 N. Y. S. 687; Jones *v.* Atchison, &c. R. Co., 150 Mass. 304; Hodges' Estate, 66 Vt. 70; Smith *v.* Hall (R. I.), 37 Atl. 698; Hannah *v.* Carnahan, 65 Mich. 601; Rabb *v.* Flenniken, 29 S. C. 278; Powers *v.* Bullwinkle, 33 S. C. 293; Claiborne *v.* Holland, 88 Va. 1046; Taylor *v.* Kemp, 86 Ga. 181; Citizens' Nat. Bank *v.* Jefferson, 88 Ky. 651. In Drake *v.* Crane, 127 Mo. 85, trustees were held justified in using trust funds in the erection of a hotel to aid in developing and enhancing the value of the trust real estate.

A power to reinvest is not necessarily exhausted by a single exercise thereof. Hayes *v.* Applegate (Ky.), 39 S. W. 436.

even if trustees have express power to vary the securities, they will not be allowed to do so capriciously, or without some apparent object;¹ and they ought not to sell out an investment without having in view an immediate reinvestment: if they do so, they may be held to pay the loss that may occur.² If an investment in a particular fund or stock is directed by a testator, it cannot be varied except by the consent of all the parties interested; and if there are parties not *sui juris*, or not in being, the court itself will not order a change.³ Where an investment was not to be varied without the consent of the testator's wife, and she waived the provisions of the will, her consent was still held necessary.⁴ In those States where there are no stocks, funds, or securities, prescribed by law, or by the order of court, in which trustees must invest in order to be safe, and investments are once made by trustees in safe and proper securities, or where investments are left by the testator in such securities, the courts will be very adverse to a change, and will not allow one, except for some very controlling motive. The reason is, that where there is no rule governing investments by trustees, except that they shall act in good faith and upon a sound discretion, courts are very averse to change proper investments once made, and select others by so very indefinite a rule.⁵ (a)

¹ *Brice v. Stokes*, 11 Ves. 324; *De Manneville v. Crompton*, 1 V. & B. 359; *Fowler v. Reynall*, 3 Mac. & G. 500.

² *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Watts v. Girdlestone*, 6 Beav. 190.

³ *Wood v. Wood*, 5 Paige, 596; *Trans. University v. Clay*, 2 B. Mon. 386; *Contee v. Dawson*, 2 Bland, 264; *Deaderick v. Cantrell*, 10 Yerg. 263; *Burrill v. Sheil*, 2 Barb. 457; *Personeau v. Personeau*, 1 Des. 521; *Lamb's App.*, 58 Penn. St. 142.

⁴ *Plympton v. Plympton*, 6 Allen, 178.

⁵ *Murray v. Feinour*, 2 Md. Ch. 418.

(a) Trustees expressly empowered by the will to postpone the sale and conversion of any part of the testator's estate for such time as seems expedient to them were held justified in postponing the sale of the testator's business, and in carrying on the business with intent to benefit the tenant for life whom the will entitles to the profits until a sale is made. *In re Crowther*, [1895], 2 Ch. 56. Such power ex-

§ 467. If trustees make an improper investment with the knowledge, assent, and acquiescence, or at the request of the *cestui que trust*, they cannot be held to make good the loss, if one happens;¹ but the *cestuis que trust*, to be affected by such consent or acquiescence, must be *sui juris*, and capable of acting for themselves;² if, therefore, they are married women, or minor children, or other persons incapacitated, or under disability, they cannot be bound by any alleged acquiescence, nor by their urgent requests,³ although a mar-

¹ *Booth v. Booth*, 1 Beav. 125; *Langford v. Gascoyne*, 11 Ves. 333; *Nail v. Punter*, 5 Sim. 555; *Farrar v. Barraclough*, 2 Sm. & G. 231; *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Raby v. Ridehalgh*, 7 De G., M. & G. 104; *Walker v. Symonds*, 3 Swanst. 64; *Munch v. Cockerell*, 5 Myl. & Cr. 178; *Poole v. Munday*, 103 Mass. 174; *Brice v. Stokes*, 11 Ves. 319.

² *Buckeredge v. Glasse*, 1 Cr. & Phil. 135.

³ *Walker v. Symonds*, 3 Swanst. 69; *Hopkins v. Myall*, 2 R. & M. 86; *Ryder v. Bickerton*, 3 Swanst. 80, n.; *March v. Russell*, 3 Myl. & Cr. 31;

pressly given to carry on a business, accompanied by a direction to sell, will not justify the trustee in carrying on the business indefinitely, but only for a reasonable time. *In re Smith*, [1896] 1 Ch. 171, where two years from the testator's death was deemed a reasonable time. Such a power subjects the general assets of the estate to payment for goods bought on the executor's credit to carry on the business. *Willis v. Sharp*, 115 N. Y. 396. It does not enable the trustee to mortgage real estate for debts incurred by him in carrying on the business. *In re Webb*, 63 L. T. 545; see *In re Jones*, 61 id. 661. In general, when debts are contracted by trustees who are authorized to carry on business, their creditors can only resort to the trust fund when the trustees are entitled to be indemnified therefrom, and the

creditors reach it only by being substituted to the equities of the trustees. *Dowse v. Gorton*, 40 Ch. D. 536. See *Mason v. Pomeroy*, 151 Mass. 164, 167; 154 id. 481; *Woddrop v. Weed*, 154 Penn. St. 307; *Young v. Weed*, id. 316.

It is not a breach of trust for the trustee to set up for himself in a similar kind of business, if there is no solicitation of old customers or deception; but such an act on his part is ground for his removal as trustee, as his position is inconsistent with the best interests of the trust. *Moore v. McGlynn*, [1894] 1 Ir. R. 74.

Executors are not bound to carry out the testator's contracts, which were personal and bound him only. *Marvel v. Phillips*, 162 Mass. 399; see *Russell v. Buckhout*, 87 Hun, 46; *Cox v. Martin*, 75 Miss. 229.

ried woman may acquiesce in the investment of trust property, given to her sole and separate use, in such manner that she cannot afterwards complain of the investment as improper.¹ But in order that the *cestuis que trust* may be bound by their acquiescence in an improper investment, there must be, on their part, full knowledge of all the facts and circumstances;² and the trustee must be free from all suspicion of misrepresentation or concealment.³ (a) The remainder-man

Nail v. Punter, 5 Sim. 556; *Kellaway v. Johnson*, 5 Beav. 319; *Bateman v. Davis*, 3 Madd. 98; *Cocker v. Quayle*, 1 R. & M. 535; *Murray v. Feinour*, 2 Md. Ch. 422; *Barton's Est.*, 1 Pars. Eq. 47; *Kent v. Plumb*, 57 Ga. 207.

¹ *Mant v. Leith*, 15 Beav. 524; *Brewer v. Swirles*, 2 Sm. & G. 219; *Sherman v. Parish*, 53 N. Y. 483. But she may maintain a suit to correct the irregularity, although she cannot claim anything as for a breach of the trust. *Ibid.*

² *Munch v. Cockerell*, 5 Myl. & Cr. 178; *Montford v. Cadogan*, 17 Ves. 489. And they must be apprised of the effect of their legal rights. *Adair v. Brimmer*, 74 N. Y. 539.

³ *Burrows v. Walls*, 5 De G., M. & G. 233; *Underwood v. Stevens*, 1 Mer. 712; *Walker v. Symonds*, 3 Swanst. 1.

(a) *Nichols, Appellant*, 157 Mass. 20; *McKim v. Glover*, 161 id. 418; *White v. Sherman*, 168 Ill. 589; *New York Life Ins. Co. v. Kane*, 45 N. Y. S. 543; *English v. McIntyre*, 51 id. 697; *Smith v. Howlett*, id. 910; 40 Am. Dec. 518. An investment on securities of a description authorized by the trust, where the breach of trust consists only in not exercising due caution in taking it, stands on a different footing from an investment of an unauthorized description, which the beneficiary must either accept or reject. *In re Salmon*, 42 Ch. D. 351; 1 Ames on Trusts (2d ed.), 487, and note. But the trustee's liability for an improper investment is not affected by the fact that the security upon which it was made has since been disposed of, as against a bene-

ficiary who never consented thereto or impeded the trustee's obtaining the benefit of such investment. *Head v. Gould*, [1898] 2 Ch. 250.

A trustee who distributes a trust fund among strangers at the request of a beneficiary, and upon his covenanting to indemnify him, cannot afterwards recover under the covenant for the loss of a beneficial interest in the fund to which he subsequently becomes entitled. *Evans v. Benyon*, 37 Ch. D. 329; *Crichton v. Crichton*, [1895] 2 Ch. 853, 858.

A pretended investment, when fraudulent, as when a trustee seeks to place among the trust assets doubtful or worthless securities owned by himself, is voidable at the option of the beneficiary, to whom any third party participating in the

cannot acquiesce in an investment, until his interest falls into possession, so as to be bound.¹ If the improper investment has been made, at the request of the tenant for life, and such tenant has received an increased income by reason of the improper investment, such increased income can be recovered back from the tenant for life.² But if the tenant for life protested against the illegal investment, and desired the trustees to make a proper investment, the increased income from the illegal investment cannot be recovered back.³ In all cases the assent to an illegal investment must be so formal that the trustees are justified in acting upon it. If it is a mere expression that a certain investment would be safe, without any intention that the trustees should act upon it, the *cestui que trust* will not be bound.⁴ So an assent to a particular investment cannot justify a subsequent mismanagement of the investment.⁵ And acquiescence by the *cestui que trust* will not be presumed from mere lapse of time, if he has done nothing to acknowledge it, or has received no benefit.⁶ Any party whose rights are endangered by an improper or unauthorized investment may apply to the court for redress;⁷ but if the investment was made by mistake, or has been corrected, the trustees will not be removed, or they will not be deprived of the funds.⁸

¹ Bennett v. Colley, 5 Sim. 181; 2 Myl. & K. 225; Brown v. Cross, 14 Beav. 105.

² Dimes v. Scott, 4 Russ. 195; Mehrrens v. Andrews, 3 Beav. 72; Howe v. Dartmouth, 7 Ves. 150; Mills v. Mills, 7 Sim. 101; Pickering v. Pickering, 4 Myl. & Cr. 289; Holland v. Hughes, 16 Ves. 114; Hood v. Clapham, 19 Beav. 90; M'Gachen v. Dew, 15 Beav. 84; Raby v. Ridehalgh, 7 De G., M. & G. 104; Band v. Tardell, id. 628; Stewart v. Sanderson, L. R. 10 Eq. 26.

³ Bate v. Hooper, 5 De G., M. & G. 358; and see Turquand v. Marshall, L. R. 6 Eq. 112; Hood v. Clapham, 19 Beav. 90.

⁴ Nyce's App., 5 Watts & S. 254.

⁵ Lockhart v. Reilly, 39 Eng. L. & Eq. 135.

⁶ Phillipson v. Gatty, 7 Hare, 516.

⁷ Bromley v. Kelly, 39 L. J. Ch. 274.

⁸ Ibid.

fraud is also accountable. Warren 443; Stokes v. Terrell (Miss.), 23 v. Union Bank, 157 N. Y. 259; So. 371; Moody & M. Co. v. Trustees, 99 Wis. 49.

§ 468. It is difficult to lay down any general rule that is equitable and applicable to all cases, as to the interest that trustees shall pay upon trust funds in their hands. In England, (a) if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank for an unreasonable time, in addition to their liability for its loss during such delay, they will be charged with interest at the rate of four per cent; but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment, and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of five per cent; and, in certain special cases of misconduct, the court will order annual or semi-annual rests, for the purpose of charging them with compound interest. In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is, whether simple or compound interest shall be imposed. The general rules, so far as they can be drawn from all the cases, are as follows: (1) If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business,¹ or deposits it in bank in his own name, or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so,² he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements.³ This

¹ *Cool v. Jackman*, 13 Brad. (Ill.) 560; *Lehmann v. Rothbarth*, 111 Ill. 185; *Society v. Pelham*, 58 N. H. 566; the trustee must pay interest from the time of diverting the fund.

² *Judd v. Dike*, 30 Minn. 385; *Pickering v. De Rochemont*, 60 N. H. 179; *Lyons v. Chamberlin*, 25 Hun, 49.

³ *Burdick v. Garrick*, L. R. 5 Ch. 241; *Blogg v. Johnson*, L. R. 2 Ch. 225; *Berwick v. Murray*, 7 De G., M. & G. 843; *Treves v. Townshend*, 1

(a) See *Collins v. Wade*, [1896] 1 Ir. R. 340; 1 Ames on Trusts (2d ed.), 498, n.

rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and if they make more than legal interest, they shall pay more, as, if they make usurious loans, they shall be charged with all

Bro. Ch. 384; *Forbes v. Ross*, 2 Bro. Ch. 430; *Piety v. Stace*, 4 Ves. 620; *Ashburnham v. Thompson*, 13 Ves. 402; *Bates v. Scales*, 12 Ves. 402; *Pocock v. Reddington*, 5 Ves. 794; *Sutton v. Sharp*, 1 Russ. 146; *Crackelt v. Bethune*, 1 J. & W. 122; *Att. Gen. v. Solly*, 2 Sim. 515; *Heathcote v. Hulme*, 1 J. & W. 122; *Brown v. Sansome*, 1 McC. & Y. 327; *Westover v. Chapman*, 1 Coll. 177; *Robinson v. Robinson*, 1 De G., M. & G. 247; *Jones v. Foxall*, 15 Beav. 392; *Saltmarsh v. Barrett*, 21 Beav. 349; *Knott v. Cottee*, 16 Beav. 77; *Rocke v. Hart*, 11 Ves. 58; *Lincoln v. Allen*, 4 Bro. P. C. 553; *Younge v. Combe*, 4 Ves. 101; *Dawson v. Massey*, 1 Ball & B. 231; *Hicks v. Hicks*, 3 Atk. 274; *Perkins v. Boynton*, 1 Bro. Ch. 375; *King v. Talbott*, 40 N. Y. 86; *Nelson v. Hagerstown Bank*, 27 Md. 53; *Cook v. Addison*, L. R. 5 Ch. 466; *Duffy v. Duncan*, 35 N. Y. 187; *Young v. Brush*, 38 Barb. 294; *Owen v. Peebles*, 42 Ala. 338; *Wistar's App.*, 54 Pa. St. 60; *Newton v. Bennett*, 1 Bro. Ch. 359; *Littlehales v. Gascoigne*, 3 Bro. Ch. 73; *Franklin v. Firth*, id. 433; *Longmore v. Broom*, 7 Ves. 124; *Trimleston v. Hammil*, 1 Ball & B. 385; *Tebbs v. Carpenter*, 1 Madd. 290; *Mousley v. Carr*, 4 Beav. 49; *Hoskins v. Nichols*, 1 N. C. C. 478; *Beverleys v. Miller*, 6 Munf. 99; *Diffenderffer v. Winder*, 3 G. & J. 341; *Mumford v. Murray*, 6 Johns. Ch. 1; *Jacot v. Emmett*, 11 Paige, 142; *Kellett v. Rathbun*, 4 Paige, 102; *De Peyster v. Clarkson*, 2 Wend. 77; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Manning v. Manning*, 1 Johns. Ch. 527; *Brown v. Rickett*, 4 id. 303; *Williamson v. Williamson*, 6 Paige, 298; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; *Minuse v. Cox*, 5 Johns. Ch. 448; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Gray v. Thompson*, 1 Johns. Ch. 82; *Armstrong v. Miller*, 6 Ohio, 118; *Astor's Est.*, 5 Whar. 228; *Merrick's Est.*, 2 Ash. 285; *Worrall's App.*, 23 Penn. St. 44; *Graves's App.*, 50 id. 189; *Hess's Est.*, 69 id. 454; *Peyton v. Smith*, 2 Dev. & B. Eq. 325; *Jameson v. Shelly*, 2 Humph. 198; *Dyott's Est.*, 2 Watts & S. 655; *In re Thorp*, Davies, 290; *Carr v. Laird*, 27 Miss. 544; *Lomax v. Pendleton*, 3 Call, 538; *Handy v. Snodgrass*, 9 Leigh, 484; *Dillard v. Tomlinson*, 1 Munf. 183; *Carter v. Cutting*, 5 Munf. 223; *Wood v. Garnett*, 6 Leigh, 271; *Miller v. Beverleys*, 4 Hem. & M. 415; *Chase v. Lockerman*, 11 G. & J. 185; *Ringgold v. Ringgold*, 1 H. & G. 11; *Arthur v. Marster*, 1 Harp. Eq. 47; *Rowland v. Best*, 2 McCord, Ch. 317; *Lyles v. Hattan*, 6 G. & J. 122; *Griswold v. Chandler*, 5 N. H. 497; *Lund v. Lund*, 41 N. H. 355; *Turney v. Williams*, 7 Yerg. 172; *Williams v. Powell*, 16 Jur. 393; *Dornford v. Dornford*, 12 Ves. 127; *Wright v. Wright*, 2 McCord, Ch. 185; *Knowlton v. Bradley*, 17 N. H. 458; *McKim v. Hibbard*, 142 Mass. 422.

their gains from the use of the money.¹ If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made.² There may be an exception to the rule, that a deposit of the trust-money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability of legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty.³ (a) If therefore the sums are small, and the trustee receives no credit or profit from the act, or if the act was accidental, or beneficial to the *cestui que trust*, legal interest will not be imposed upon the trustee;⁴ or if the trustee was a member of a firm of bankers, and he deposited with the firm in his name as trustee, he will not be charged with interest, although the firm made a profit from the deposit.⁵ The proper mode of taking the account of

¹ *Barney v. Saunders*, 16 How. 513; *Oswald's App.*, 3 Grant, 300; *Martin v. Rayborn*, 42 Ala. 468.

² *Bentley v. Shreve*, 2 Md. Ch. 219; *Rapalje v. Hall*, 1 Sandf. Ch. 339.

³ *McKnight v. Walsh*, 23 N. J. Eq. 136; 24 N. J. Eq. 492.

⁴ *Rapalje v. Hall*, 1 Sandf. Ch. 399; *Graves's App.*, 50 Penn. St. 189; *Bond v. Abbott*, 42 Ala. 499.

⁵ *Hess's Est.*, 69 Penn. St. 454.

(a) See *Dorris v. Miller*, 105 Iowa, 564; *Re Myers*, 131 N. Y. 409; *Clark's Estate*, 39 N. Y. S. 722; *In re Muller*, 52 id. 565; *Westover v. Carman*, 49 Neb. 397; *Fant v. Dunbar*, 71 Miss. 576; *Truett v. Williams*, 101 Ga. 311; *Danforth's Estate*, 66 Mo. App. 586; *Howard v. Manning* (Ark.), 44 S. W. 1126; 1 Ames on Trusts (2d ed.), 482, 484, 496, n. There should doubtless be a distinction between losses by misconduct and those by mere neglect or lack of attention or of good judgment, but the distinction is not clearly followed out in the cases. See *Bartol's Estate*, 182 Penn. 407; *Dick's Estate*, 183 id. 647; *Ricketts v. Ricketts*, 64 L. T. 263; *English v. McIntyre*, 51 N. Y. S. 697; *Carver's Estate*, 118 Cal. 73; *Rush v. Steele*, 93 Va. 526; 1 Ames on Trusts (2d ed.), 494, 496, n. A southern guardian, who invested his ward's money in confederate bonds during the War of the Rebellion, was held not liable therefor, in *Baldy v. Hunter*, 171 U. S. 388; 98 Ga. 170; see *Franklin v. McElroy*, 99 Ga. 123; *Finch v. Finch*, 28 S. C. 164.

trustees is to treat all the income of the trust received during the current year as unproductive, and to charge against the income of the current year all the disbursements, including the compensation or commissions of the trustees for the same year, and to strike a balance, upon which, as a general rule, interest is to be allowed,¹ but in such a way as not to compound it.² If, however, these balances are too small to invest, or for any reason the trustees might equitably keep them on hand, interest will not be allowed upon them until the balances so accumulate as to be properly invested, or until the trustees ought to invest them.³ Of course, as soon as a trustee properly pays the fund into court, his liability for interest ceases.⁴ But so long as any litigation is pending over the fund, and the money is not brought into court, the trustee is bound to keep it invested, and he is liable for legal interest.⁵ But a guardian is not liable to interest while the settlement of his account is pending.⁶

¹ *Boynton v. Dyer*, 18 Pick. 1; *Pettus v. Clawson*, 4 Rich. Eq. 92; *Jones v. Morrall*, 2 Sim. (N. s.) 241; *Clarkson v. De Peyster*, 2 Wend. 78; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Luken's App.*, 47 Pa. St. 356; *Reynolds v. Waker*, 29 Miss. 250; *Roach v. Jelks*, 40 Miss. 754; *Crump v. Gerack*, id. 765.

² *Rowland v. Best*, 2 McCord, Ch. 317; *Jordon v. Hunt*, 2 Hill, Eq. 145; *Walker v. Bynum*, 4 Des. 555; *Powell v. Powell*, 10 Ala. 900; *Shepherd v. Stark*, 3 Munf. 29; *Burwell v. Anderson*, 3 Leigh, 348; *Garrett v. Carr*, 3 id. 407; *Campbell v. Williams*, 3 Mon. 122; *Jones v. Ward*, 10 Yerg. 160. See *Elliott v. Sparrell*, 114 Mass. 404.

³ *Rapalje v. Hall*, 1 Sandf. Ch. 399; *Woods v. Garnett*, 6 Leigh, 271; *Graves's App.*, 50 Penn. St. 189; *Luken's App.*, 47 id. 356. Trustee is generally chargeable with interest to be computed from the first day of January following his receipt of the funds. *Livingston v. Wells*, 8 S. C. 347.

⁴ *January v. Poyntz*, 2 B. Mon. 404; *Yundt's App.*, 13 Penn. St. 575; *Lane's App.*, 24 id. 487; *Younge v. Brush*, 38 Barb. 294; *Brandon v. Hoggatt*, 32 Miss. 335.

⁵ *Ibid.*

⁶ *Yader's App.*, 45 Penn. St. 394. But a trustee who retained funds in his hands, making a claim to them as his compensation, which he failed to establish, was charged with interest from the time he ought to have paid them. *Jenkins v. Doolittle*, 69 Ill. 415.

§ 469. (2) If a trustee is directed and bound to invest in a particular stock or fund within a certain time, or within a reasonable time, and he neglects to make the investment as directed, the *cestui que trust* has his election to take the money and legal interest thereon, or so much stock as the money would have purchased at the time when the investment ought to have been made, and the dividends thereon.¹ It has been held in some cases, that if trustees were directed to invest in *stocks, or in real estate*, and they neglected to do either, the *cestui que trust* might have the amount of stocks that could have been purchased, and the dividends thereon.² On the other hand, it has been held, and is now established in such case, that, as the trustees might have invested in real securities, and such real securities might have been of less value than the original fund, the *cestui que trust* can have only the money and legal interest thereon, and cannot claim the amount of stocks that might have been purchased.³ If trustees are directed to invest a certain fund separately, they will be liable for losses occurring by reason of neglecting this provision.⁴ In Wisconsin, it has been held that if a trustee is directed to invest in United States bonds or in real estate security, the interest which he might have obtained upon proper real estate security is the measure of his liability for failure to invest the fund.⁵

§ 470. (3) If the trust fund was properly invested, according to the direction of the trust instrument, or according to

¹ *Shepherd v. Mauls*, 4 Hare, 504; *Robinson v. Robinson*, 1 De G., M. & G. 256; *Byrchall v. Bradford*, 6 Madd. 235; *Vyse v. Foster*, 8 Ch. 334; *Ihmsen's App.*, 43 Penn. St. 471; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Darling v. Hammer*, id. 220; *McElhenny's App.*, 46 Penn. St. 347.

² *Hockley v. Bantock*, 1 Russ. 141; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379; *Ouseley v. Anstruther*, 10 Beav. 456.

³ *Marsh v. Hunter*, 6 Madd. 295; *Shepherd v. Mauls*, 4 Hare, 500; *Robinson v. Robinson*, 1 De G., M. & G. 256; *Phillipson v. Gatty*, 7 Hare, 516; *Rees v. Williams*, 1 De G. & Sm. 314.

⁴ *Wilmerding v. McKesson*, 103 N. Y. 329.

⁵ *Andrew v. Schmitt*, 64 Wis. 664.

law and the trustee improperly converts the fund into money and neglects to invest it, or invests it improperly, or uses it in trade, business, or speculation, the *cestui que trust* may, at his election, take the dividends or interest which the fund would have produced if the investment had been suffered to remain where it was properly made; or he may take legal interest on the fund; or he may take all the profits that have been made upon the fund.¹ If the *cestui que trust* elects to take the profits, he must take them during the whole period, subject to all the losses of the business: he cannot take profits for one period and interest for another.²

§ 471. (4) If the trustee improperly changes an investment, and refuses to reinvest the money in a legal manner; or if he refuses to invest the fund in the first instance; or if he uses the fund in trade, business, or speculation; or makes an improper or illegal investment, — the *cestui que trust* may have the income that would have accrued from the proper investment; or he may have simple interest at the legal rate;³ or he may take all the profits of the trade or business, or other investment or employment of the money, and if the trustee refuse to account for the profits arising from his use of the money, or if he has so mingled the money and the profits with his own money and profits that he cannot separate and account for the profits that belong to the *cestui que trust*, the *cestui que trust* may have legal interest computed with annual rests, in order to compound it.⁴ (a) And some-

¹ Jones v. Foxall, 15 Beav. 392; Robinett's App., 36 Penn. St. 174; Saltmarsh v. Barrett, 31 Beav. 349; Kyle v. Barnett, 17 Ala. 306; Barney v. Saunders, 16 How. 543; Brown v. De Tastet, Jac. 284; Cook v. Collingridge, id. 607; Crawshay v. Collins, 15 Ves. 218; 2 Russ. 325; Featherstonhaugh v. Fenwick, 17 Ves. 298; Docker v. Somes, 2 Myl. & K. 655; Wedderburn v. Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; Norris's App., 71 Penn. St. 125.

² Heathcote v. Hulme, 1 J. & W. 122.

³ Cogbill v. Boyd, 79 Va. 1, and cases in next note; Seguin's App., 103 Penn. St. 139.

⁴ Jones v. Foxall, 15 Beav. 392; Raphael v. Boehm, 11 Ves. 92; 13

(a) See Forbes v. Allen, 166 351; Davis v. Eastman, 68 Vt. 225; Mass. 569; White v. Ditson, 140 id. Lehman v. Rothbarth, 159 Ill. 270;

times even biennial rests will be allowed in computing the compound interest where the trustee has used the fund in his own business.¹ There has been considerable conflict of opinion and authority upon the matter of compounding interest against a trustee. Lord Cranworth said, that a trustee might as well be charged with more principal than he had received as to be charged with more interest.² In another case, it was said in England that a trustee would be charged with more than four per cent interest:³ (1) when he *ought* to have received more; (2) when he *did* receive more; (3) when he is *presumed* to receive more; and (4) when he is estopped to say he did not receive more.⁴ (a) Compound interest was allowed in one case where the trustee held the fund after the minor *cestui* came of age without making any arrangement with the child or explaining to him his rights.⁵ The burden is on the trustee to show that he made no profits, or received no benefit from the money;⁶ and if he refuses to

Ves. 407; 1 Madd. 167; *Saltmarsh v. Barrett*, 31 Beav. 349; *Walker v. Woodward*, 1 Russ. 107; *Heighington v. Grant*, 5 Myl. & Cr. 258; 2 Phill. 600; *Williams v. Powell*, 15 Beav. 461; *Walrond v. Walrond*, 29 Beav. 586; *Stackpole v. Stackpole*, 4 Dow. P. C. 209; *Elliott v. Sparrell*, 114 Mass. 404; *State v. Howarth*, 48 Conn. 207; *Hook v. Lowry*, 95 N. Y. 103.

¹ *Page's Ex'r v. Holeman*, 82 Ky. 573.

² *Att. Gen. v. Alford*, 4 De G., M. & G. 851.

³ *Penney v. Avison*, 3 Jur. (N. S.) 62.

⁴ *Att. Gen. v. Alford*, 4 De G., M. & G. 851; *Norris's App.*, 71 Penn. St. 106.

⁵ *Emmet v. Emmet*, 17 Ch. D. 142.

⁶ *Knott v. Cottee*, 16 Beav. 77; 16 Jur. 752; *Swindall v. Swindall*, 8 Ired. Eq. 286; *Ringgold v. Ringgold*, 1 H. & G. 11; *Diffenderffer v. Winder*, 3 G. & J. 311; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Bryant v. Craige*, 12 Ala. 354; *Hodge v. Hawkins*, 1 Dev. & B. Eq. 566; *Hugh v. Smith*, 2 Dana, 253; *Karr v. Karr*, 6 Dana, 3; *Smith v. Kennard*, 38 Ala. 695; *McElhenny's Ap.*, 61 Penn. St. 188. Annual rests were allowed

White v. Sherman, 168 Ill. 589; *Ricker* (14 Mont. 153), 29 L. R. A. *Hughes v. People*, 111 Ill. 457; 622, and note.

Kane v. Kane (Mo.), 48 S. W. 446; (a) See *Forbes v. Ware*, 172 Mass. 1 *Ames on Trusts* (2d ed.), 498, n.; 306.

In re Eschrich, 85 Cal. 98; *Re*

account or to show the amount of profits received, the court will give compound interest, in order that it may be certain that the *cestui que trust* gets the profits of the trade or business in which the trustee has employed the money.¹ To justify the compounding of interest, there must be a wilful breach of duty,² and not simple neglect; there must be some special and peculiar circumstances.³ Compound interest will not be given against negligent trustees where the facts do not indicate a withdrawal of the funds from their legitimate channels of accumulation, or a realization by the trustees of profits on the assets.⁴ If the money is simply used in business, and it appears that the profits were not equal to the interest, annual rests will not be made.⁵ It appears now to be the settled doctrine, that compound interest will not be given as a penalty for a breach of trust, nor will it be given for an employment of the money in the course of trade, if the profits made in the trade can be clearly ascertained, and

in Harland's Acct., 5 Rawle, 329; *Livingston v. Wells*, 8 S. C. 347; the question was left open in *Dietterich v. Heft*, 3 Penn. St. 91; *McCall's Est.*, 1 Ash. 357; *Pennypacker's App.*, 41 Penn. St. 44, and rests were wholly rejected in *Graves's App.*, 50 Penn. St. 189.

¹ *Knott v. Cottee*, 16 Beav. 77; 16 Jur. 752; *Swindall v. Swindall*, 8 Ired. Eq. 286; *Ringgold v. Ringgold*, 1 H. & G. 11; *Diffenderffer v. Winder*, 3 G. & J. 311; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Bryant v. Craige*, 12 Ala. 354; *Hodge v. Hawkins*, 1 Dev. & B. Eq. 566; *Hugh v. Smith*, 2 Dana, 253; *Karr v. Karr*, 6 Dana, 3; *Smith v. Kennard*, 38 Ala. 695; *McElhenny's App.*, 61 Penn. St. 188. Annual rests were allowed in Harland's Acct., 5 Rawle, 329; *Livingston v. Wells*, 8 S. C. 347; the question was left open, *Dietterich v. Heft*, 3 Barr, 91; *McCall's Est.*, 1 Ash. 357; *Pennypacker's App.*, 41 Penn. St. 44, and rests were wholly rejected in *Graves's App.*, 50 Penn. St. 189.

² *Hughes v. People*, 111 Ill. 457; *Wilmerding v. McKesson*, 103 N. Y. 329.

³ *Garniss v. Gardner*, 1 Edw. Ch. 128; *Ackerman v. Emott*, 4 Barb. 626; *Tebbs v. Carpenter*, 1 Madd. 290; *Fay v. Howe*, 1 Pick. 528, and n.; *Clemens v. Caldwell*, 7 B. Mon. 171; *Fall v. Simmons*, 6 Ga. 272; *Kennan v. Hall*, 8 Ga. 417; *Cartledge v. Cutliff*, 21 Ga. 1.

⁴ *Ames v. Scudder*, 83 Mo. 189.

⁵ *Utica Ins. Co. v. Lynch*, 11 Paige, 521; *Kyle v. Barnett*, 17 Ala. 306; *Ringgold v. Ringgold*, 1 H. & G. 11; *Myers v. Myers*, 2 McCord, Ch. 214; *Wright v. Wright*, id. 185; *Johnson v. Miller*, 33 Miss. 553.

are less than legal interest, or less than five per cent; but if nothing appears as to the profits, the courts will presume that the ordinary profits of trade are made, or five per cent in England and the legal interest in the United States. And if the interest or profits of the fund are retained in the trade, instead of being paid out, it will be presumed that the trustees made a similar rate of interest or profit upon the sum retained in trade, and therefore annual rests will be made, and compound interest given; not as punishment or penalty, but because the fund and the income employed in trade are presumed to produce that amount of income, interest, or profit.¹ The trustee must seek out the *cestui que trust* to pay the income to him, or he must pay interest upon it. So, where a trustee receives property and sells it, he must account for the proceeds. And if he refuses, he will be charged with the highest value that can be sustained by the evidence.² But a mere payment into bank to the general account of the trustee is not such an employment of the money as to justify compound interest.³ A trustee is accountable for all interest and profits *actually* received by him from the trust fund, and for all which he *might have obtained by due diligence and reasonable skill*.⁴

§ 472. If a trustee is directed to make a certain investment, and to accumulate the income, and he neglects or refuses so to do, the *cestui que trust* is entitled to compound interest, upon all the authorities. (a) If, by the instrument

¹ Jones v. Foxall, 15 Beav. 388; Burdick v. Garrick, L. R. 5 Ch. 233. See the matter of compound interest elaborately discussed by Mr. Justice Scarburgh in Ker v. Snead, 11 Law Rep. 217, Boston, Sept. 1848; and Wright v. Wright, 2 McCord, Eq. 200-204; McKnight v. Walsh, 23 N. J. Eq. 136; 24 id. 498; Lothrop v. Smalley, 23 id. 192.

² McKnight v. Walsh, 23 N. J. Eq. 136; Burdick v. Garrick, L. R. 5 Ch. 233.

³ Norton's Estate, 7 Phila. 484.

⁴ Cruce v. Cruce, 81 Mo. 676.

(a) See Rogers' Estate, 179 Penn. 8; Burt v. Gill (Md.), 42 Atl. 968; St. 609; Howell's Estate, 180 id. Fritts' Estate, 44 N. Y. S. 344. A 515; Milligan v. Pleasants, 74 Md. direction to accumulate must not

of trust, interest is to be added to principal semi-annually, semi-annual rests will be made; otherwise annual rests will be made,¹ or an inquiry will be directed to ascertain what would have been the amount of the accumulation if the directions had been followed, in order to charge the trustee with the amount.² And where a trustee was ordered by the court to invest a sum in controversy, and he neglected to do so, he was ordered to bring the whole sum into court with compound interest.³ Interest may be allowed against a trustee, although the bill does not pray for it.⁴ If a trustee improperly withholds money as a commission, he may be made to pay compound interest on it.⁵

¹ *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 407, 590; *Dornford v. Dornford*, 12 Ves. 127; *Knott v. Cottee*, 16 Beav. 77; *Pride v. Fooks*, 2 Beav. 430; *Byrne v. Norcott*, 13 Beav. 336; *Stackpole v. Stackpole*, 4 Dow. P. C. 209; *Brown v. Southhouse*, 3 Bro. Ch. 107; *Karr v. Karr*, 6 Dana, 3; *Bowles v. Drayton*, 1 Des. 489; *Hodge v. Hawkins*, 1 Dev. & Bat. 564; *Wilson v. Peake*, 3 Jur. (N. S.) 155; *Brown v. Sansome*, 1 McCle. & Yo. 427; *Lesley v. Lesley*, 1 Dev. 117; *Fitham v. Turner*, 23 L. T. (N. S.) 345; *Court v. Robarts*, 6 Cl. & Fin. 64; *Townsend v. Townsend*, 1 Gif. 201

² *Brown v. Sansome*, 1 McCle. & Yo. 427.

³ *Latimer v. Hansom*, 1 Bland, 51; *Winder v. Diffenderffer*, 2 Bland, 166; *McKnight v. Walsh*, 23 N. J. Eq. 136; 24 id. 498; *Lathrop v. Smalley*, 23 id. 192.

⁴ *Blogg v. Johnson*, L. R. 2 Ch. 225.

⁵ *McKnight v. Walsh*, 23 N. J. Eq. 136.

contravene the rule against perpetuities. See *Hascall v. King*, 51 F. R. 244; *Re Errington*, 76 L. T. N. Y. S. 73; *In re Rogers*, 48 id. 616. 175; *Ingraham v. Ingraham*, 169



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